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STAKEHOLDERS ROUNDTABLE MEETING

ALBERTA UTILITIES COMMISSION

Calgary, Alberta
October 2, 2009

1 Proceedings taken at Stakeholders Roundtable Meeting held
2 October 2, 2009, at the offices of the Alberta Utilities
3 Commission, Calgary, Alberta

4
5 Doug Larder Alberta Utilities Commission
6 Moin Yahya
7 Bill Lyttle
8 John Esaiw
9 Darin Lowther
10 Fino Tiberi
11 Rob Thomas
12 Kenneth Jull (Baker McKenzie) (via teleconference)
13
14 Kim Johnston ATCO Power
15 Mary Dylke
16
17 Joel Forrest TransCanada
18 Rosemary Stevens
19
20 Douglas Wilson MSA
21 Harry Chandler
22 Robert Hunter (Bull, Housser & Tupper)
23
24 Evan Bahry IPPSA
25 Bryan Duguid (May Jensen Shawa Solomon)
26
27 Jeff Lam Powerex
28
29 Renee Marx TransAlta
30
31 Lynn Meyer Capital Power
32 Akira Yamamoto
33 Douglas Crowther (Fraser Milner Casgrain)
34
35 Elizabeth Soria ENMAX Energy
36
37 Eman Tadayoni AltaLink
38
39 Brenda Ball Court Reporter

24 MR. LARDER (AUC): Welcome everybody. We hope
25 to cover the discussion paper, the issues surrounding the
26 specified penalty issue. We think we will be done before
27 noon.

1 Just to reiterate from the last time, these are
2 without-prejudice discussions; in other words, you're not
3 going to be held to the remarks or positions or points that
4 you're making in this session, that's for sure. We have
5 two commissioners with us. Bill Lyttle has joined us, and
6 Moin Yahya will be here momentarily. Again, the
7 Commissioners can ask questions and maybe they will be a
8 little more active, but the same without-prejudice rule
9 applies to them as well.

10 We'll confirm this near the end as well, but
11 we're probably shooting for an October 23 final written
12 submission round. After that, the issues go to the
13 Commission for consideration. Depending on how they go,
14 we'll issue a timetable thereafter.

15 Are there any housekeeping matters, preliminary
16 matters, before I hand it over to John?

17 MR. BAHRY (IPPSA): To just to clarify that point
18 on October 23rd, that's the date you think we should be
19 able to be submitting a final letter or comments on this
20 entire discussion.

21 MR. LARDER (AUC): Yes. So the transcript
22 should be scrubbed by then, both for the last session and
23 this session, so you will have the benefit of that.

24 MR. BAHRY (IPPSA): Would that be open-ended or
25 did you want us to take a stab at answering some questions
26 you may pose, or is that really kind of up to us?

27 MR. LARDER (AUC): Our intention was it was up

1 to you. To the extent that you hadn't covered points in
2 your submissions to date, the two days of discussion was
3 intended to find out what the other side is saying, rebut
4 the other side or the other issues, and that would be in
5 this round of October 23.

6 MS. MEYER (Capital Power): Do we need to reiterate the
7 points we make in this meeting in those comments, or will
8 the Commission have the transcripts available to them to be
9 able to get that information?

10 MR. LARDER (AUC): The transcripts will
11 certainly be available to the Commissioners. I don't think
12 we're going to direct you how to set up or what the content
13 is in your submissions. We're going to leave that to you.
14 If you think it's useful for some kind of summary of what
15 you've already said, by all means put it in. If there's
16 new points that come out as a result of these discussions,
17 that's primarily what we're giving you an opportunity to
18 put down on paper.

19 MS. MEYER (Capital Power): Okay, thank you.

20 MR. LARDER (AUC): All right, John, take it
21 away.

22 MR. ESAIW (AUC): What we're going to do a
23 little bit different today is in the first session on the
24 admin penalties we assigned ahead of time sections for
25 people to lead the discussion on; today I'll be leading
26 briefly just the discussions. We've put this quick
27 PowerPoint together here to lead into the subject matter,

1 and then after I run through the high-level feedback and
2 observations, I've highlighted throughout the comment
3 matrix parties that I'll just call on to start the
4 discussion. If you don't have anything to say, I'm not
5 forcing you to. I'm just going to pick people at random.
6 If you don't have any comments, that's fine, then we can
7 just go around the table, and if there are no tent cards
8 up, then we will just move on to the next issue.

9 So just to clarify that third slide there,
10 "Purpose of Discussion," we're going to review the process
11 and procedures for specified penalty proceedings today. So
12 the responses from stakeholders that were submitted on the
13 paper that we issued as well as the material we got back
14 from our hearing surveys, one of our roles here
15 post-hearing is to put out surveys on several different
16 items, so we've taken all those responses that we've had
17 from the first specified penalty hearings and compiled the
18 feedback we received there. So that's part of what's in
19 the material today.

20 And then "Not the forum to discuss" we've
21 highlighted there. So we're not going to talk about ISO
22 rules today; we're not going to talk about any penalties
23 that have been issued by the MSA, whether past or present;
24 matters that are currently under review by MSA or otherwise
25 being addressed by the Commission with respect to those
26 matters; and then the rule itself. So we're going to save
27 that for another day.

1 We do plan to have further consultation in the
2 future. If the Commission decides to revise a portion of
3 Rule 19, we will have separate consultations specifically
4 to address Rule 19.

5 A bit of background. As far as the Commission
6 goes, we've handled three specified penalty hearings to
7 date. As far as what was considered as part of those
8 proceedings, we addressed each of the items that we've put
9 out for comment today and the stakeholder survey of past
10 proceedings as mentioned as included in the material. We
11 received feedback from the several parties listed there,
12 but certainly that doesn't prevent anyone else from
13 commenting throughout the day today.

14 So what we did was we took all the feedback and
15 grouped it into seven general issues that we've presented
16 here in the slides as well as the matrix there. So we'll
17 start off with "General Comments." There were only two
18 parties that had general comments, so I'll review those.

19 IPPSA recommended goals or boundary conditions to
20 be established in the specified penalty process. Similar
21 comments were mentioned in the administrative penalties as
22 well. MSA noted certainly that the specified penalty
23 process should be a more efficient process due to the
24 nature of the penalties, and MSA did caution against rules
25 that would unnecessarily complicate the specified penalty
26 proceeding process.

27 As far as the "AUC Observations" go, we have a

1 mandate to ensure rules are applied fairly, objective, and
2 ensuring competitive rules are enforced. That's part of
3 our Vision and Values and What We Do and How We Do It. So
4 that's something that we've committed to as a Commission.

5 We've established AUC Rule 17, which is the
6 process for ISO rule development and Rule 19 which is
7 specified penalty. So those are just some background
8 observations there.

9 Evan, I don't know if you had any more to add.
10 There was quite a bit of general comment that you put into
11 the original matrix.

12 MR. BAHRY (IPPSA): Yes, you note that we
13 indicated that we had a series of goals. I could reiterate
14 our goals, our ideas of what that was, just for
15 edification. It may help the dialogue more than just a
16 one-liner. So if I could, I wouldn't mind rattling off
17 briefly what we had in mind.

18 So one goal would be to ensure that as the
19 penalty associated with the conduct rises, so too should
20 the procedural protection. This may lead to designing a
21 regime that is not "one size fits all" but rather allows
22 for flexibility in the approach based on the likely
23 penalty.

24 Second, another goal would be to provide
25 participants with a known process. To this end, IPPSA is
26 recommending that the regime be defined in rules, which may
27 even contemplate different procedural approaches based on

1 the different types of behaviours be investigated.

2 These comments were intended to apply to the
3 administrative penalties as well as to specified, so if
4 there is a little bit of an overlap there, you'll
5 understand where we're coming from.

6 A third goal would be to enable the market to
7 learn from the experience. To this end, IPPSA members have
8 contemplated a role for market participants in the hearing
9 process.

10 And finally, a fourth goal would be to recognize
11 due diligence. To this end, you will note that the IPPSA
12 submission strongly suggests that breaches of rules be
13 considered strict liability offences, at a minimum.

14 So those are goals or boundary conditions that we
15 had proposed in our general comments.

16 MR. ESAIW (AUC): Thank you. The other thing I
17 would maybe note in there, I think we put it in the
18 original paper, and the MSA also picked it up in the
19 comment matrix, was that we have some performance measures
20 that we have set for ourselves as a Commission to try and
21 make these processes as efficient as possible. So we do
22 have performance measure internally that we're trying to
23 get 75 percent of the proceedings to a hearing stage within
24 60 days of a completed file. So sometimes that works,
25 sometimes it doesn't, depends how many preliminary matters
26 we have to deal with, but we were trying our best
27 internally by setting performance measures to get to these

1 proceedings in an efficient manner. Lynn.
2 MS. MEYER (Capital Power): This is something we didn't
3 put in our comments because I wasn't aware of Bill 32 at
4 the time. Bill 32 has a provision in it -- and it's not
5 been proclaimed yet, as far as I could tell, but it's
6 passed -- I don't know if it's a requirement but it
7 actually contemplates the agencies having a feedback role
8 to the government. They're supposed to implement policy as
9 well as provide advice back to the government.

10 And I'm just wondering if there is anywhere that
11 you're tracking any deficiencies in the legislation to be
12 able to feed that back to the government? I'm not saying
13 that there are any. It's just something that I noticed
14 when I was going through Bill 32. And I've always thought
15 that the agencies had that role, but there's been a bit of
16 a question, and I think it's quite explicit the now.

17 So you've got an advisory role as well as an
18 implementing role. And I'm just curious about if you're
19 tracking, because I think there's maybe some deficiencies
20 in the legislation even after Bill 50 is passed, and it
21 would be nice to see that those are being tracked somewhere
22 so that if you're identifying anything going through the
23 specified penalties process, that you can feed that back to
24 the government, and I don't know if you've got a process
25 for gathering stakeholder input for that.

26 MR. LARDER (AUC): We are talking with Edmonton
27 about different issues that the governance legislation

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1 raises for us. I can't confirm that exactly is one of
2 them, but those discussions are underway. I know the first
3 sort of tranche of issues had to do with ethic's codes and
4 other --
5 MS. MEYER (Capital Power): Mandate letters and all that
6 stuff.
7 MR. LARDER (AUC): Yes.
8 MS. MEYER (Capital Power): Yes, I thought it was quite
9 helpful for people in the industry and for the agencies to
10 have it very clear that they do have that advisory role as
11 well, because I've always thought you did but I think it
12 makes it quite explicit that you do have it.
13 MR. LARDER (AUC): Lynn, the link to this
14 discussion?
15 MS. MEYER (Capital Power): The link to this discussion
16 is you've talked about Rule 17 and Rule 19, and those would
17 reflect the current legislation, you can't do anything
18 that's outside the current legislation, but if, in the
19 course of developing those rules, you identify deficiencies
20 in the legislation or even a consultation on Bulletin 20,
21 2009-20, so any of the consultations that you're doing, if
22 there is a place where that could be picked up would be
23 helpful. I'm sort of leaping ahead to the potential
24 consultation on Rule 19. I should have maybe put my card
25 up when he was doing that. I just see that you're talking
26 about some rules that you've got and wondering if there's
27 any place to put that feedback in. So that's the link.

1 MR. LARDER (AUC): Just to confirm, the current
2 approach is this, I don't know if other agencies are like
3 ours, and, Giuseppa, you can confirm this, but at least
4 once a year we provide a three-year legislative wish list,
5 and the things that get on that list are generated from
6 discussions like this or however they come up, vetted and
7 discussed. If they get on our list internally, then that's
8 the document that goes to Edmonton, and then it depends if
9 they're as excited about these things as we are. Sometimes
10 we mesh, and most of the time the stuff we want lags
11 behind.

12 In any event, I had a question in connection with
13 your points, Evan, if I might. I was just looking for an
14 illustration, and this maybe touches on the topic at the
15 last session we had here, but you say that the regime "may
16 even contemplate different procedural approaches based on
17 the different types of behaviours" that are being
18 investigated or the subject of a potential specified
19 penalty. What did you have in mind in particular?

20 MR. BAHRY (IPPSA): On that one I think it
21 related more to the administrative penalties issue.
22 Specified penalties are a little different, and so I think
23 what we want to do with specifieds is try to make them
24 fairly straightforward. Administrative penalties, however,
25 because they can talk about, in the FEOC reg, everything
26 from information sharing to anticompetitive behaviour,
27 perhaps because it's just a wide spectrum of the magnitude

1 of the issue being investigated, in that circumstance
2 perhaps some flexibility in the regime is appropriate. Do
3 you need three Commissioners to sit over all those hearings
4 if it's a little more straightforward? So I think the
5 comment was more directed to the administrative penalty
6 mindset.

7 MR. LARDER (AUC): Let me ask you this then: If
8 there is a specified penalty and the number is \$50,000, is
9 it your view that that kind of proceeding should be
10 different than a companion proceeding which has a \$3,000
11 penalty? Is it the quantum of the penalty on the specified
12 penalty front that should determine more or less
13 safeguards, to use a phrase?

14 MR. BAHRY (IPPSA): Again, it was more to do with
15 the administrative penalties, not the specifieds. If
16 you're at \$50,000 for specifieds, you've probably gone
17 through, in theory, up the ladder, three or four, this is
18 probably your fourth challenge or issue that you've broken
19 a rule on. So would that still need to change at the
20 magnitude -- in the realm of specified penalties, perhaps
21 they should be more straightforward. In other words, what
22 I'm trying to say is under specifieds, I'm not sure if our
23 comment on flexibility is related to specifieds, but it was
24 more in the mindset of administrative penalties.

25 A member was discussing this with us, the
26 comment, but our view kind of was keep specifieds a little
27 more simple and mechanical in terms of their approach, but

1 administrative penalties, because they can cover such a
2 range of behaviour, that arena may require more flexibility
3 in design of how the adjudication occurs.

4 MS. MEYER (Capital Power): I think it might depend on
5 the nature of the offence too, what the flexibility should
6 look like. It depends on not so much the magnitude of the
7 fine, I don't think, or the penalty, as what type of
8 offence is it. You may have a very straightforward penalty
9 for failing to file some document, and that might even lend
10 itself better to a written proceeding than to an oral
11 proceeding. I think it depends more on what the offence
12 is. Because some of them might be very technical. And
13 that was partly what we said in our comments, both on
14 administrative and specified. If it's quite a technical
15 thing, a written proceeding, at least in part, might be
16 more appropriate. But if it's fairly straightforward and
17 oral evidence is the appropriate way to go, that's probably
18 the better approach.

19 MR. BAHRY (IPPSA): So, Lynn, you would suggest
20 that for specifieds the process become fairly routine,
21 standardized; whereas for the offences, administrative
22 penalties or --

23 MS. MEYER (Capital Power): No, exactly the opposite. It
24 depends on the nature of the offence; right?

25 MR. ESAIW (AUC): Joel.

26 MR. FORREST (TransCanada): Just wanting to build on that
27 in that I guess what you're saying is money isn't

1 everything, and I think that that's perhaps one of the
2 tensions that we're going to have to deal with here, is
3 that sometimes it's corporate reputation, sometimes it is
4 related to difficulty interpreting the rule or differences
5 in interpreting the rule that makes a big difference to
6 someone, especially if you've got a large volume of
7 whatever that particular thing is that you've done that is
8 supposedly done wrong. If you do a lot of it, it could be
9 one fine that's very small, but if you do it thousands of
10 times a year, all of a sudden the picture changes.

11 So I'm thinking that there are definitely going
12 to be situations that we may get into where you want more
13 procedural fairness than might just be offered to you based
14 on if you just said \$2,000 gets you almost no procedural
15 fairness. It could represent much more than \$2,000.

16 MR. ESAIW (AUC): That certainly is a good
17 lead-in to "Oral versus Written Proceedings." I anticipate
18 there would be some jumping around today due to the nature
19 of the discussions, so that's fine. "Oral versus Written,"
20 certainly on probably the Commission's side and stakeholder
21 comments, a lot of preference was expressed for oral
22 proceedings. I would note that TransAlta in their
23 submission put that the default should be a written
24 process. So maybe, Renee, if you could start that.

25 MS. MARX (TransAlta): Sure. So I think the reason
26 that we chose putting forward a written process as the
27 default was, given the nature of the specified penalty

1 proceedings so far, they've been shorter hearings. In a
2 number of cases, the cases will be fairly straightforward
3 and not necessarily require an oral hearing. Obviously
4 there's going to be variances. Things have to be looked at
5 on a case-by-case basis. We thought an oral hearing should
6 still be available, but, rather than just not deciding one
7 way or the other, choosing a starting point for the
8 specified hearings, that being written, and then going from
9 there.

10 If the market participant felt that there were
11 certain issues that would require oral testimony, whether
12 it's a policy issue or a credibility issue, et cetera, to
13 have that option available at the option of the market
14 participant. So that's kind of where we were coming from
15 on that, recognizing I think at the end of the day you
16 would probably end up with about half/half, half written,
17 half oral.

18 MR. ESAIW (AUC): Okay. Joel.

19 MR. FORREST (TransCanada): Just a comment on that. I
20 guess part of what I heard I quite like in that it would be
21 to a certain extent at the option of I guess the defendant
22 in this case, but my first thought is making sure that
23 everybody is talking about the same thing. So I guess I'm
24 not sure exactly what we have in mind when we say written
25 process versus oral.

26 I guess in my mind an oral hearing traditionally
27 involves pre-filed written evidence, IRs, things like that,

1 and then you have an oral phase to deal with the hearing.
2 I think we're starting to talk about an oral hearing in a
3 different context now, which is you don't have all of that
4 pre-filed written evidence to rely on, and so there's a
5 difference in the way we're using the terms now.

6 A written process that would involve IRs and
7 written exchanges but perhaps not an oral component is very
8 different than a written process that doesn't involve or
9 just involves submissions but no opportunity for IRs. I
10 think our issue is, especially when something is of
11 particular interest to you, you're interested enough to
12 essentially dispute it, head to a hearing, if you're not
13 given the opportunity to ask IRs and things like that,
14 that's problematic for us.

15 MR. ESAIW (AUC): So that is the next section.
16 We will get there. Renee.

17 MS. MARX (TransAlta): Just a brief comment about
18 that, and I'm not trying to jump too far ahead to the next
19 section, but in making our suggestion of written as a
20 default, we would want to see written IRs as part of that
21 process, which we haven't seen with the oral hearings. In
22 terms of the Commission trying to proceed more
23 expeditiously with that hearing process, I think, there
24 haven't been written IRs with the oral hearing, and that
25 may be okay still in a number of situations, but if we did
26 have a written process, I think written IRs is just a
27 necessary requirement to that.

1 MR. ESAIW (AUC): Doug Crowther.
2 MR. CROWTHER (Fraser Milner): I actually agree with Joel.
3 It's important to have a common understanding of what it is
4 we're discussing when we talk about oral versus written,
5 and I also suspect that there's more commonality perhaps.
6 Capital Power's approach, if you wanted to render
7 it down to its essence, was that if instead of a written
8 process as the default you had the oral process -- which I
9 think we could probably agree carries the most assurances
10 of procedural fairness and the greatest opportunity for the
11 party that's accused of the contravention to challenge the
12 case of the MSA through cross-examination, et cetera --
13 have that as the default, in other words, the highest
14 watermark of protection, if you will. But recognizing that
15 in many instances a written process, for a number of
16 reasons, might be more appropriate. I think that "money
17 isn't everything" is indeed a sentiment that Capital Power
18 shares; that there are some things that, even if they are
19 reflected in very minor specified penalties in terms of
20 amount, the fact that you're even accused of doing that is
21 something that's, in some cases, worth challenging as
22 strenuously as possible.
23 So I think the idea of the oral hearing, the most
24 protection, as the default, is one that was attractive to
25 Capital Power. But Capital Power recognized that there
26 will be circumstances in which written processes may be
27 more appropriate. But that would be something on which the

1 Commission as a routine matter, probably, would seek the
2 input of the parties, the MSA and the party accused:
3 "Okay, our usual model is oral, but we'd like to hear from
4 you whether we should depart from it for any particular
5 reason in this circumstance."

6 So that's the approach that I think Capital Power
7 would favour. And there are reasons, as Capital Power
8 enunciated in its submission, why a written process might
9 be more appropriate in particular circumstances of
10 exceptionally complicated technical types of matters
11 where -- some of those concepts, matters, specifics -- it's
12 easier to more accurately reflect them in writing, perhaps
13 supplemented by some kind of oral process.

14 And one other point I think that's worth
15 emphasizing, and I think it picks up on something that Joel
16 said earlier, Capital Power would say that any of these
17 specified penalty proceedings must begin with an
18 adequate -- and I emphasize "adequate" and apply a broad
19 meaning to it -- an adequate notice of specified penalty.
20 I think "application" was the wording that was used in the
21 Capital Power submission, but I think the technical term
22 would be a "notice of specified penalty." So that the MSA
23 would be under an obligation to provide a very complete and
24 detailed version of what it thinks are the facts and the
25 basis for the allegation of contravention so that the party
26 facing those allegations can start off knowing, in a very
27 basic sense, what is the case that it's expected to meet.

1 So I think that perhaps picks up, in part, on what Joel was
2 saying.

3 MR. FORREST (TransCanada): Right. And I guess one other
4 thing I would take from the oral version that you've just
5 described, that that would be acceptable in many cases as a
6 starting point, but I guess, really, we're talking about
7 probably the AESO and the MSA would need to be prepared to
8 seat panels to respond to questions. I wouldn't want to
9 find myself in sort of a one-sided hearing where there is
10 an application but yet no seated panel to respond to
11 cross-examination on the other side, especially if you're
12 going to do away with the IR process and leave it all to
13 the hearing.

14 MR. ESAIW (AUC): Just one quick sound check.
15 Ken, are you there?

16 MR. JULL (Baker McKenzie): Yes, I am.

17 MR. ESAIW (AUC): You've been quiet.

18 MR. JULL (Baker McKenzie): Let me just jump in with one
19 comment. In the paper that I did, I tried to identify the
20 different ways in which you can categorize types or
21 categories, and it seems to me that that discussion is
22 relevant to a hearing here and hearing from Capital Power
23 and others that money isn't everything.

24 So certainly, as it's structured now, the
25 legislative regime is structured so that specified
26 penalties have a cap of a hundred and right now they only
27 go as high as ten. But there is room potentially to

1 consider a scheme that would, in fact, categorize by virtue
2 of subject matter. In the paper that I did, I gave the
3 example of the Office of the Superintendent of Financial
4 Institutions Act, if you look at what they did, they passed
5 regulations, and their regulations created a very detailed
6 scheme that set out that different types of allegations
7 would merit different types of treatment.

8 So you could go to the regulations, and,
9 depending which Act you were charged with, you would look
10 up in the table and it would tell you that's either a
11 serious, moderate, or minor offence. So that is another
12 technique that's out there.

13 And I'm interested, as a follow-up, in hearing
14 people talk about the extent to which the ISO rules might
15 involve anticompetitive type of conduct. Because that
16 obviously, even if the magnitude of the penalty is small,
17 involves a serious allegation that might have some
18 potential civil consequences. So I'm not as familiar with
19 the ISO rules as most people in the room, and I would be
20 interested in hearing people talk about that issue.

21 MR. LARDER (AUC): Do you mean that there could
22 be an ISO rule with this competition element in it that
23 would be subject to a specified penalty?

24 MR. JULL (Baker McKenzie): I have to tell you I hadn't
25 really thought about it as a possibility until it was just
26 raised today. Somebody raised that possibility, and I
27 thought if that's a possibility, that's something we should

1 think about.
2 So as I read the ISO rule-making power, it's
3 quite broad under the Act, and they can pass any rule
4 necessary or advisable to carry out their duties and
5 responsibilities. So, Doug, at present are any of the ISO
6 rules what one could consider heading towards
7 anticompetitive conduct?
8 MR. ESAIW (AUC): I was perhaps going to
9 suggest that was maybe out of scope for today's discussion.
10 MR. JULL (Baker McKenzie): Okay.
11 MR. ESAIW (AUC): I don't know if anyone else
12 feels that way.
13 MR. LARDER (AUC): I will note, though, Ken, I
14 think in our Act a specified penalty proceeding can be
15 brought before us but the Commissioners can say, "No, this
16 merits something more." We can transform that into an
17 administrative penalty. That might be a whole other
18 discussion of when that happens, if that happens, and
19 you're down this one track and then "No, it's not \$10,000
20 anymore."
21 MR. JULL (Baker McKenzie): That's a very good point.
22 MR. LARDER (AUC): I don't know if we
23 particularly highlighted that in this discussion or not.
24 We have lots of cards up, though, Ken. You triggered
25 something.
26 MR. ESAIW (AUC): Evan.
27 MR. BAHRY (IPPSA): I was under the impression

1 that the ISO's behavioural rules were stricken when the
2 FEOC reg came to pass. There was a section, Rule 1.10, I
3 believe, which had a lot of those behavioural rules in
4 place, which was, again, I believe, stricken under the FEOC
5 reg.

6 MR. ESAIW (AUC): Thank you. Mr. Wilson.
7 MR. WILSON (MSA): Thanks. Evan is right, I
8 think, because of the FEOC reg. So at the moment there are
9 not in the ISO rules any rules that I'm aware of that have
10 sort of an anticompetitive aspect to them. They are more
11 tuned to dealing with the system, putting offers in,
12 et cetera.

13 The second thing I would add is, and it actually
14 follows Doug's point to some degree, if you look at Section
15 52(1) in the AUC Act -- and this is something that's quite
16 relevant, I think, in the limitation period discussion, so
17 we'll get back to it later -- but it is clear that the MSA
18 has the option to go into the specified penalty regime.
19 That's not mandatory.

20 I think our theology to date has been that if
21 there's some conduct that may involve breach of a rule but
22 seems larger in nature or larger in impact, that we would
23 probably take it not through the specified penalty
24 regime -- certainly not only through the specified penalty
25 regime -- we might actually go after it in a more
26 full-blown hearing before the Commission because we were
27 alleging some kind of FEOC implication or, for your

1 benefit, Ken, an anticompetitive implication.

2 It appears to us that the AUC Rule 19 right now
3 is -- it previously got more after, to some degree, a
4 number of contraventions and impact to the system, but as
5 it has evolved, the penalty tables are more "Have you
6 breached?" And to some degree the penalty is associated to
7 the fact that you did breach. It's not about what are the
8 FEOC implications of that.

9 So I guess that's a long-winded second part of
10 the answer. I think the opportunity is there for the MSA
11 to take anticompetitive conduct to I'll call it a larger
12 administrative penalty proceeding.

13 MR. JULL (Baker McKenzie): That's very helpful for me.

14 MR. ESAIW (AUC): Thank you. Doug.

15 MR. LARDER (AUC): For tribunals like ours,
16 certainly the old Board, I guess maybe the Commission as
17 well, there's an enduring criticism directed towards
18 tribunals like ours, and that is "You take too long."
19 You've got a rate application or a money file, you've got a
20 facility file, you're waiting for the approval; "You're
21 taking too long."

22 So when I hear this discussion -- I'm simplifying
23 it -- these are specified penalties. Notwithstanding money
24 isn't everything, these are specified penalties. They're
25 supposed to be a lesser breed of contraventions. But my
26 question is the timing aspect. Is that less important in
27 this context than it is when you're waiting for the rate

1 decision or the pipeline approval? Because we always
2 thought we should do things quicker because that's the
3 criticism we have. But in discussions like this, it's "Not
4 so much." "Give us all the steps; we're in no rush."
5 MR. ESAIW (AUC): Liz.
6 MS. SORIA (ENMAX): So I'll respond to that by
7 saying I think you've hit on a key distinction between an
8 application to do something and a penalty issue. Because I
9 think, in ENMAX's view anyways, while you don't want to
10 really be stuck in a process that drags on for a long time,
11 you're willing to do it if that's what you need to do in
12 order to get the facts out or the case dealt with in a way
13 that you feel is as fulsome as you need it to be. So I
14 think the need for speed is less so.
15 We've said in our submission that we do recognize
16 that, generally speaking, we should aim for a more speedy
17 process for specified penalty matters but that there has to
18 be that flexibility so that if there is something else at
19 play in terms of differences over interpretations of the
20 rules or facts that really need to be brought forward, we
21 want to make sure that there's that avenue to deal with
22 those other issues, the non-monetary issues that we might
23 want to have dealt with.
24 MR. LARDER (AUC): I note that there certainly
25 are some jurisdictions in North America, and, John, you
26 always give us this example in Ontario when you got your
27 statement at the end of the month and there was a fine in

1 there: "You breached this rule; that was 10 grand by the
2 way," or "that was 5 grand."
3 New York state is another. For these little
4 contraventions, they just issue the penalty. There didn't
5 seem to be any kind of a fulsome process to determine
6 whether you actually were offside or not. I'm sure there
7 was, but they were very speedy, very efficient.
8 MR. FORREST (TransCanada): Was there a public notice
9 that was available to everyone saying you broke all these
10 rules at some point?
11 MR. ESAIW (AUC): I'm not sure if they made the
12 contraventions public. That I don't know.
13 MR. LOWTHER (AUC): I believe they're posted on a
14 website.
15 MR. LARDER (AUC): In Ontario?
16 MR. LOWTHER (AUC): Yes.
17 MR. ESAIW (AUC): Yes. I'm not sure about New
18 York.
19 MR. FORREST (TransCanada): If I can just build on Liz's
20 comment. I would agree with the sentiment. I think the
21 other thing is to remember that the way we get to a point
22 where we actually have an AUC proceeding is something has
23 happened; there's been a notice; you've decided that you
24 are going to then dispute it, as opposed to all of the ones
25 you say, "Okay, we did something wrong," we pay the fine,
26 and everybody moves on. These are the ones that we're
27 interested in disputing.

1 And I think that, especially for behaviour in
2 real-time events that carry on, carry on, carry on, to go
3 back many years in order to reconstruct and be able to
4 provide an adequate defence of your actions several years
5 into the future is problematic, and that's the argument for
6 we don't necessarily need to go faster on the proceeding
7 but it's problematic for us to be able to reconstruct the
8 past several years out.

9 MR. ESAIW (AUC): And we'll get to that in the
10 limitation period discussion as well. Harry.

11 MR. CHANDLER (MSA): I can speak to Ontario. The
12 situation in Ontario on compliance issues is as you say,
13 John, that they are perfunctory, quite frankly. They are
14 matters that are resolved between the compliance people in
15 the province and the participant, and that goes through a
16 considerable amount of detail and exchange on what the
17 breach was, what the facts were, and whether it in fact
18 happened. Then a finding is made, and it's published on
19 the website. So the participant is named; the provision is
20 named; the penalty is named. Not a lot more detail, but
21 that can always happen. And there's never been a challenge
22 to any of those. And those are penalties that were well
23 over \$100,000 in some cases. Most of them are quite small.
24 There is recourse to what's called a dispute resolution
25 panel, and that's never happened either. There have been
26 overtures for that to happen, and those usually occasion
27 discussion.

1 So all of this stuff about the rigor of the
2 proceedings is quite interesting to me because it's never
3 been an issue in Ontario. I think it had something to do
4 with understanding why you have rules in the first place,
5 that they are going to be occasionally broken, and a large
6 component of what has happened in Ontario is what we would
7 call ACRs, or alternative case resolution, where it's not a
8 formal proceeding and it's not a formal finding. It is a
9 recognition, usually, that something happened that probably
10 shouldn't have happened and next time there may be
11 implications, but that serves to clarify people's thinking
12 about things.

13 MR. ESAIW (AUC): Thank you. Jeff.

14 MR. LAM (Powerex): I thought I could share also
15 another jurisdiction's experience. We have the experience
16 in Ontario, but we also have the experience in California.
17 So they adopted a similar approach. To Doug's question
18 about is there a benefit to having speed of resolving the
19 specified penalty proceedings, I think from a market
20 perspective I think there is because that provides
21 certainty for participants and participating in the market.

22 So the California experience is similar. They
23 have a mechanism, and not necessarily saying that applies
24 for all rules and all kinds, but there are certain
25 performance-related rules, energy delivery performance
26 being an example, that lends itself more to a financial
27 settlement regime where penalties are levied through the

1 normal course of the settlement process. And that
2 definitely does speed up the process of those specific
3 penalties. And if there are disputes, they go through,
4 again, the normal dispute resolution process under the
5 individual tariffs or rule books of that pool.

6 So in California they've successfully done that.
7 And that doesn't take away the ability for the market
8 monitors to take action if there is egregious changes in
9 activities or performance levels of participants, and so
10 that is always made available to them and the appropriate
11 mechanisms and proceedings that can be taken. So that's
12 certainly our experience, and it seems to have worked well
13 in the past several years in that jurisdiction.

14 MR. ESAIW (AUC): Doug.

15 MR. CROWTHER (Fraser Milner): Three basic points. The
16 first, I suppose, is that -- although I find the discussion
17 about the experiences in other jurisdictions to be helpful
18 and interesting -- we have to remember that, in its wisdom,
19 the legislature included provisions in the Act which permit
20 a person that wishes to dispute a specified penalty the
21 opportunity to come to the Commission and have that
22 argument before the Commission. The Commission then makes
23 the decision.

24 And I suspect -- although I can't speak
25 knowledgeably to this -- that some of the other
26 jurisdictions don't have precisely the same structure with
27 an MSA function separate and apart from the Independent

1 System Operator, and that the dispute resolution mechanism
2 that Harry spoke to is potentially something more akin to
3 what we have here. But the fact that the legislature
4 included the provision means it's there for a reason, and I
5 don't think that we let "lickety-split" override whatever
6 it is that the legislature decided should be available to
7 someone who's being prosecuted.

8 Second, again to come back to a point that I
9 tried to make earlier, Capital Power's notion is that an
10 oral proceeding would be the default, if you will, but that
11 the Commission would be encouraged to seek the input of the
12 parties. So if a party were concerned about speed, then it
13 could opt for speed. The MSA, on the other hand, could
14 say, "Well, in this particular case, we don't think that
15 speed should be the overriding objective and we need to
16 have a more full-blown process" or whatever. I think we're
17 really just talking about what the default is, what the
18 starting point is, and then the parties would be expected
19 to assist the Commission in finding a process that best
20 fits the particular circumstance.

21 And, lastly, I would say -- and, Doug, you've got
22 lots of experience, I think, that would support this --
23 that oral hearings are not necessarily longer than written
24 processes. There are real opportunities in oral
25 proceedings for efficiencies. So I don't think we should
26 assume that opting for an oral process, with the procedures
27 that are generally attendant to that, is going to take much

1 longer, if at all, than if you went by way of some sort of
2 written process.

3 MR. ESAIW (AUC): I'll give the last word to
4 Harry on this one.

5 MR. CHANDLER (MSA): It will be a very short word.
6 Just to be clear, in Ontario the legislation allows for,
7 after this dispute resolution, going to the Ontario Energy
8 Board for a penalty over \$10,000. And so, sure, you've got
9 to have these kinds of frameworks. It's a question of how
10 you use them, how you want to use them.

11 MR. ESAIW (AUC): Thank you. We'll move on to
12 number 2 there, "Written Information Requests." I'll just
13 review the feedback and the AUC observations.

14 As mentioned already by Capital Power, MSA should
15 be required to disclose all relevant information without
16 being requested to do so. So that was commented on
17 already.

18 IRs should promote efficiency. That was in the
19 document probably in several places. Comment is also made
20 that information requests should be permitted with leave of
21 the Commission. So that was a possibility that was put on
22 the table as well.

23 And then I would say a lot of case-by-case
24 approach was also suggested, depending on the nature of the
25 hearing.

26 So I might call on either Joel or Rosemary to
27 comment on that subject matter.

1 MR. FORREST (TransCanada): Sure. Our position was
2 probably closer to perhaps the case-by-case. Although, the
3 more I think about it the more I get to a point of at least
4 having the opportunity to ask questions. It may depend on
5 what you're faced with in terms of the fulsomeness of the
6 application. So, for instance, if you really don't either
7 understand or feel that you have a complete set of
8 information in front of you or that there is more relevant
9 information out there that you know or think may help you
10 in your defence, it really limits your ability to present
11 that defence if you don't have an opportunity to ask IRs.

12 In the event that you went with sort of an oral
13 hearing and were able to ask those questions of the
14 relevant people on the stand, that might go some distance
15 or bridge that gap. The only caution I would have with
16 that is that to the extent it is a hearing that has a
17 technical nature or has information that would be required
18 that would take some time to compile, the IR process may
19 lend itself to producing that information in a way that's
20 useful both to the parties but also to the Commission.

21 MR. ESAIW (AUC): Thank you. I'm going to pick
22 up on what the MSA submitted in the matrix there. The
23 statement that "Information requests are not necessary in
24 most applications."

25 MR. HUNTER: (Bull Housser): Our position is "generally
26 not," but you'll notice that what we've said is IRs should
27 be available to a participant with leave. So in the

1 situation that Joel was just referring to, if the
2 participant felt there was a need, they could apply to the
3 Commission for the IR. I think our concern is if we build
4 this into the system now, the IR process, it's going to
5 stretch it out.

6 MR. ESAIW (AUC): Darin.

7 MR. LOWTHER (AUC): Just a question on that
8 subject. The MSA has used voluntary IRs with parties too
9 in past cases. We didn't raise it in the paper, and I
10 don't think we got any comments back from parties on that
11 subject, but that practice has been used. I'm wondering
12 what people think of that as an option as well.

13 MR. WILSON (MSA): You will be surprised to know
14 that we liked it actually. We thought it was good. It's
15 not always going to be hugely adversarial. There are some
16 realities. They're interested to make things move along.
17 It's in everybody's interest. I think the Commission Rules
18 of Practice right now allow for motions in support of
19 better particulars in relation to an application, motions
20 to seek information, perhaps an information request, if you
21 really think that's necessary. And we haven't had that
22 many specified penalty proceedings obviously.

23 I think our view was, essentially, in some ways
24 like Capital Power's; that a good starting point and the
25 right place was to have an oral hearing. It would provide
26 an adequate opportunity to test the evidence.

27 We did try to put in applications that were

1 relatively complete at the outset, but sometimes you
2 exchange further information as you go, and obviously when
3 we put in our application we don't know what the defence
4 will look like. To some degree you guess, but you don't
5 know until you see.

6 So there was exchange in one proceeding in
7 particular of information back and forth. It worked
8 relatively efficiently. And, again, all of that amounted
9 to evidence of the fact that if you leave it to almost a
10 proceeding-by-proceeding right-sizing of process you
11 actually can get to a pretty good spot. And if you have to
12 go through some motions or whatever in that proceeding
13 because of the nature of what's at stake or someone's real
14 concern that they need more, you can do it, and the Rules
15 of Practice right now allow for it.

16 So we're actually arguing against mandatory IRs,
17 but we think the opportunity for IRs should be there.

18 MR. LOWTHER (AUC): That's helpful, thanks.

19 MR. ESAIW (AUC): Doug.

20 MR. CROWTHER (Fraser Milner): At the risk of reopening
21 discussion from our previous session, a large part of this,
22 in my view, turns on the disclosure obligation under which
23 the MSA is expected to operate. And that's a point that
24 was made in the Capital Power submission, and I don't
25 propose to repeat it. But I think it would be correct to
26 say that if the MSA is subject to a broader obligation of
27 disclosure -- relevance as opposed to reliance -- then the

1 need for the party accused to submit information requests
2 is diminished. So that was the first point. I don't think
3 we need to revisit all the -- I thought -- quite useful
4 discussion we had on the disclosure issue last time.

5 The other point I think that Capital Power has
6 also made and probably was made in the last session -- and
7 I may be the sole voice in the wilderness on this -- but
8 the information request process ought not to be -- and I
9 don't think that the MSA intends it to be this way -- but
10 an opportunity for the MSA to continue its investigation.
11 I would have thought the information request process ought
12 to be one-sided, in the sense that the party that is
13 accused is able to ask for information from the MSA but not
14 vice versa.

15 And I think, though, that Brian Wallace at the
16 last session made, I thought, a fair point, which was if
17 the party accused is filing expert evidence in its defence,
18 that it could be efficient for the MSA, for instance, to be
19 able to ask information requests in respect of that new
20 evidence, evidence that would not have been available. --
21 opinion evidence, if you will -- to test that opinion
22 evidence. I think that potentially makes sense from an
23 efficiency perspective.

24 So that's just a couple of other nuances on this
25 whole information request topic.

26 MR. ESAIW (AUC): Thank you. If nothing
27 further on that, we'll move on to the third topic, "Panel

1 or Individual Commissioner."

2 So, in general, a fair amount of support for a
3 three Commissioner Panel on these proceedings. It was
4 suggested in several places that in the case of a
5 settlement or consent orders that a single Commissioner
6 should suffice.

7 I would note from an AUC perspective, that is the
8 Chair's determination of the Panel. He chooses the
9 Commissioners that will get assigned to proceedings, as
10 well as how many of them will be assigned to the
11 proceedings.

12 The observation there as well, on our side, was
13 that proceedings such as settlements or consent orders have
14 actually just assigned a single Commissioner in the case
15 where it looks like a fairly expeditious process.

16 So general agreement, I would suggest, amongst
17 all the respondents on this. I really wasn't going to pick
18 on anybody for comment there, but if anybody did have
19 anything additional to add there. Joel.

20 MR. FORREST (TransCanada): I think that this sort of
21 feeds into or maybe builds on some of the discussion that
22 has gone on this morning, but in our comments about single
23 Commissioner versus full Panel, things like that, as our
24 thinking has developed internally at TransCanada, what we
25 were thinking of was some sort of alternative dispute or
26 mediation sort of step that might be possible.

27 I think that the thing that we struggle with is

1 providing, at least in our mind, adequate context or
2 understanding of the full nature of the events that sort of
3 surround some of the specified penalty events. Because it
4 sometimes seems very simple to say, "Here's your output,
5 here's what you were at," and things like that, and it
6 looks very straightforward, but there's a lot more context
7 to it in order to understand the entire picture.

8 I wouldn't say that we've fully developed our
9 thinking on this, but I started hearing that in other
10 jurisdictions there are sort of alternative steps or
11 processes along the way that involve some discussion and
12 some discussion that would involve the regulator, I guess
13 the AUC at this point. So I guess I'm just throwing it out
14 that there that our thinking is sort of evolving, but that
15 something to consider would be an AUC-led or mediated type
16 of -- whether it's a mediation session or alternative
17 dispute session, that it might be with a member, it might
18 be with a member that's not part of the Panel, it might be
19 with a staff member, to have that discussion before you
20 actually get to a full-blown hearing to see if you can
21 resolve the issue before that.

22 So I throw it out there as an idea but not
23 something that's fully developed yet.

24 MR. LARDER (AUC): Joel, the MSA can confirm,
25 but the MSA does have the discretion to enter into these
26 kinds of discussions with the party, with the market
27 participant, leading to the different results it can lead

1 to. But you're suggesting not the MSA and the party in the
2 room together figuring out things and making a deal but the
3 Commission in the room at the same time?
4 MR. FORREST (TransCanada): That's right, that's what I
5 was suggesting. I understand that that process is already
6 available, but I think that it's at the stage that you get
7 to the AUC. So you've decided that you're going to dispute
8 something, and before you actually get to a full-blown
9 hearing.
10 MR. LARDER (AUC): What's the advantage of
11 having the Commission in the room?
12 MR. FORREST (TransCanada): Well, as I say, it's not
13 fully developed, but I think that the idea was that there
14 would be that third party, that sort of mediation party
15 that might guide those discussions in terms of, if the
16 agreement has not been achieved just with the two in the
17 room, you may have that added dynamic of someone who is
18 familiar with the AUC, familiar with the AUC's processes,
19 things like that, that might help guide the parties towards
20 an agreement. It may not work, and it might work in some
21 cases, but it would certainly involve three willing parties
22 at least. But, in any case, it may not be an idea that
23 comes to pass, but it was something that we started to
24 think about.
25 MS. STEVENS (TransCanada): And if I could just add to
26 that, so what we were thinking of it as is sort of what
27 they had at the EUB and they have at the ERCB, which is the

1 facilitated ADR process that happens in lots of different
2 facility applications. And we were thinking how that would
3 work is obviously the discussions do go on between the
4 parties but when a market participant decides to dispute --
5 and I think that that's really critical in all of our
6 discussion about what the hearing process looks like, and I
7 think Joel made that point earlier, is this is when we've
8 decided to dispute something. So it's not every specified
9 penalty that will ever be issued.

10 So when we get issued with that notice, and we've
11 decided to dispute it, we were contemplating whether we
12 could speed up the process or avoid a hearing process
13 through something like a facilitated ADR process. And,
14 like we said, we just thought of this. But it does play
15 into what we were hearing about the experience in Ontario,
16 is that there is a dispute resolution process, and if that
17 does not work, there's ultimate recourse to the OEB.

18 So that's why we were just putting it out there,
19 and that's where the idea came from, is that EUB construct
20 of the facilitated ADR process in other proceedings.

21 MR. LOWTHER (AUC): I just had a question on that
22 for clarification. What role would you say the Commission
23 has in that process when the Commission itself would have
24 to approve of any settlement if there was a settlement?
25 And then if there wasn't a settlement, then the Commission
26 would have to be involved in terms of hearing the matter.

27 MS. STEVENS (TransCanada): And this is just from my own

1 personal experience at ADRs before the ERCB, is that there
2 was an independent mediator that was selected by the
3 parties who did the mediation, but there was a staff member
4 that was present. That's one model.

5 You can look at judicial dispute resolution
6 models where you have a judge that comes in and sits down
7 with the parties in a civil context to have the judicial
8 dispute resolution, and that's an actual judge, but they
9 are certainly not the judge and can have no contact, I
10 guess, with the other judges who would actually be deciding
11 the case.

12 So I don't think we have the answer to what it
13 would look like, and I think that would have to be
14 developed, but it was just an idea that we had come up with
15 a couple of days ago, literally just a couple of days ago,
16 and I think we've heard it mentioned now in the Ontario
17 context. So we're just bringing it up for discussion. But
18 I think there is different ways you can structure it.

19 MR. LYTTLE (AUC): I just had a question. If
20 you, under the present circumstance, were maybe going to
21 bring one in ten disputes to the Commission, if there was
22 that alternative in place, what would incentivize you not
23 to bring all ten of those to the dispute before you brought
24 something to the Commission?

25 MS. STEVENS (TransCanada): I guess, even to do an
26 alternative dispute resolution process still takes a lot of
27 resources and time and energy to go into that and to

1 dispute it. So if we were able to reach a settlement just
2 between the two of us, as we do in many cases, I don't
3 think we would necessarily be incentivized to take it
4 further to hope that -- I mean, I guess that's the
5 decision-making point for a market participant; is when you
6 look at what you've been charged with and the circumstances
7 of it, you evaluate all of it to decide whether you're
8 going to dispute it or not.

9 And I don't think whether or not you have a
10 mechanism of a dispute resolution process with a mediator,
11 and ultimately the Commission, changes your decision
12 making. Either we're going to go forward with the dispute
13 and have some third party help us to resolve that, or we're
14 going to settle it and pay it. I'm not sure that we would
15 be incentivized.

16 MR. FORREST (TransCanada): I just want to make sure I'm
17 clear on the question. If you're saying one in ten would
18 be disputed, would we be incented to give ADR a shot on all
19 of our specified penalties? I think for most of them,
20 especially where the rule is clear and behaviour is fairly
21 easily measured, we wouldn't engage in that if we knew that
22 we clearly had breached a rule. I think that we would be
23 motivated on the same number of instances to pursue ADR. I
24 don't know as it would result in an increase. So I'm not
25 sure if that's helpful.

26 MR. LYTTLE (AUC): Thank you.

27 MR. ESAIW (AUC): Doug.

1 MR. LARDER (AUC): Just a clarification from
2 Harry. When you described that process, I understood it to
3 be the compliance staff and the market participant, those
4 were the two parties in the room talking about it. There
5 was no mediator or --
6 MR. CHANDLER (MSA): That's right.
7 MR. ESAIW (AUC): Mr. Hunter.
8 MR. HUNTER (Bull Housser): It occurs to me --
9 remembering we're dealing with specified penalties here --
10 that the reason, I would think, typically that there's a
11 dispute is the market participant thinks that they have a
12 due diligence defence, and the more experience we have with
13 specified penalty cases -- we only have three at the
14 moment -- the more experience we have with that, the more
15 you're going to know about whether your due diligence
16 defence is going to work.
17 And so it seems to me this will become, over
18 time, less of an issue, and I'm not sure it's necessary to
19 build in an ADR process, especially right now when we're
20 sort of feeling our way along and developing the case law.
21 To build in an ADR process at this time would be building
22 it in on a basis of not enough knowledge to really know how
23 much is going to be needed down the road.
24 MS. STEVENS (TransCanada): Just in response to that, I'm
25 not sure it's always the case that it's simply -- it can be
26 a due diligence defence, but it can be a difference in
27 interpretation of the rule, which is where we would see

1 something like this perhaps being helpful. And like I
2 said, this was just something we put out for discussion.
3 It's not something that we necessarily see as a mandatory
4 step, because I don't think dispute resolution works unless
5 all of the parties are willing to participate in it. And
6 my understanding is that ADR even with the ERCB now is not
7 a mandatory step; that the parties have to opt for it. So
8 I guess that would be my comments on that. Joel, I don't
9 know if you have anything else to add.

10 MR. FORREST (TransCanada): The only thing I would build
11 on is that the due diligence defence, I would sort of take
12 your point on that, but I think that certainly sometimes it
13 really is interpretation of the rules or a combination of
14 interpreting rules and the context within which it took
15 place. And we've seen in some of the specified penalties
16 that have gone on already that they were rules based; that
17 there may have been a due diligence component to them, but
18 that wasn't the entire picture.

19 MR. WILSON (MSA): You may have answered this,
20 Rosemary, and perhaps I missed it earlier. Are you
21 thinking that this ADR would be some kind of binding
22 process or would only be binding if the parties agreed that
23 it would be binding?

24 MS. STEVENS (TransCanada): Yes, and, like I said, we do
25 not have a full picture of what this would look like, but I
26 don't think we would think of it like a binding
27 arbitration, because then you're just basically replacing

1 the Commission's job.

2 Like I said, obviously we understand that the MSA
3 and market participants have that opportunity to meet, just
4 the two of them, prior to a notice being issued. But if
5 the notice is issued and we wish to dispute it, we wonder
6 whether there would be benefit in having that dynamic of a
7 third party.

8 I guess what we would see would come out of it is
9 either a settlement would be reached in that meeting, at
10 which point we would have to take that forward to the
11 Commission for approval and whether that goes to a single
12 Commissioner then, because it's an approval of something
13 that's a settlement and not disputed, or I think we could
14 come out of it and say, well, agreement hasn't been
15 reached, we're going to a hearing, I think is the two
16 things that would come out of that.

17 MR. LARDER (AUC): I think three or four years
18 ago the Environmental Appeal Board of Alberta took a
19 decision which was basically if you're going to appear in
20 front of them you had to do ADR first. So I think it has
21 some experience in Alberta, at least before that agency.

22 MS. STEVENS (TransCanada): And, like I said, my
23 experience is in a facility context at the ERCB where it
24 wasn't mandatory, my understanding. If I remember
25 correctly, it wasn't mandatory, but the ERCB encouraged
26 parties to pursue the ADR process before coming to the
27 hearing.

1 MR. LARDER (AUC): We had a dedicated group that
2 did that job, people who worked in the field offices.
3 That's where most of those kinds of discussions took place
4 or disputes took place. There was six or eight, as I
5 recall, in that group, and, yes, if one or the other party
6 wanted to try to talk, staff was available to attend and
7 set up a structure, and there was also this other program
8 where you could get an outside mediator on the list as
9 well.

10 MR. LOWTHER (AUC): I just had a quick question.
11 Did either one of those involve penalties or alleged
12 contraventions?

13 MS. STEVENS (TransCanada): No, they didn't, and that's
14 why we're not entirely sure it works in a contravention
15 situation. But no, those were facility applications where
16 you've got an objection to a facility or dispute between
17 two commercial parties. So we're not sure that it
18 necessarily translates to this situation.

19 MR. FORREST (TransCanada): However, I guess the one
20 thing I would point out is already I think that it's one of
21 those things that can be done with the MSA and the parties.
22 So I don't think there's any bar to it.

23 MS. MEYER (Capital Power): One of the deficiencies that
24 I see in our current regime, and I actually looked at the
25 Macrory paper that was mentioned at the last meeting, and
26 there is a big section in there on alternative penalties to
27 monetary penalties. And I don't know if that type of

1 process might lead to better compliance. For example,
2 things like a mitigation plan rather than a fine. Because
3 that's one of the deficiencies that I see, because I know
4 that the AUC has taken the view that specified penalties
5 have to be monetary. So there's a gap, I think, in our
6 system in terms of it's a monetary penalty, which may not
7 lead to the most compliant behaviour.

8 And the question for the AUC is I don't know if
9 you could even contemplate it being other than a monetary
10 penalty that's an outcome of an ADR process, but it might
11 be something like improving your systems or some kind of
12 compliance plan or mitigation plan to make sure that you
13 don't run off-side the rule again that might be a better
14 alternative than a specified penalty. Because I think
15 that's the main goal of this whole system, is have people
16 following the ISO rules so that the system works really
17 well, and that's the whole idea behind them. So if you had
18 some alternative process that would lead you into more of a
19 compliance scheme rather than a monetary penalty, that
20 might be better for both the market participants and for
21 the system. It might work better.

22 I don't know if that's what you were
23 contemplating, but I think that might be an alternative. I
24 do have concerns about the MSA being the right party in
25 terms of that type of a scheme because they don't have the
26 technical knowledge. And we've said this before, we think
27 that's a defect in the scheme that we have now where the

1 AESO isn't a party to any kind of compliance scheme. No
2 offence to the MSA, but you don't necessarily have the
3 technical knowledge to know if a particular mitigation
4 scheme is going to lead to the outcomes that the AESO would
5 want.

6 So I'm asking a question but I'm also saying that
7 might provide this element that's missing from our current
8 scheme.

9 MR. FORREST (TransCanada): And I think that you've
10 probably articulated it a little bit differently than we
11 thought about it, but as I was listening, I was thinking
12 that one of the scenarios that we were thinking of that
13 might lend itself to this type of process is where there
14 are difficulties that emerge in either enforcement or
15 operation of a rule.

16 So, for instance, the outcome may be a specified
17 penalty component, but there may also be a component that
18 would involve recognition that there needs to be changes to
19 a rule or something like that. I think that that type of
20 discussion lends itself to discussing those broader issues,
21 rather than a hearing process which becomes very narrowly
22 focused on a specific behaviour, on a specific event, and
23 tends not to lend itself to broader discussions of the
24 context.

25 MS. STEVENS (TransCanada): And just to add on to that,
26 one thing that we did discuss and I think picks up on your
27 point, Lynn, is whether the AESO would possibly be there

1 for this kind of alternative dispute resolution process;
2 that they could be there to provide that input that you're
3 talking about, that technical input; and that if what comes
4 out of it, like Joel was saying, is yes, we pay a specified
5 penalty but the AESO also goes away and decides to change
6 its rule or something like that, if that was the result of
7 it, we would see that as a beneficial process to get to
8 that point.

9 MR. WILSON (MSA): I was just thinking if the
10 AESO was here they might raise a concern that if there is
11 some possibility, to follow Joel's point and yours,
12 Rosemary, that there would be some finding that a rule
13 would be deficient, they would be gravely concerned -- that
14 it's not a rule proceeding. The rule is the rule, and it's
15 about a particular breach. And if there is a concern about
16 the wording of a particular rule -- and we all know there
17 is lots of such concerns -- there are processes for dealing
18 with those, for revisiting rules, and they are
19 painstakingly slow, and there are a lot of rules in the
20 rule book, and the reality is it will take a while, but
21 maybe those are the places to have those discussions. And
22 I'm not trying to diminish the idea that there are concerns
23 that rules could be flawed and it affects how people are
24 able to comply, but I think the AESO would say, "Look, we
25 don't want leakage of that kind of discussion into these
26 other proceedings."

27 MS. STEVENS (TransCanada): And just to be clear about

1 that, it's not that what would come out of the settlement
2 is "Here is our settlement agreement on our specified
3 penalty; oh, and here is a new rule for approval that the
4 three parties wrote up without input from others."
5 It's just that it would get the process started,
6 the AESO potentially initiating its own -- I think as was
7 our experience, the rule process, initiating their own
8 consultation on that and opening it up if that came out of
9 it.

10 So, no, I'm not suggesting that we would be
11 circumventing the normal rules process for that.

12 MR. ESAIW (AUC): Well, I suggest that that
13 might be the subject of another roundtable another day. I
14 don't know that we can necessarily give any direction or
15 advice or guidance on what the Commission might think of
16 that straw dog at the moment.

17 MR. FORREST (TransCanada): It was really an idea that
18 would be thrown out there and recognizing that it would
19 require further discussion.

20 MR. ESAIW (AUC): Let's take a break.
21 (ADJOURNMENT)

22 MR. ESAIW (AUC): Ken, are you still there?
23 MR. JULL (Baker McKenzie): I am actually. If it's
24 appropriate, I wanted to jump in, if I could, with a
25 comment before we go on with respect to the issue of one
26 member versus a panel.

27 MR. ESAIW (AUC): Okay.

1 MR. JULL (Baker McKenzie): I just wanted to reiterate
2 that the starting point for this discussion is in the Act.
3 It's in Section 13. It clearly provides that the Panel can
4 be one or more members, and the Act, as you know, says the
5 Chair may designate any one or more members sit as a
6 division.

7 So clearly the Act contemplated that one person
8 could sit, and I think that when we're looking at this
9 issue we have to keep in mind that there are a lot of other
10 scenarios, albeit they're judges, but scenarios where a lot
11 of important decisions are made by one person. The classic
12 example is a criminal trial in the Provincial Court which
13 is decided always by one judge.

14 So I just throw that out to say that, in my view,
15 it seems that some thought should be given to identifying
16 the types of hearings that might be appropriate for one
17 person.

18 MR. ESAIW (AUC): Thank you.

19 Moving on to the fourth item, "Limitation
20 Period." A clear division, I would say, in the responses.
21 As far as I could tell, across the board the stakeholder
22 comment was that the current provisions of two and four
23 years should be reduced to one and two years, and the MSA
24 responded in their submission that the two and four should
25 stay as is. So I might get the MSA to start us off on that
26 topic.

27 MR. WILSON (MSA): Thanks. You set it up

1 nicely; we're all alone out there. We think the Commission
2 has got it fairly right right now. To my earlier comment,
3 if we agree that the specified penalty regime is intended
4 to create some efficiencies at the option both of the MSA
5 but also the participant -- because just because we issue a
6 specified penalty doesn't mean the participant has to go
7 along, it's quite clear. So I think there is optionality
8 on both sides.

9 If you squeeze that optionality down by squeezing
10 down the limitation period, it just means that that avenue
11 isn't as available. And I guess I would just pose that
12 comment to say is that what you really want?

13 It's not that if you shorten the limitation
14 period in the Rule 19 that the MSA will necessarily go away
15 or the matter will die. It just means that it must go the
16 other route. It likely will go the other route, and then
17 we've lost the administrative efficiency there, and the
18 Commission has lost some opportunity for efficiency too.
19 It means more of the more full-blown hearings. And that's
20 a reality that perhaps isn't the best outcome for anyone.

21 So as a general comment I guess we should
22 remember what we're trying to achieve, the limitation
23 period is really where it's going to cut potentially
24 against that. We do think the number is right right now.

25 The last comment is relating to the fact that
26 we're talking about specified penalties. Right now Rule 19
27 deals with a relatively small subset of AESO rules, really

1 quite small. We think it will grow over time naturally.
2 In fact, our advocacy is that it should really apply to all
3 AESO rules.

4 Lurking beyond that on the horizon as a result of
5 Bill 50 is the possibility that specified penalties might
6 be available for reliability standards as well. And that's
7 really worth considering.

8 So when we're thinking about how we approach
9 Rule 19 in particular in specified penalties, I think we
10 should also keep in mind not just where we are right now,
11 what we're dealing with, but the future state to some
12 degree.

13 Reliability standards have the unique feature of
14 more likely only being monitored on an ex post and in a
15 true ex post, after audit kind of approach, a lot of them.
16 It means that the clock is running from the date of the
17 contravention quite easily, because the monitoring doesn't
18 occur until audit, and that takes a while to get to the
19 audit, because you need an audit period, and then of course
20 the audit itself, and so it goes. And that's the AESO
21 portion of all of this. That's not even including our
22 plodding nature of getting through the files that we get
23 from the AESO.

24 So I think there is some natural slowness in the
25 system. If we shrink that limitation period or change it
26 from being triggered particularly from the date we become
27 aware of something, we're going to create some real

1 challenges and losses there too.
2 MR. ESAIW (AUC): Bryan.
3 MR. DUGUID (May Jensen): What I think I heard Doug
4 saying just there was that if the limitation period were
5 shortened the result of that would be there would be less
6 opportunity for discussion and resolution because the clock
7 would tick out and the MSA's hand would be forced into
8 proceeding with a complaint over to the AUC. And if that's
9 the basis on which the MSA suggests that the limitation
10 period should be long, as long as two years and also four
11 years from the date of the event, that I don't see that
12 supporting the point, because in many instances in
13 circumstances dealing with limitation periods it's quite
14 easy, if there is discussion ongoing with a likelihood of
15 resolution, to park and stop the clock, whether you call
16 that a standstill agreement or a tolling agreement or
17 whatever. If there's some reason to think that resolution
18 is afoot, then everybody is incented not to have a formal
19 process triggered, and it's quite common and easy to effect
20 that. So I think that if discussions are ongoing and
21 there's a resolution that looks promising, then the parties
22 are going to be able to sort that out.
23 In terms of the other point that was made on the
24 MSA not knowing about what happened and taking time to
25 learn about that, the way that the periods are structured,
26 there's the two periods. There's the first period that's
27 earlier, and that triggers off of when the MSA learns about

1 it. But there's the second that's longer, and that's from
2 the date the event occurred. And so the proposal I think
3 generally from market participants is that the two-year
4 period would apply and ought to cover, I would have
5 thought, the subject matter of specified penalties from the
6 date the event occurred, even if that does mean that the
7 AESO has to be involved first and then the MSA and so on.
8 And that doesn't bring into play the one-year period where
9 the MSA has to learn about it to trigger that timeline.

10 So I think it's for reasons like that that you're
11 seeing that the market participants generally are saying
12 that for specified penalties and the subject matter that's
13 involved with them and the relative nature of that ought to
14 be something that's a lot less than is proposed because of
15 the many points that are, I think, well made in this
16 PowerPoint slide 9 that the AUC has circulated for us.

17 MR. ESAIW (AUC): Thank you. Lynn.

18 MS. MEYER (Capital Power): I agree with what Bryan said,
19 but Doug raised the spectre of reliability standards, and
20 one of the things that we had thought we might raise in
21 today's meeting and then chose not to but I'm going to now
22 anyway, I'm hopeful that the specified penalty rule as it
23 relates to AESO rules is not just going to be a
24 cookie-cutter when we hit reliability standards. I know
25 that that consultation has not yet started. And I wouldn't
26 gear the rule in the process for AESO rules necessarily to
27 be the same as for reliability standards.

1 We haven't had that consultation yet. I'm
2 hopeful that we'll have a very separate consultation and be
3 able to deal with those when they arise, but I wouldn't be
4 gearing this specified penalty rule as relates to AESO
5 rules necessarily to be the same as for reliability
6 standards. We want to have the opportunity to discuss
7 those separately.

8 MR. WILSON (MSA): Just a partial response to
9 Bryan's comments. I guess, for clarity, in terms of our
10 support of the existing version in AUC Rule 19, we do think
11 the numbering is right, but we particularly think that
12 triggering it from the date of awareness by the MSA is
13 pretty important. So it does deal with some of the issues
14 about how long it takes to monitor, and, in fact, there are
15 even some AESO rules which relate to procurement, for
16 example, which you only monitor by audit much after the
17 fact. So there's going to be some delay there. That
18 factors into the outside period perhaps more than the date
19 upon which the MSA became aware of it.

20 If we're talking about specified penalties and
21 the limitation period that applies to our ability to issue
22 one, it's really talking about how long an investigation
23 may go on before we get into that or are precluded from
24 taking that administratively efficient approach. And I
25 would just reiterate we seriously feel we would not stand
26 down on matters that are worth pursuing. What it will mean
27 is we will just have to pursue matters through the larger

1 regime, and it will just be as it may. I don't know that
2 that's a net gain for anyone, so I'm puzzled somewhat about
3 the idea of shrinking down the limitation period, overall
4 what the benefit is to participants, given that Section 65
5 has a three and six, and it's much broader again, and
6 that's our default.

7 MR. FORREST (TransCanada): I just have a question, and
8 I'm just not familiar enough with maybe all of the specific
9 rules that are subject to specified penalties at this
10 point. Maybe I should start off with the assumption is the
11 specified penalties are for relatively day-to-day
12 operations of the system kind of things. I'm just
13 wondering what it is that would take that long period of
14 time of monitoring that would be either not discovered or
15 not have been noticed or something like that within that
16 sort of two- to four-year time period that would then lead
17 to be something that would be of sufficient importance to
18 then to pursue it in the administrative field.

19 I'm just asking because I'm thinking of things
20 like dispatch compliance or something, that if you don't
21 notice it for two years, is it something that you're really
22 going to pursue then two years later?

23 MR. WILSON (MSA): I'm assuming the idea of the
24 MSA becoming aware of something is really speaking to when
25 it's referred by the AESO; the AESO suspects a
26 contravention and has referred it. So if we agree on that,
27 then we get into the MSA's process, which obviously can

1 take a while, and some of the reason it takes a while is
2 resourcing, for example. As more and more rules get into
3 eligibility for specified penalty, you're going to see more
4 rules potentially flowing through there.

5 Overall, the rule book as it's more actively
6 monitored requires more resources to be on top of those
7 files. Each and every file takes resource allocation,
8 which means there are throughput issues. And it's not
9 because people intend to be plodding. It's because
10 sometimes you have to be.

11 The other reason you're plodding or careful or
12 slower is because of procedural issues. Participants are
13 rightly concerned to have due process in the investigation
14 stage, a real opportunity to provide their views, and we
15 try and give that at the same time as trying not to let it
16 get out of hand such that you actually take forever to get
17 through an investigation, leaving aside what you do in a
18 hearing. Now, there is a balancing.

19 So all of those things go toward slowing down the
20 throughput from the point that we get a formal referral to
21 the point where we're at a decision where we might issue a
22 specified penalty, having done the analysis and the
23 information gathering and the discussions, et cetera. So I
24 guess it's not surprising, to me, anyway, on the inside,
25 that these can take a while.

26 And as I look at more and more files coming down
27 the pipe, subject to what Harry would say, in theory we can

1 staff up so that we could whip those things off in a couple
2 of weeks, allowing for process. The problem is you need
3 probably hundreds of analysts to do that, not three or
4 four. Again, there is a balancing. How big do you want
5 the MSA to be?

6 MR. FORREST (TransCanada): I guess TransCanada's concern
7 would be that you could be operating for up to four years
8 thinking that you have been absolutely compliant and had no
9 problems whatsoever, only to find out that you now have a
10 specified penalty for something several years ago, and
11 that's problematic to sort of reconstruct. And obviously
12 we keep records, all that kind of stuff, but especially to
13 have people, when it's people involved making decisions,
14 carrying out actions, to have that person available or have
15 that person remember the events at 2:00 in the morning from
16 three years ago creates a problematic situation for someone
17 trying to defend themselves in that position.

18 MR. WILSON (MSA): I think that's a fair enough
19 point, Joel. So that's the other side of it: Is there
20 prejudice to the participant, their ability to recall
21 evidence or retain it? I think it's fair enough also to
22 say, though, that participants are, early on, aware by
23 virtue of interactions with the AESO's monitoring and on
24 knowing of the referral that there is an issue. It's not
25 like they're going to be surprised by a potential breach
26 three years after if they've been told by the AESO a year
27 after that they're referring it to us. So to some degree I

1 think that mitigates the concern that you would sort of
2 blithely go on thinking there's no issue. In fact, there
3 is a potential issue.

4 MR. ESAIW (AUC): Doug.

5 MR. LARDER (AUC): Bryan, you described the
6 standstill agreements, the interruption of a limitation
7 period. Would that require an amendment to the current
8 rule? Or are you saying statutory limitations, for
9 example, can be interrupted if the parties agree?

10 MR. DUGUID (May Jensen): Right.

11 MR. LARDER (AUC): That's a principle of law?

12 MR. DUGUID (May Jensen): Exactly that. It's a matter
13 of stopping the clock. It happens all the time in relation
14 to limitation periods, whether they're under the
15 Limitations Act or the old Limitations of Actions Act or
16 any other contractual deadline. I don't suspect there
17 would be any question that if market participant X signed
18 an agreement saying that it would not rely on the
19 expiration of a one-year limitation period that it could
20 then stand up in the hearing before the AUC, if it were
21 brought later than that, and say, "Well, we're now able to
22 rely on the expiration of the one-year limitation period."
23 They would be waived/estopped from being able to do so. So
24 I think it ought to be pretty simple to put in place with
25 this limitation period as with any other.

26 MR. ESAIW (AUC): Jeff.

27 MR. LAM (Powerex): I have a question and a

1 comment. Given that the trigger is when MSA is aware or
2 receives a referral from the AESO, is there a limitation
3 for the AESO? Maybe it lands on the limitation when the
4 AESO makes that referral, because it seems to hinge on
5 that, given what I've heard here in the discussion. So
6 from a practical perspective, that seems to be where the
7 gap could be. So if it takes time for the AESO to get
8 through its compliance monitoring, it's fine to say that
9 the participant has known when the AESO refers it, but
10 that's where really the period can be extended and leaves
11 the participant open-ended in terms of any past compliance
12 liabilities.

13 MR. WILSON (MSA): To some degree, then, the
14 outside limitation is going to bear on that. The broadest
15 outside limitation is six years after the contravention.
16 So the time that the AESO requires to get through the
17 monitoring process eats into that. It doesn't bear on the
18 front-end limitation. It bears on sort of the outside
19 period. In Rule 19 right now I guess it's four years from
20 the date of the contravention. So it eats into that.

21 And, again, I know they do the best they can, but
22 it's a question also sometimes of resources and how many
23 things you're expected to monitor and how you actually get
24 to go about that.

25 MR. HUNTER (Bull Housser): Just to quickly address
26 Bryan's comments. I have been involved in a number of
27 standstill agreements. I must confess I'm always a bit

1 nervous about them. While it precludes the two parties
2 from dealing with the limitation, my concern has always
3 been what happens if the judge -- and I'll use it in a
4 civil situation where we've done it -- the judge says
5 "Hasn't the limitation period passed here, guys?" And we
6 all have to stand up and say, "Maybe, but we've decided
7 we're not raising that, My Lord."

8 I don't know the answer to the question: "Well,
9 what happens then if the judge said, 'Well, I'm raising
10 it'? Now what do we do?"

11 So I've certainly used standstill or tolling
12 agreements. I must confess I've always had a question in
13 my mind at the end of the day what would happen if the
14 trier of fact questioned my standstill agreement. So I
15 just throw that out. I don't know as there is any case law
16 on that.

17 MR. JULL (Baker McKenzie): Just on that point, in
18 Ontario we have a parallel in the Provincial Offences Act,
19 but the Act itself specifies that the defendant has to
20 consent to any extension of a limitation period, and it's
21 specified in the legislation itself. So thereby the court
22 can look at the statutory provision and say, "Okay, there's
23 the authority for me to abide by this."

24 Here it seems to me you've got a hybrid. It
25 doesn't seem to be in the Act, but it's in the rules. So I
26 don't know how a court would treat that, but I would
27 imagine that everyone would agree that the rules would

1 apply.
2 MR. ESAIW (AUC): Over to Moin and then Bryan.
3 MR. YAHYA (AUC): That was my question. I
4 always thought -- and this is just a question of
5 clarification -- that statutes of limitations were an
6 affirmative defence available to the defendant to assert.
7 So I think that -- in getting out of the AESO rules and so
8 let's go to the ultimate limitation periods. Somewhere in
9 there it says something like if after two years or ten
10 years the defendant is entitled to rely on the fact that
11 two years have passed or ten years have passed. So I'm
12 just curious, why would you think that the judge would have
13 the authority to invoke the statute of limitation? The
14 wording of all of these statutes of limitation is usually
15 that the defendant is entitled to say, "No, sorry, time is
16 gone, you can't bring this up."
17 And related to that question, to the MSA people,
18 ten years ago when we changed from the old rules which were
19 five years for contracts, two years for torts, and all
20 that, we went to this new "one size fits all" two years
21 statute of limitations for everything and ten year ultimate
22 limitations, there was some concern that that would
23 increase litigation in general because now if you have a
24 breach of contract situation, you've got construction, a
25 new building going up, you're going to be concerned about
26 this defect, it's two years from discovery of the defect,
27 everybody is going to be suing because that's the only

1 thing you have to do, there was concern that you would see
2 this spike in litigation. The empirical question I have is
3 have we seen that? Have we seen a spike in litigation in
4 the last ten years?

5 MR. ESAIW (AUC): Bryan.

6 MR. DUGUID (May Jensen): I think that's a great point
7 Moin raises in the sense that we're speaking about an
8 ability, a right, to assert a defence, and that's why I
9 used the instance of market participant X agreeing that
10 they would not assert that defence. They're not going to
11 be able to then assert that defence. There are certain
12 rights under statutes that cannot be waived for public
13 policy reasons, for instance. Some statutes for consumer
14 protection reasons or what have you, builders liens and
15 other context where statutory rights cannot be waived.

16 But the default is that if you've got a right, no
17 matter what it is, you can waive it. The default isn't the
18 other way around, that if you've got a right that you
19 cannot waive it. The default is that you can, unless the
20 statute says that you cannot. So you're going to be held
21 to your waiver of it. And moreover, I don't think many
22 market participants, as a practical matter, are going to
23 waive their rights and then try to assert the very same
24 rights.

25 In terms of the spike on litigation, that's hard
26 to really answer. Litigation is always a function of so
27 many different variables. It may be that it's because of a

1 limitation period change or it may be because of the
2 economy or what have you.
3 MR. WILSON (MSA): I take your point that a
4 defendant or the respondent could essentially agree not to
5 raise it in defence. Let me take it to the outside
6 limitation period. The way it's worded in Section 65 of
7 the AUCA, it says that an administrative penalty may not be
8 issued. So I think that's basically saying to the
9 Commission -- and I'm not sure that the parties can say,
10 "Don't worry about that" -- may not be issued after these
11 dates. So that's the three and six.
12 Inside that, I guess if the Commission wished to
13 in its Rule 19 allow some flexibility for clarity, two and
14 four, or one and two unless the parties otherwise agree,
15 I'm not sure that we would object to that.
16 Just a practical reality perhaps, if we're
17 talking about the MSA getting a file, and let's say there
18 are a hundred such files open at any one time, the clock is
19 running on all of them, not necessarily on exactly the same
20 calendar but running on all of them, it might be practical
21 or certainly prudent for the MSA to actually look for
22 agreement from the participant that they will not hold the
23 MSA to those deadlines.
24 We're talking here about the investigation phase.
25 Bryan, you mentioned earlier that if the parties are in
26 discussions about how to resolve something, they might
27 naturally discuss "Well, we've got this limitation period,

1 what are we going to do?" The limitation period is about
2 the MSA concluding after an investigation that the right
3 thing to do is to issue this notice of specified penalty.
4 That's really what we're talking about. We have a dialogue
5 with the participant, but really it's about the exchange of
6 information, sometimes about resolution, but more or less
7 it's allowing us to get to the end of our investigation
8 phase.

9 I guess I would just pose the possibility that if
10 there is an allowability for the participant to say, "We
11 are going to not raise that limitation," we might prudently
12 actually ask for that up front on every file so we know
13 that we don't have to be thinking on every file about that
14 clock and what we're going to do and do we need to get into
15 discussions with them. Those discussions themselves, of
16 course, take time.

17 MR. JULL (Baker McKenzie): I just have to leave now, but
18 judging by the tenor of the discussion, everyone has it
19 well in hand, and it sounds to me like both sides and all
20 the issues are being fully canvassed. So thanks a lot for
21 allowing me to participate in this session today. I really
22 appreciate it.

23 MR. ESAIW (AUC): Thank you Ken. Moin.

24 MR. YAHYA (AUC): The three and six specified
25 in the statues, that's the jurisdictional, in effect,
26 ultimate limitations period; that's what you're arguing?

27 MR. HUNTER (Bull Housser): The problem is that it says

1 an administrative penalty may not be imposed.
2 MR. YAHYA (AUC): From discovery or is it
3 ultimate?
4 MR. WILSON (MSA): No, the three is from the
5 date the Commission learns of it. The six is sort of the
6 ultimate contravention; six out.
7 MR. ESAIW (AUC): Good discussion on that one.
8 Next section there, no. 5, is "Involvement of Other
9 Persons." Certainly there was a general support for
10 limitation of parties that were allowed to actively
11 participate in the proceeding. Early on in our first three
12 hearings, the Panels did determine that the only parties to
13 the proceedings would be the MSA and the applicant that the
14 MSA was filing for. We did have some attempts to have
15 participation in our first hearing. The Panel determined
16 that it would just be the MSA and the party.
17 The only thing I would note here is that in the
18 submissions, take ENMAX, put in there that it was only
19 parties, and there was some agreement, if I could put it
20 that way, with what the MSA submitted. So maybe I will get
21 Liz to start that one.
22 MS. SORIA (ENMAX): Okay. Yes, our view is we
23 would want to limit the hearing to the two parties
24 involved. Our other concern that we mentioned is that we
25 would like the distinction between PPA owner and PPA buyer
26 to be clarified so that only the one truly responsible for
27 the offence is the party that's involved.

1 MR. ESAIW (AUC): Joel.
2 MR. FORREST (TransCanada): I think the only issue that
3 TransCanada had with this, and to a certain extent we got
4 into this discussion a little bit earlier, which is that
5 over time the defence of due diligence will be more greatly
6 defined by these proceedings. We would all, as market
7 participants, have an interest in the development of that
8 due diligence defence, and so that was where our comments
9 were along the lines of with respect to penalty and due
10 diligence defence we think it may be appropriate for other
11 parties to be allowed to intervene, at least on those
12 narrow issues.

13 Absolutely, I don't think that anybody needs nor
14 is it appropriate to have other parties speaking to the
15 actual event, but it's more that development of the
16 concepts that will be applicable to all market participants
17 that would be of interest to TransCanada.

18 MR. ESAIW (AUC): Renee.
19 MS. MARX (TransAlta): TransAlta was one of the
20 parties who suggested that it be open for some
21 participation of other parties in unique circumstances. I
22 think generally we believe that it should be limited to the
23 MSA and the named party related to the offence. But sort
24 of following up on Elizabeth's point is related to the PPA
25 buyer issue, I'm not going to go into details on that, but
26 there may be some issues, we foresaw, in certain cases
27 where the other party may want or be directly affected

1 confidentiality would actually be granted. I think that's
2 also our experience so far. But I think the case will
3 arise one day when it will be an appropriate ruling, and to
4 not circumvent that possibility, I think we should make
5 sure we continue the informal practice that's been
6 established.

7 MR. LARDER (AUC): Is that the MSA's official
8 position? Every application you file with us is initially
9 confidential?

10 MR. WILSON (MSA): Well, we're sensitive to the
11 fact that parties might want to raise confidentiality, and
12 as Liz said, it's moot and the opportunity is passed if
13 you've already uploaded it into the public system. And in
14 fact, to some degree it's more burdensome to the
15 Commission, because we just send them the materials by
16 e-mail and then they have to upload it.

17 So we're okay with that, with continuing that
18 practice. I think it is fair. We do generally oppose
19 confidentiality claims or are sceptical about them, I
20 guess, is the point, but certainly the rules allow for
21 them, and we think the right thing to do is allow the party
22 to bring forward its claim before it's sort of all out
23 there. And this is particularly true if you want in the
24 MSA's application this rather large disclosure. There are
25 implications to that.

26 MR. HUNTER (Bull Housser): It may be that this is really
27 something that the Commission should deal with about a

1 filing rather than us filing it -- I think the last time we
2 filed two versions, a redacted version. I mean, we're
3 doing it electronically, so we're not killing trees, but
4 we're doing two versions, and it would be perhaps helpful
5 to have the Commission establish a timeline in there where
6 they weren't uploading it publicly -- and I know that would
7 require a fair number of changes -- but so that the MSA
8 would file, there would be the period of time for the
9 participant to bring their application, and if they didn't
10 bring the application, then it got uploaded. As it is,
11 we're kind of in this messy position, but I suspect we're
12 in this messy position because we're early on in the
13 process.

14 MR. LOWTHER (AUC): The practice that you've been
15 undertaking now affords the named party that opportunity.
16 In practice, I think you e-mail the application to us, and
17 you serve it on the parties or the named party. In the
18 case of redacted material, there was a third party. In
19 that case, that had to be sorted out. We are considering
20 software changes that would enable a greater flexibility
21 with respect to confidential material being filed. That's
22 come up in the context of the preferential sharing of
23 information applications that may be made to the Commission
24 in the FEOC reg where the regulation itself contemplates
25 that the hearing itself wouldn't be fully public.

26 So we are looking at some IT changes to
27 accommodate a bit more flexibility, but in the meantime I

1 think we would probably only be able to accommodate the way
2 we have in the past, and it sounds, I guess, from what I've
3 heard so far, that that seems to be working reasonably well
4 for the named parties and the MSA. If there are some
5 aspects of that, what I'm saying is I guess we would
6 probably have to continue to do that manually, which places
7 the burden on Commission staff, which we're fine with.

8 MR. ESAIW (AUC): The hope is that we can get a
9 system fix so that when you make a submission you can
10 simply check a box that says "Confidential" and it would
11 remain that way until the Panel makes some sort of
12 determination that it should or shouldn't be confidential,
13 and then at that point we can release it to the world or it
14 will remain confidential. But there's hopefully an IT
15 solution coming your way.

16 Next section 6, "Private Proceedings." I guess
17 I'll note there, fairly general consensus on the issue.
18 It's been suggested I think in a few submissions that a
19 settlement proceeding be held in camera, but other than
20 that, general agreement that these proceedings should be
21 public.

22 MR. LARDER (AUC): I'm sorry, can I just go back
23 to that confidentiality issue? In an extreme case, let's
24 say we have the four-year limitation and that's when it
25 gets to the Commission, what is it about the kinds of rules
26 that are the subject of these specified penalties -- the
27 contravention is four years old at least -- that is that

1 confidential? We're not talking about trades, we're not
2 talking about competitive FEOC-type infractions, or a
3 scheme of strategic trading that's going to be revealed. I
4 don't know. I don't know enough about the AESO rules, but
5 you guys do. So what generally is it that is so
6 confidential that the notice or application would have to
7 be filed confidentially initially, in that extreme example.
8 It's four years old.

9 MR. WILSON (MSA): Well, as I said earlier,
10 we're skeptical too, Doug, but maybe if you were pursuing a
11 breach of a rule which related to procurement and you're
12 talking about efforts to procure and they have to go around
13 and get three bids and all that and some information about
14 the bids, it might impact actually a party on the other.
15 It might be almost a third-party interest there that's at
16 stake potentially, or there might be terms in the contract
17 that are at stake potentially that you would need some help
18 from the Commission to resolve.

19 Generally, if you're talking about
20 run-of-the-course information, a lot of it is going to be
21 public, particularly as the FEOC reg goes forward, even
22 offers and identities are going to be public. So a lot of
23 it is, you're right, going to lose its sensitivity with
24 time fairly quickly. Four years is a lot of time.

25 MS. MEYER (Capital Power): I can think of operational
26 stuff about plants you might not want to be public. It
27 might affect the security of the plants. That type of

1 thing you might always want to be confidential. Even in
2 four years it may not have changed sufficiently that you
3 wouldn't want that information, in particular, held in
4 confidence. Trades, you're right, but if there is stuff
5 about the physical assets, I think there could be security
6 issues around disclosing some of that information in any
7 event. So even four years out, you want the ability to
8 claim confidentiality over that type of information, I
9 would think.

10 MR. WILSON (MSA): Actually -- here we are
11 talking about reliability standards again -- the cyber
12 standards go right there.

13 MS. MEYER (Capital Power): Exactly.

14 MR. WILSON (MSA): Yes.

15 MS. MEYER (Capital Power): And any other kind of thing
16 like that.

17 MR. LOWTHER (AUC): Would propriety processes be
18 another example?

19 MS. MEYER (Capital Power): They might be. They are
20 probably going to be physically related or patent related
21 or that type of thing, but I can think of circumstances
22 where you would want that information to be held in
23 confidence. And it's nice to have the opportunity to make
24 the pitch ahead of time, because the MSA might very well be
25 disclosing that as part of their application, and you would
26 certainly want that part to be redacted from the public
27 record I would think. So you want the opportunity to make

1 that argument.
2 MR. ESAIW (AUC): Thank you. So "Private
3 Proceedings." Once again, general consensus that they
4 should be open and public, but certainly limitations on
5 who's able to participate in them. And then certainly we
6 had several comments that the settlement proceeding, for
7 instance, would be something that should be held in camera.
8 So once again I wasn't really going to point out
9 anyone to speak to that. It seemed to be a fairly general
10 consensus on that, but if anybody wanted to speak to it I
11 open up the table.
12 And then finally, moving on to number 7, the
13 "Template Process." So this was a template that we put
14 out. I believe it was part of the discussion paper that
15 was really a guide that the Commission would use
16 process-wise to manage our way through one of these
17 proceedings.
18 Once again, I think it was fairly good feedback
19 we have on the template process. It is, at the end of the
20 day, the Panel's decision if they're going to follow that
21 process the way we've laid it out exactly as it is. But
22 it's certainly a good guideline that we're trying to use as
23 staff when we're preparing the Panels for the proceeding.
24 So I don't know if anyone has further comment on
25 what we've put out there as a process with respect to the
26 template itself? Evan.
27 MR. BAHRY (IPPSA): Thanks, John. Just on page

1 10 here of the June 30th document there's a multi-step
2 process, 11 steps. Step 7 has the MSA filing information
3 requests to the named party. And our anxiety was that this
4 should be bounded to simply the response that's filed in
5 step 6, not to open new avenues of discourse and
6 discussion, but rather simply to, I guess, it's the
7 evidence that we file. And that wasn't clear in the
8 template. So it would be helpful if the AUC can clarify
9 that, indeed, step 7, information requests from the MSA,
10 would clearly be bound just to step 6, the material filed
11 in step 6, which is the party's response.

12 MR. ESAIW (AUC): Okay. Is there anything to
13 pick up on that one?

14 MR. LOWTHER (AUC): No, Evan and I talked about
15 it, and that was clear to me, I guess, that was his
16 question. I'm glad you raised it, put it on the table. I
17 think that maybe it wasn't as clear as it could have been,
18 but that was I think where we were heading in the template,
19 is that this wouldn't be an opportunity for the MSA to
20 start afresh or head down other paths with respect to any
21 information request process; that that, in fact, would have
22 been done as part of its investigation; that this would be
23 specifically intended to deal with the evidence that was
24 filed in the proceeding and give the MSA an opportunity to
25 ask questions about that if it wasn't clear.

26 MR. ESAIW (AUC): Okay.

27 MR. LOWTHER (AUC): So we would, I guess, propose

1 to amend the table to clarify that.
2 MR. BAHRY (IPPSA): Thank you.
3 MR. FORREST (TransCanada): I have just one thing on the
4 template, and really it sort of leads back to what I had
5 commented earlier, and it's not so much a procedural step
6 obviously at the oral hearing, but, especially if there is
7 no IR process in advance, that there would need to be some
8 recognition that parties like perhaps the AESO or the MSA
9 would seat panels in order to answer those questions at
10 that oral hearing stage.
11 MR. ESAIW (AUC): Liz.
12 MS. SORIA (ENMAX): Just one suggestion possibly
13 to add at the front of the process, sort of an optional
14 step for preliminary motions, which may not exist in every
15 case but could exist I would say. So you might want to
16 leave it as a placeholder for that part of the process.
17 MR. LOWTHER (AUC): We didn't include that just
18 because that's part of the Rules of Practice in any event.
19 So I think you would be afforded that opportunity in any
20 circumstance. So to avoid repeating what already exists in
21 Rule 1, you would have the opportunity to do that in any
22 event. Similarly, with the Rule 14 in certain
23 circumstances. So we were trying to limit this to simply
24 the steps as it related to the unique proceeding. That was
25 our rationale.
26 MS. SORIA (ENMAX): That makes sense.
27 MR. ESAIW (AUC): So before we adjourn, I

00076

1 thought I would just open it up to the table for any
2 additional comments before we wrap it up.
3 So if there are none, we are adjourned.
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5 MEETING ADJOURNED AT 11:35 A.M.
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