

Rules vs. Common Law

Considerations for Rule-Making	
Flexibility	
Within the framework of rules, the AUC requires the flexibility to address the unique merits of each case. The current AUC Rule 001- Rules of Practice provides an appropriate approach to conducting hearings before the commission and is an appropriate starting point, even for administrative penalty proceedings.	
Any concern that making rules without the context of a particular fact situation might result in an inappropriate outcome could be handled by establishing procedural rules as a default, but allowing for applications for an exception to the rules if a particular case warrants it. This would be consistent with the current AUC Rule 014 which allows for applications of confidentiality to be made, where the general rule is that confidentiality is not to be afforded.	
Rules regarding availability of defences and quantum of penalty should include broad discretion for the AUC to allow additional defences or submissions as to why the quantum of penalty should be waived or reduced in a particular case.	
Extent	
It is understood that absolute ranges of quantum cannot be created to take into account all potential circumstances or factors that might arise in any given case, however, a range of quantum by type of offence, seriousness of offence, and past non-compliance would guide the expectations of the MSA and parties under MSA investigation.	
Given the limited experience of the AUC and market participants with MSA proceedings, it would be difficult to develop a comprehensive set of rules capable of anticipating all situations. What is more important at this time is to have principles that will guide these cases, rather than detailed rules that may not anticipate or address all situations that may arise.	
At this time, to create detailed rules may be premature as there have not been many MSA proceedings yet and those that have occurred have dealt with one specific ISO rule (Rule 6.6 - dispatch variance).	

Bulletin 2009-15: Section 76 of the AUCA states that the Commission may make rules governing any matter within its jurisdiction including “any matter necessary for the administration of the system of administrative penalties under section 63.” The Commission may also make rules of practice governing the Commission’s procedure and hearings. In addition, under section 11 of the AUCA, the Commission has the powers of a Judge of the Court of Queen’s Bench necessary for the exercise of its jurisdiction.

Can the Commission make rules, or if so should it, with respect to the burden of proof, availability of defences and quantum of penalty; or should the Commission develop the jurisprudence on these points on a case by case basis as they are raised by parties?

Rules vs. Common Law

Rules	Common Law
AUC Jurisdiction	
Rule-making regarding burden of proof and the available defences falls within the broad authority in Section 76.	Section 76 describes the AUC's authority in procedural terms. "Procedure" denotes the mode by which a legal right is enforced; it is akin to the word "practice" and means the rules that are made to regulate the classes of litigation within the court itself. It does not involve or imply anything relating to the extent or nature of the jurisdiction of the court. Similarly, the word "administration" is defined as the management or supervision of something (in this case, the administrative penalty scheme). The definition implies an authority to oversee the existing Section 63 process, as opposed to a positive right to create new rules affecting substantive rights within that process. Section 76(1)(f) authority does not extend to substantive rules relating to the determination of liability in the hearing process for which an administrative penalty may be sought
Section 76(1)(f) allows the AUC to make rules relating to penalty assessment.	
Rules are an interpretation of the law, not law-making (as such they are appealable).	
What the AUC can do in a hearing, it can do in rule-making.	
Parallel drawn between rule-making and ruling on a matter within a hearing in terms of providing direction for future matters.	Rule-making regarding standard of proof and availability of defences may interfere with the AESO's mandate to develop ISO rules.
AUC jurisdiction could be clarified by regulation	
Fairness – consistency, certainty	
A finding of contravention could result in sanctions which are punitive and severe and could have an injurious effect on business reputation. Fairness dictates that the MSA and market participants should know the procedural rules well in advance of a hearing, and the rules should be the same for everyone.	It may be argued that if the AUC makes rules on the issue of burdens of proof and defences without a hearing, it has fettered its discretion if this same issue arises in a hearing and that a factual context is necessary for the appropriate disposition on these issues.
With a case-by-case approach to establishing jurisprudence, the rules will be less certain in the early years and will change over time as the jurisprudence is refined, creating a non-level playing field.	It may also be argued that a hearing on these issues will give them a potential right of appeal to the Court of Appeal on a question of law.
Regulatory Efficiency	
Rule-making following this consultation would take advantage of the expert submissions and roundtable discussions. Although the AUC is not required to hold a hearing before making a rule, this consultative process is inclusive and transparent.	
Handling the matters on a case-by-case basis is a less efficient use of the time and resources of the AUC, the MSA and parties named in a MSA notice than establishing rules through this consultation process.	