



AUC

Alberta Utilities Commission

Stakeholder Consultation Discussion Paper - Specified Penalty Proceedings

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Contents

1 INTRODUCTION AND BACKGROUND..... 3
2 PURPOSE AND CONTEXT 4
3 SPECIFIED PENALTY PROCEEDINGS..... 5
4 CONSULTATION PROCESS..... 9
APPENDIX A 10

List of Tables

Table 1. Commission Consultations – Markets Proceedings..... 4
Table 2. Template Process – Specified Penalty Hearing..... 10

STAKEHOLDER CONSULTATION DISCUSSION PAPER

SPECIFIED PENALTY PROCEEDINGS

1 INTRODUCTION AND BACKGROUND

1. In 2008, when the Alberta Utilities Commission (Commission or AUC) was established, it was given the responsibility to adjudicate market proceedings, including specified penalty proceedings, pursuant to the *Alberta Utilities Commission Act* (AUC Act) and amendments to the *Electric Utilities Act* (EUA).¹
2. The Commission consulted with industry stakeholders regarding the process to be followed for market proceedings in June 2008.
3. Following these stakeholder consultations, the Commission conducted hearings that dealt with applications made by the Market Surveillance Administrator (MSA) regarding specified penalties.² Procedural considerations regarding the process used in the specified penalty hearings were addressed as part of each proceeding.
4. In early 2009, the Commission conducted a web-based survey of parties who were directly involved in one or more of the markets proceedings that took place in 2008 (stakeholder survey). The stakeholder survey was conducted with the following objectives in mind:
 - (a) to obtain feedback from stakeholders that were directly involved in markets proceedings that took place in 2008;
 - (b) to identify areas of success and areas for improvement in the context of the Commission's objective of continued improvement; and
 - (c) to identify topics for further discussion as part of stakeholder consultations regarding markets hearing processes.
5. On June 3, 2009, in [Bulletin 2009-15](#), the Commission initiated a consultation process to facilitate discussions on the potential regulatory treatment of procedural fairness and due process issues associated with proceedings brought before the Commission by the MSA (Consultation on MSA Proceedings).
6. On June 17, 2009, the Commission received written comments on the topics raised in Bulletin 2009-15 from the following parties: the Alberta Electric System Operator, AltaGas Ltd., AltaLink, L.P. (AltaLink), ATCO Power Ltd., Direct Energy Marketing Limited, ENMAX Energy Corporation (EEC), the Independent Power Producers Society of Alberta, the MSA,

¹ The AUC Act and amendments to the EUA established the authority, *inter alia*, for the Commission to: establish rules governing the process and procedures that the Independent System Operator (ISO) may use to develop and file ISO rules; establish rules regarding the form and content of specified penalties; issue orders, decisions and associated penalties with respect to the contravention of the EUA, the *Gas Utilities Act*, AUC decisions, orders or rules, conduct that does not support the fair, efficient and openly competitive operation of the market; hear complaints regarding the conduct of the ISO or the MSA; receive revisions to ISO rules and Alberta Reliability Standards; and hear complaints regarding ISO rules.

² These included Proceeding 71 – Confirmation of a Specified Penalty Issued to TransCanada Energy Ltd., Proceeding ID 75 – Confirmation of a Specified Penalty Issued to EPCOR PPA Management Inc. and Proceeding ID 115 – Late Payment of a Specified Penalty Issued to Syncrude Canada Ltd.

TransAlta Corporation (TransAlta), and TransCanada Energy Ltd. (TransCanada).³, some of which dealt directly with specified penalty proceedings and process.

2 PURPOSE AND CONTEXT

7. The purpose of this discussion paper is to communicate to stakeholders the suggestions and feedback from stakeholders that the Commission received regarding specified penalty proceedings and to introduce a number of changes being considered by Commission staff. The ideas and suggestions are presented to provide for further input from stakeholders and are not to be taken as being endorsed by the Commission.

8. Section 3 of this discussion paper summarizes stakeholder comments and suggestions regarding the process used for specified penalty proceedings, objectives of the Commission with respect to dealing with specified penalty proceedings and suggestions for consideration as identified by Commission staff and stakeholders. This material should be read in conjunction with the Consultation on MSA Proceedings identified in Bulletin 2009-15.

9. For your convenience, current and future consultations regarding markets-related proceedings and process are summarized in Table 1 below.

Table 1. Commission Consultations – Markets Proceedings

Current Consultations		Future Consultations
Consultation on MSA Proceedings	Consultation on Specified Penalty Process	Consultation on Objections to ISO Rules, Complaints Regarding ISO Rules and Future Consultations
<ul style="list-style-type: none"> • Rules v. Common Law • Burden of Proof • Availability of Defense • Quantum of Penalty • Divesting of Economic Benefit • Nature of Hearings • Evidence • Disclosure • Process Employed in Administrative Penalty Cases • Other Items (to be determined) 	<ul style="list-style-type: none"> • Process Employed in Specified Penalty Cases that are not paid or disputed 	<ul style="list-style-type: none"> • Process Employed in Objection to ISO Rules proceedings • Process Employed in Complaints regarding ISO Rules • Future Consultation on AUC Rule 017 – ISO Rule Process • Future Consultation on AUC Rule 019 – Specified Penalties • Future Consultation on Alberta Reliability Standards

10. The discussion paper regarding the Consultation on MSA Proceedings is available on the AUC website at <http://www.auc.ab.ca/market-oversight/market-consultations/Pages/default.aspx>.

³ These stakeholder comments are available at <http://www.auc.ab.ca/market-oversight/market-consultations/Pages/default.aspx>.

The discussion paper(s) and further information regarding Objections to ISO rules, Complaints regarding ISO rules and the other items identified as future consultation topics will be communicated through future bulletins. To be added to the Commission's distribution list for bulletins, please contact Crystal Carstens at crystal.carstens@auc.ab.ca.

3 SPECIFIED PENALTY PROCEEDINGS

Summary of Stakeholder Comments and Suggestions to Date

11. The following is a summary of the suggestions for improvement received by the Commission as part of the stakeholder survey regarding specified penalty proceedings. The specific proceeding within which the comments were provided is also identified below:

- Establish a written information request process (or something similar) prior to the commencement of the oral hearing (Proceeding ID 71);
- Establish prior procedural steps for specified penalty proceedings that involve complex technical subject matter (Proceeding ID 71); and
- Allow other parties to participate in specified penalty proceedings or establish a public process for items that may set a precedent for other market participants (Proceeding ID 71 and 75).

12. The following is a summary of the suggestions made by stakeholders regarding specified penalty proceedings in response to Bulletin 2009-15. It is recognized that there may be some overlap regarding comments that involve both the Consultation on MSA Proceedings and the Consultation on Specified Penalty Process. The stakeholder that submitted the comment is also identified below:

- Some matters within the rule making authority of the Commission should not be handled by broad rule language, but should instead be left to the Commission's discretion (MSA);
- The Commission should establish rules that prescribe the burden of proof and the applicable standard, defenses that may be available, and the range of penalties by type of offence, having regard to factors in AUC Rule 013 (EEC);
- There is the need for acknowledgement of the operational realities of the system, the recent change in process and responsibilities regarding ISO rule enforcement and deficiencies related to some ISO rules in the context of rules enforcement (TransCanada);
- The Commission should retain discretion to depart from its guidelines and permit Transmission Facility Owners to make submissions as to why a particular case does not warrant a specified penalty (AltaLink);
- The Commission should exercise its discretion to hold either a written or oral proceeding (AltaLink and TransCanada);

- Less serious matters and settlement applications should be dealt with in writing, while more serious matters should be oral. In both cases the proceedings should be conducted in private (*in camera*). The Commission should issue a public report if it finds a contravention (EEC);
- All enforcement proceedings should be decided by a panel of the Commission (AltaLink and EEC) unless the party under investigation consents otherwise (EEC);
- Consideration should be given to a process that falls somewhere between the MSA's enforcement process and a hearing before the Commission, and this process might involve a single member of the AUC (TransCanada);
- Proceedings should include a mandatory disclosure of all relevant documentation and an information request process (AltaLink);
- In all matters of process, it is appropriate and useful to gauge the extent of the process by factoring in the nature of the proceeding (including possible outcomes). This is best accomplished on a case by case basis (MSA);
- Market participants should be allowed to elect, upon notice of a potential rule violation that would lead to a specified penalty, whether or not to provide further information or pay the specified penalty (TransCanada);
- It is not appropriate or useful to see proceedings involving specified penalties as necessarily much different than those involving administrative penalties (MSA);
- Under what circumstances should parties other than the MSA and the market participant that is the subject of the MSA's investigation or penalty be permitted to participate? (TransAlta);
- There should be a limitation period for the MSA to complete an investigation and determine whether to impose a penalty or refer a matter to the Commission (TransAlta);
- Should there be a requirement to materially advance a proceeding within a certain period of time (i.e. to prevent unreasonable delay in a proceeding)? (TransAlta);
- The Commission should make a rule that prescribes the process steps related to and arising from the MSA giving notice under section 51(1)(a) of the AUC Act, including prior publication of reports forming the basis of the matters to be heard by the Commission (EEC).

Commission Objectives, Considerations and Suggestions⁴

13. To date, the Commission has not developed a process template for specified penalty proceedings. The hearing process was determined on a proceeding by proceeding basis.

⁴ These are the views of Commission staff, not the Commission itself, and are presented to promote discussion regarding the topic.

14. The objective of the Commission in developing a process template for specified penalty proceedings is to provide general guidance to market participants and industry stakeholders regarding the steps and relative timing that could be used for future specified penalty hearings. The Commission also recognizes that the process adopted for specified penalty proceedings will depend, in part, on the Commission's decisions regarding the Consultation on MSA Proceedings.

15. When developing the process associated with specified penalty proceedings, the Commission must consider the steps and time elements outlined in relevant sections of the legislation. Within this context, the Commission is interested in hearing an application from the MSA regarding a specified penalty in the most efficient and effective manner possible, while at the same time adhering to principles of natural justice and procedural fairness.

16. After consideration of the comments submitted to the Commission, the legislative requirements and the objectives noted above, Commission staff has identified a series of items for discussion with stakeholders:

- Consider the possibility of oral and written proceedings in the context of a specific application. As a general rule, the Commission has a preference for oral hearings regarding specified penalties in order to enable cross-examination of parties and to allow for oral questions from the Commission panel. In relatively simple cases, the Commission has sought the input of the MSA and the party named in a notice as to whether they can agree on a means to resolve all or part of a matter before the Commission. To the extent that the parties are able to resolve all or part of the matters, the Commission has proceeded entirely on a written basis;
- Consider the use of written information requests in conjunction with specified penalty proceedings. The need for written information requests may not exist in all cases, and may depend on the nature of the case, the complexity of the subject matter and the nature of the evidence filed;
- Consider whether specified penalty proceedings should in most cases continue to be decided by a panel of the Commission unless special circumstances dictate, as determined by the Commission Chair; and
- Consider whether the limitation period by which the MSA must issue a notice of specified penalty, as outlined in AUC Rule 019 is appropriate and should continue to apply.

17. The subject of a specified penalty proceeding is to address circumstances where the MSA has issued a notice of specified penalty to a particular market participant. Under section 52(4) of the AUC Act, at the conclusion of its hearing, the Commission may:

- (a) rescind the notice of specified penalty issued under subsection (1),
- (b) confirm the specified penalty set out in the notice of specified penalty, or
- (c) impose an administrative penalty on the person in accordance with section 63.

18. Given these options and the nature of the hearing, the Commission has been of the view that direct involvement in specified penalty hearings should be limited to the MSA and the market participant that is the subject of the application by the MSA.

19. The Commission recognizes that persons other than the MSA and the market participant who is the subject of the application may have an interest in a specified penalty proceeding, including the process followed and the outcome of the proceeding. Other persons are able to register as interested parties⁵ to the proceeding and monitor specified penalty proceedings to the extent that proceedings are not dealing with confidential information. Oral hearings are open to the public, and the Commission seeks to provide as much transparency to the process as possible. Decisions issued by the Commission regarding specified penalties are available on the Commission's website.

20. The Commission has been of the view that issues other than whether an ISO rule was contravened and whether a notice of specified penalty should be rescinded, confirmed or whether an administrative penalty should be imposed are more appropriately addressed in a proceeding that addresses the ISO rule itself.

21. After consideration of the comments submitted to the Commission and the views noted above, Commission staff has identified the following items for discussion with stakeholders:

- Consider the involvement of other persons in specified penalty proceedings; and
- Consider whether specified penalty proceedings or settlement proceedings should be dealt with in private (*in camera*).

Proceeding Process for Specified Penalty Proceedings

22. After consideration of the comments discussed above as well as those submitted in the stakeholder survey and in response to Bulletin 2009-15, Commission staff has developed a template for specified penalty proceedings (see Appendix A). The development of a template is only a guide. The final determination of any hearing process will be determined by the Commission on a case by case basis.

23. Stakeholders are encouraged to comment regardless of whether the items discussed above have been included in the template.

24. The Commission has established an overall timeline for MSA proceedings, and will undertake to have 75% of MSA proceedings reach the hearing stage within 60 days of the completed application. Further, the Commission will issue a decision in all MSA proceedings within 90 days after the conclusion of the hearing or other proceeding.

25. The template outlines a timeline that would have a specified penalty proceeding reach the hearing stage approximately 60 days after the MSA files an application with the Commission. Final determination of the schedule will be made by the proceeding panel on a case by case basis.

⁵ There is, however, no opportunity for these parties to participate in the proceeding.

26. Provisions for information requests are included at the discretion of the Commission panel if the proceeding is oral, and are mandatory if the proceeding is in writing.
27. An agreed statement of facts between the parties to the proceeding is specifically contemplated in the proceeding schedule, however it is recognized that such an agreement may not always be filed.

4 CONSULTATION PROCESS

28. As noted in Section 1, on June 3, 2009, the Commission announced a consultation process to facilitate discussions on the potential regulatory treatment of procedural fairness and due process issues associated with proceedings brought before the Commission by the MSA.
29. The first step was for stakeholders to comment, in writing, on the topics identified in Bulletin 2009-15. These comments were submitted by June 17, 2009, and formed the input to the discussion paper authored by Mr. Jull and this discussion paper.
30. Stakeholders and interested parties are asked to submit written comments on this discussion paper on or before **August 17, 2009**. The Commission has scheduled a roundtable meeting on **September 10, 2009** to discuss this paper and parties' comments. Some of the Commissioners intend to participate in the discussion at the roundtable meeting.
31. Following the round table meeting, both discussion papers, together with all written comments and submissions will be forwarded to the full Commission, and the full Commission will determine the next steps to be taken.
32. Interested parties are requested to make their submissions on this discussion paper in electronic format to Doug Larder at doug.larder@auc.ab.ca on or before **August 17, 2009**.

APPENDIX A

The following is a template for a specified penalty proceeding, as discussed in section 3 of this discussion paper. Items that are bolded are changes from the current process:

Table 2. Template Process – Specified Penalty Hearing

	Submission Type	Timeframe	Comment
1.	MSA files Application regarding a specified penalty with the Commission	As identified in Rule 019	
2.	Commission issues Notice of Proceeding	Flexible	Commission to appoint panel and establish process
3.	Commission issues Schedule	Flexible	May be combined with Commission Notice of Proceeding
4.	Party named in Notice of Specified Penalty (Named Party) files Information Requests to MSA	1 week after Notice of Proceeding or as specified in Commission Schedule	Provisions for Information Requests are at the discretion of the Commission panel, if proceeding is oral. Information Requests will be mandatory if proceeding is in writing.
5.	MSA files Information Request responses	1 week following Filing of Information Requests or as specified in Commission Schedule	
6.	Named Party files response to MSA Application	2 weeks following filing of MSA Information Request responses (if any) or as specified in Commission Schedule	
7.	MSA files Information Requests to Named Party	1 week following Filing of Response by Named Party or as specified in Commission Schedule	Provisions for Information Requests are at the discretion of the Commission panel - see above
8.	Named Party files Information Request responses	1 week following Filing of Information Requests or as specified in Commission Schedule	
9.	Agreed Statement of Facts (if any)	1 week following filing of Information Request responses by Named Party or as specified in Commission Schedule	
10.	Oral Hearing	1 week following filing of Agreed Statement of Facts or as specified in Commission Schedule	

	Submission Type	Timeframe	Comment
11.	Argument and Reply Argument	As specified in Commission Schedule	If oral hearing, the default process will be oral argument and oral reply argument. In all other cases, it will be written argument and written reply argument.