

Consultation on Market Surveillance Administrator Proceedings Before the Alberta Utilities Commission (Bulletin 2009-15)
 Comment Matrix – September 2, 2009

PARTY	TOPIC
	Rules versus Common Law
ENMAX Energy Corporation (EEC)	<ul style="list-style-type: none"> • Market Surveillance Administrator (MSA) and market participants should know the procedural rules before going into the process and the rules should be the same for everyone. • Any concern that making rules without the context of a particular fact situation could be mitigated by establishing procedural rules as a default but allowing for applications for an exception. • Commission should establish rules that prescribe the burden of proof and the applicable standard, defences that may be available, and the range of penalties by type of offence, having regard to the factors in AUC Rule 013 – <i>Rules on Criteria Relating to the Imposition of Administrative Penalties</i> (Rule 013). • Prescribing rules for a range of quantum would fall within the Commission’s general authority under section 76 of the <i>Alberta Utilities Commission Act</i> (AUC Act), if not squarely with its authority under section 76(1)(f) of the AUC Act. • Commission should make a rule that prescribes the process steps related to and arising from the MSA giving notice, including prior publication of reports forming the basis of the matters to be heard by the Commission.
TransCanada Energy Ltd. (TransCanada)	<ul style="list-style-type: none"> • Current AUC Rule 001 – <i>Rules of Practice</i> (Rule 001) provides an appropriate approach to conducting hearings and is an appropriate starting point for administrative penalty proceedings.
Independent Power Producers Society of Alberta (IPPSA)	<ul style="list-style-type: none"> • Should have general rules and principles to govern the process and procedure.
Capital Power Corporation (CPC)	<ul style="list-style-type: none"> • Section 76(1) of the AUC Act allows the Commission to make rules governing any matter or person within its jurisdiction. • Create rules that classify types of contraventions (i.e. as strict liability, absolute liability, <i>men’s rea</i>), indicate the standard of proof that the MSA would be expected to satisfy in relation to them, or confirm what defences may be recognized in certain circumstances. • Rules would ensure consistency and predictability and that parties know, at a minimum, in advance of the hearing, the standard of proof that the MSA will be expected to satisfy.
TransAlta	<ul style="list-style-type: none"> • Require flexibility on a case-by-case basis, creating rules would be premature as there have not been many MSA

Corporation (TransAlta)	
Alberta Electric System Operator (AESO)	<ul style="list-style-type: none"> The matters raised in the Jull Paper do not lend themselves to a generic set of rules but are more appropriately reviewed on a case-by-case basis as they are raised by the parties to a specified penalty proceeding. Parties should be at liberty to put certain issues before the Commission without impacting the ability of the AESO to perform its duties through its rules making function.
AltaLink Management Ltd. (AltaLink)	<ul style="list-style-type: none"> Commission should make procedural rules regarding the burden of proof, availability of defences and quantum of penalty.
Market Surveillance Administrator (MSA)	<ul style="list-style-type: none"> Commission's rule-making authority under the AUC Act is limited to procedural matters and does not extend to substantive matters of law, such as the standard of proof or availability of defences. Section 76(1)(f) of the AUC Act only allows the Commission to make rules relating to penalty assessment which is contemplated by section 63 as opposed to substantive rules relating to the determination of liability in the hearing process.
Standard of Proof	
EEC	<ul style="list-style-type: none"> The MSA should be required to prove the <i>actus reus</i> beyond a reasonable doubt as outlined in <i>R. v. Sault Ste. Marie</i> [1978] 2 S.C.R. 1299 (<i>Sault Ste. Marie</i>). Where a contravention involves a positive state of mind associated with impugned conduct, <i>mens rea</i> should have to be proved beyond a reasonable doubt.
TransCanada, IPPSA	<ul style="list-style-type: none"> For administrative tribunals, the balance of probabilities standard is well established as the appropriate standard of proof. This standard should be balanced with a rigorous hearing process that allows for appropriate testing of the evidence before the Commission.
CPC	<ul style="list-style-type: none"> The MSA bears the burden of proof. A proceeding brought by the MSA is akin to a regulatory offences trial. Regardless of the classification of the contravention, the prohibited act must be proved beyond a reasonable doubt <i>Sault Ste. Marie</i> has created a common law presumption that regulatory offences will be interpreted as requiring strict liability unless the legislature clearly indicates that the offence is one of absolute liability.
TransAlta	<ul style="list-style-type: none"> Burden of proof should be on a balance of probabilities regardless of whether it is a specified penalty proceeding or an administrative penalty proceeding.
AltaLink	<ul style="list-style-type: none"> Burden of proof for a contravention under the AUC Act should be beyond a reasonable doubt.

MSA	<ul style="list-style-type: none"> • Appropriate standard of proof with respect to the <i>actus reus</i> of a contravention under the AUC Act is proof on a balance of probabilities as these as administrative/civil proceedings. • Supreme Court of Canada in <i>F.H. and McDougall et al.</i>, [2008] S.C.J. No. 54, has made it clear that the balance of probabilities is not subject to stricter scrutiny depending on the nature of the contravention or penalty.
Availability of Defences	
EEC	<ul style="list-style-type: none"> • Where there are high penalties there should be no absolute liability. • Propose the following evidentiary burden scheme: <ul style="list-style-type: none"> ○ MSA establishes elements of <i>actus reus</i> beyond a reasonable doubt; ○ Party named in the MSA's notice has the burden to prove due diligence on a balance of probabilities.
TransCanada	<ul style="list-style-type: none"> • Due diligence defence must be available to defendants. • Permitting the due diligence defence recognizes that in some circumstances the operational realities of the Alberta Interconnected Electric System (AIES) may result in a market participant being in contravention of the rules despite their reasonable efforts to ensure compliance. • An examination of the due diligence defence should take into account: <ul style="list-style-type: none"> ○ Where it can be established that the rule is technically deficient and cannot be complied with; and ○ Whether compliance with one rule would result in contravening another. • A rule or framework of rules for administrative penalties should include a standard which defines the type of behavior expected in order to satisfy the due diligence defence. • Due diligence should also be considered when evaluating the quantum of penalty. • Criteria in section 5 of AUC Rule 013 are related to due diligence but the rule is permissive. The consideration of due diligence should be mandatory.
IPPSA	<ul style="list-style-type: none"> • Due diligence defence must always be an available defence so long as the proceeding does not require proof of intent (i.e. matters addressed in section 2 of the <i>Fair, Efficient and Open Competition Regulation</i>). • No absolute liability offences. • Due diligence is an important consideration with respect to quantum of penalty. Criteria in section 5 of AUC Rule 013 are related to due diligence but the rule is permissive. The consideration of due diligence should be mandatory. • Inappropriate to require a consideration of due diligence with respect to divestment of economic benefit.
CPC, MSA	<ul style="list-style-type: none"> • Due diligence defence should be available as a matter of liability rather than merely as a factor influencing the quantum of penalty.
TransAlta	<ul style="list-style-type: none"> • Due diligence should be available in relation to the offence itself. • No absolute liability offences.
AltaLink	<ul style="list-style-type: none"> • Commission should exercise its discretion with respect to defences on a case-by-case basis.

	<ul style="list-style-type: none"> • TFO should be able to raise any mitigating factors as a defence, including, but not limited to the following: <ul style="list-style-type: none"> ○ TFO took reasonable steps to avoid an alleged breach; ○ Breach was caused by factors reasonably beyond the TFO's control; ○ TFO reported the breach to the AESO promptly; ○ TFO has taken steps to mitigate any harm caused by the breach; and ○ TFO has taken steps to ensure that the contravention will not occur in the future.
Quantum of Penalty	
EEC	<ul style="list-style-type: none"> • General range of penalties could be established for each type of contravention. • A range of quantum by type of contravention, seriousness of contravention and past non-compliance would guide the expectations of the MSA and the parties named in a MSA notice. • Penalties should be determined on a case-by-case basis (within the general range), having regard to the specific circumstances and factors involved. • There should be a clear distinction between Power Purchase Arrangement (PPA) Owners and Buyers as to who bears responsibility for non-compliance and resulting sanctions.
TransCanada	<ul style="list-style-type: none"> • Expand the specified penalty matrix to include a broader range of potential contraventions to give market participants guidance as to the seriousness of the offence and the fine likely to be associated with the offence.
IPPSA	<ul style="list-style-type: none"> • Have a matrix of categories of administrative penalties and associated maximum penalties for each category. • Matrix should take into account the market participant's history.
CPC	<ul style="list-style-type: none"> • Commission should identify the different range of penalties for different contraventions. • Should categorize by subject matter and assign suggested penalties to the classes of contraventions.
TransAlta	<ul style="list-style-type: none"> • Premature to develop a penalty table for administrative penalties given the guidance in Rule 013. • Issue of a penalty matrix should be revisited in two years. • A penalty matrix would be appropriate for reliability standards (for example, see the penalty matrix that is used by NERC as part of its Sanction Guidelines). • Premature to develop a penalty matrix for all ISO Rules given the limited number of cases before the Commission for rule violations.
AltaLink	<ul style="list-style-type: none"> • A matrix may be useful to provide guidelines on penalties for types of contraventions but Commission should retain discretion to depart from its guidelines and permit TFOs to make submissions why a particular case does not warrant a specified penalty.
MSA	<ul style="list-style-type: none"> • Absent specific legislative authority similar to that found in section 52(7)(b) of the AUC Act for specified penalties, the Commission does not have the authority to specify in advance the types of contraventions subject to section 63 administrative penalties or the range of penalties that may be applied to those contraventions.

	<ul style="list-style-type: none"> • Unclear whether creating a range of penalties for contraventions will necessarily result in any procedural efficiencies or other benefits. • It would be difficult for the Commission to establish a matrix of administrative penalties or categorization by subject matter because the Commission has not had the benefit of considering the variety of contraventions that could be subject to administrative penalties in the context of a hearing.
Divesting of Economic Benefit	
EEC, TransCanada, IPPSA	<ul style="list-style-type: none"> • Divestiture should be determined on a case-by-case basis.
CPC	<ul style="list-style-type: none"> • Commission rules should set out the method that will be used to calculate economic benefit for the purposes of section 63(2)(b) of the AUC Act. • Meaning of economic benefit and the method of its calculation should include additional consultation with stakeholders.
TransAlta	<ul style="list-style-type: none"> • Order for divesting of economic benefit should not be punitive, however, there may be cases when an administrative penalty is not enough and a divesting of economic benefit is appropriate. • It is not necessary to define economic benefit at this time. This issue could be revisited if in the future there are a number of cases where this occurs. • Commission should provide guidance as to when or under what circumstances the Commission would order a divesting of economic benefit.
AltaLink	<ul style="list-style-type: none"> • If the Commission drafts rules setting out the specific method for calculation of economic benefit, the Commission should retain the discretion to waive or vary a penalty if a market participant establishes mitigating factors in its defence.
Nature of Hearings	
EEC	<ul style="list-style-type: none"> • Matters involving high penalties should be afforded a reasonably high level of procedural fairness. • For more serious matters, hearings should be oral and be conducted <i>in camera</i>. All filings of the MSA and the party named in the notice should be accorded confidentiality. If the Commission finds a contravention, then its report would be public along with all filings made in the proceeding that do not have a confidential status. • Less serious matters could be conducted in writing and pending the Commission's disposition be subject to the same private proceeding and confidential filings. • Unless the party named in the MSA's notice requests otherwise, a panel of the Commission should conduct the proceeding.
TransCanada	<ul style="list-style-type: none"> • Hearings should allow for pre-filed evidence and a discovery process.

	<ul style="list-style-type: none"> • For less serious contraventions with lower penalties there could be a flexible hearing process with a single member of the Commission. • For more serious contraventions with greater penalties, there should be a full panel of three members of the Commission. • Hearings should not automatically be closed to interveners who should be permitted the opportunity to provide input on appropriate penalties when the contravention has the potential to harm other market participants or the market itself. When confidential and commercially sensitive information is required, these portions of the hearing can be held <i>in camera</i>.
IPPSA	<ul style="list-style-type: none"> • Oral hearings that include a written exchange of information through disclosure and information requests, and the pre-hearing submission of evidence in chief and sometimes post-hearing argument in writing. Should be conducted by a three member panel. • Commission should retain discretion to direct a written hearing or to have a single commissioner where the matter is relatively minor. • Intervener participation, different views for different members: <ul style="list-style-type: none"> ○ Intervener participation in the entire process; ○ Intervener participation limited to the question of penalty; ○ Allow interveners to participate without any requirement that they satisfy any particular test; or ○ Intervenors test to limit participation to those who have a direct or compelling interest in a particular hearing. • Section 44 of the AUC Act allows for settlement agreements between the MSA and market participants. The Commission should establish rules to clarify the following issues: <ul style="list-style-type: none"> ○ whether that should happen in the context of a hearing or some other proceeding; ○ what information accompanies the settlement agreement when it goes to the Commission for approval; and ○ how much the process is made public.
CPC	<ul style="list-style-type: none"> • Determine procedure on a case-by-case basis which include a consideration of the criteria in the Jull paper (at p. 18) and the submissions of the principal parties.
TransAlta	<ul style="list-style-type: none"> • Default for MSA proceedings be written with the choice of an oral hearing being available at the option of the market participant. • Should have a default panel of three. If there is a case of a more minor nature that could be heard by one Commission member, the choice should be made by the participants in the proceeding.
AltaLink	<ul style="list-style-type: none"> • All enforcement proceedings should be decided by a panel of the Commission
Evidence	
EEC	<ul style="list-style-type: none"> • When a party is facing more severe consequences, evidence should only be admitted if it would be admissible in a court

TransCanada	<ul style="list-style-type: none"> • With respect to unsponsored evidence, the Commission should adopt the approach of the Alberta Energy and Utilities Board in the <i>NGL Inquiry</i>. In this proceeding the AEUB ruled that the appropriate time to make a determination with respect to the weight of relevant but unsponsored evidence was after all submissions including those on the weight to be accorded the unsponsored evidence had been heard
IPPSA	<ul style="list-style-type: none"> • Guidelines discouraging irrelevant evidence, evidence from unreliable sources and evidence that is highly prejudicial but of limited probative value so that the Commission is not unintentionally influenced by evidence with little probative value. • Information requests should be an established procedural right in favour of market participants.
CPC	<ul style="list-style-type: none"> • Admissibility of specific evidence ought to be subject to more rigorous scrutiny when the potential assessment of administrative penalties is at issue. This scrutiny should be done on a case-by-case basis.
TransAlta	<ul style="list-style-type: none"> • No significant concerns have been raised so as to warrant a departure from the status quo of how the Commission approaches the admissibility of evidence.
AltaLink	<ul style="list-style-type: none"> • Commission should retain its flexibility established by section 20 of the AUC Act and apply rules of evidence consistent with a regulatory, rather than a criminal hearing. • All materials filed in a hearing will be placed on the public record therefore the Commission should consider broadening the grounds for confidentiality under section 13 of AUC Rule 001.
MSA	<ul style="list-style-type: none"> • Pursuant to section 20 of the AUC Act, the Commission has the discretion to depart from the rules of evidence applicable in court proceedings. • An administrative body must exercise its discretion with respect to each evidentiary objection on the basis of its mandate and the weaknesses or strengths of the particular evidence in question. • An administrative body will act fairly when it considers evidentiary decisions in light of its mandate and the purposes underlying the formal rules of evidence, which are: <ul style="list-style-type: none"> ○ To establish a sound factual basis for decisions; ○ To ensure a proper balance between the harm in accepting evidence and the value in doing so; and ○ To maintain a fair and effective process.
	Disclosure
EEC	<ul style="list-style-type: none"> • In more serious cases, disclosures should be based on relevance and reliance. The MSA should be required to disclose not only inculpatory evidence but also anything that might be exculpatory and anything in between that is relevant.
TransCanada, CPC, TransAlta,	<ul style="list-style-type: none"> • Guiding principles of disclosure must be relevance.

AltaLink	
IPPSA	<ul style="list-style-type: none"> • Section 9(2)(b) of the AUC Act requires disclosure with respect to applications. • Full disclosure of the MSA of all relevant documentation, information and expert opinions. <p>Market participant accused of a breach ought not to be required to give evidence against itself in the administrative penalty process.</p>
MSA	<ul style="list-style-type: none"> • MSA should be required to disclose the documents it intends to rely on at the hearing as part of its application and as those documents arise in its preparation for the hearing. • In most cases the documentary evidence used in these proceedings is provided to the AESO or MSA by the participant itself. • If market participants believe additional information must be disclosed to ensure a fair hearing, they have the right to apply to the Commission for leave to make an Information Request. • Limitations on disclosure are specifically dealt with in section 6(12) of the <i>Market Surveillance Regulation</i>.