

August 19, 2011

Alberta Utilities Commission
400, 425 1st Street SW
Calgary, AB T2P 3L8

Attention: Mr. Darin Lowther

Dear Mr. Lowther

Re: Bulletin 2011-17
AUC Rule 019 - Specific Penalties for Contravention of ISO Rules

AltaLink Management Ltd. (“AltaLink”) is pleased to respond to the Alberta Utilities Commission’s (“AUC” or “Commission”) July 20, 2011 invitation for comments on proposed changes to AUC Rule 019. AltaLink appreciates the opportunity to participate in stakeholder consultation on Alberta Independent System Operator (“ISO” or “AESO”) Rule changes.

AltaLink’s submissions on Bulletin 2011-17 and AUC Rule 019 are meant to be constructive and for the purposes of developing the best possible regulatory framework in Alberta. AltaLink’s comments should not be construed as an indication that it would be non-compliant with amendments to AUC Rule 019.

On February 16, 2010, AltaLink filed submissions with the AUC respecting Bulletin 2010-05 and amendments to AUC Rule 019 which preceded proposed changes under Bulletin 2011-17. AltaLink limited its comments to the context that a compliance framework aimed at generation and power marketing entities is ill-suited for transmission facilities owners (“TFOs”).¹

Changes proposed by Bulletin 2011-17, particularly the ISO Rules and operating policies and procedures (“OPPs”) for inclusion in AUC Rule 019 (the “Affected Rules/OPPs”), are a significant departure from Bulletin 2010-05. AltaLink’s concerns, addressed in greater detail below, include the following:

- i) The ISO did not conduct sufficient consultation on the July 20, 2011 proposed amendments.
- ii) The ISO originally developed the Affected Rules/OPPs to enable industry processes without consultation on the possibility of penalties for non-compliance with those rules and OPPs.
- iii) The proposed amendments under Bulletin 2011-17 are unnecessary.

¹ AltaLink’s submissions of February 16, 2010 in response to AUC Bulletin 2010-05, page 1.

- iv) AUC Rule 019 does not apply equally to the ISO and TFOs.
- v) The retroactive application of AUC Rule 019² is inconsistent with principles of statutory interpretation and administrative law.
- vi) The proposed amendments under Bulletin 2011-17 create regulatory uncertainty and the potential for double jeopardy.
- vii) The Affected Rules/OPPs, being cross industry processes, require flexibility, discretion and business judgment, and are therefore, incompatible with the application of specified penalties under AUC Rule 019.

Insufficient Consultation

Respecting the rules and OPPs the ISO now seeks to include in AUC Rule 019, AltaLink is not aware of any ISO consultation with stakeholders. To the extent that the ISO proposes to have Affected Rules/OPPs subject to specified penalties, AltaLink submits that industry-wide consultation on the rules and OPPs is required in order to determine whether any changes to the rules and OPPs is appropriately required to enable a penalty compliance framework being now applied to the rules and OPPs that were initially developed as detailed industry processes.

Turning specifically to consultation, starting in the year 2005, the ISO consulted with stakeholders on several of the Affected Rules/OPPs when those rules and OPPs were initially developed.³ AltaLink actively participated in that consultation. The ISO's consultation on the Affected Rules/OPPs was only for the purpose of developing industry processes which would not be subject to specified penalties. The ISO's own correspondence, illustrated by the examples below, confirms that the ISO did not intend for the Affected Rules/OPPs to be enforced by specified penalty.

In the ISO's initial consultation on the Affected Rules/OPPs, AltaLink is not aware of the ISO making reference to those rules or OPPs being subject to specified penalty. Between 2005 and 2008, many of those rules and OPPs were subject to amendment. In the course of consulting on those amendments, the ISO did not indicate that the changes to ISO Rules and OPPs would trigger specified penalties.⁴

² See in particular sections 4(2) and 6 of draft AUC Rule 019 as at July 20, 2011.

³ For example, a discussion of the AESO's consultation on Rule 9.1 in 2005 is set out at [http://www.aeso.ca/downloads/Letter_to_Stakeholders_compliance_review_Dec18_07\(1\).pdf](http://www.aeso.ca/downloads/Letter_to_Stakeholders_compliance_review_Dec18_07(1).pdf)

⁴ Evidence of this is found, for example, in the consultation histories of OPP 601 (AESO correspondence to stakeholders of April 11, 2005, set out at

<http://www.aeso.ca/downloads/InterimapprovedOPPLetter20050411.pdf>; see also AESO correspondence to stakeholders of October 30, 2008, set out at

[http://www.aeso.ca/downloads/Letter_of_Notice_\(LII_LIII_OPPs\)_Oct_30_2008.pdf](http://www.aeso.ca/downloads/Letter_of_Notice_(LII_LIII_OPPs)_Oct_30_2008.pdf)), OPP 1306 (AESO correspondence to stakeholders of October 30, 2008, set out at

[http://www.aeso.ca/downloads/Letter_of_Notice_\(New_OPP_1306\)_Oct_30_2008.pdf](http://www.aeso.ca/downloads/Letter_of_Notice_(New_OPP_1306)_Oct_30_2008.pdf)) and ISO Rule 9.1.2 (AESO correspondence to stakeholders of April 9, 2008, set out at

[http://www.aeso.ca/downloads/Letter_of_Notice_\(Serv_Prop\)_Apr_9_2008.pdf](http://www.aeso.ca/downloads/Letter_of_Notice_(Serv_Prop)_Apr_9_2008.pdf)).

The ISO not only refrained from consulting in respect of potential specified penalties for the Affected Rules/OPPs, it indicated in its consultation that the nature of certain Affected Rules/OPPs is inconsistent with specified penalties. For example, the ISO specifically stated that the application of OPP 601,⁵ OPP 1305⁶ and ISO Rule 9.1.2⁷ would have “low impact on the industry or the ISO” and requires “little or no effort by stakeholders for implementing a solution”. Specified penalties are quasi-criminal in nature and have significant financial and reputational impacts. The ISO’s suggestion that certain of the Affected Rules/OPPs are of “low impact” confirms that those rules and OPPs are an improper fit for the application of specified penalties.

In its submissions on AUC Bulletin 2009-20, the ISO “identified a number of possible enhancements to that consultation process”.⁸ The ISO stated that its rules consultation process “has not been fully committed to writing, nor has it been applied consistently across all rule consultations” and that it sought to improve its consultation through “commencing the AESO’s consultation process as early as possible by formal notice to stakeholders”.⁹ Given the import of specified penalties, the lack of consultation on those penalties, and the scope of potential deficiencies respecting ISO rules consultation, AltaLink submits that the ISO’s consultation on the Affected Rules/OPPs is insufficient for the purposes of amending AUC Rule 019.

Not only was the ISO’s consultation on the Affected Rules/OPPs insufficient, AltaLink is not aware of any consultation with stakeholders in respect of the July 20, 2011 proposed changes. The application of specified penalties for non-compliance with the Affected Rules/OPPs is a change to the scope of those rules and OPPs. The ISO should be required to consult on rule changes and, with respect to the July 20, 2011 amendments, has not done so.

Pursuant to the *Transmission Regulation*, the ISO must consult with market participants on matters of significant import to the electricity industry.¹⁰ More particularly, it is the ISO’s stated policy to consult with market participants on ISO Rules:

The ISO consults with stakeholders regarding the development of new ISO rules, for ISO rules changes, and for the removal of ISO rules that are no longer required due to changed circumstances (collectively "draft ISO rules changes").

⁵ AESO correspondence to stakeholders of March 24, 2005, page 10 set out at http://www.aeso.ca/downloads/Proposed_Changes_Letter_May05Process.pdf

⁶ AESO correspondence to stakeholders of January 21, 2005, page 18, set out at http://www.aeso.ca/downloads/Proposed_Changes_Letter_Jan21.pdf

⁷ AESO correspondence to stakeholders of April 9, 2008, page 3 set out at [http://www.aeso.ca/downloads/Letter_of_Notice_\(Serv_Prop\)_Apr_9_2008.pdf](http://www.aeso.ca/downloads/Letter_of_Notice_(Serv_Prop)_Apr_9_2008.pdf)

⁸ ISO Submissions on Bulletin 2009-20, page 1.

⁹ ISO Submissions on Bulletin 2009-20, page 1.

¹⁰ See, for example, *Transmission Regulation*, sections 2, 5(4)(d) and 18(3).

An effective consultation process will involve a full discussion of the views of the consulting parties, to enable the ISO to make the best decision possible in the context of the ISO mandate to make ISO rules pursuant to the legislation and regulations.

The ISO is committed to a comprehensive, inclusive, transparent, fair and efficient consultation process.¹¹

The ISO has further indicated the type of process it would include in stakeholder consultation on ISO Rules:

- commencing the ISO's consultation process as early as possible by formal notice to stakeholders;
- encouraging stakeholders to register their interest in participating in the consultation;
- seeking stakeholder input into a terms of reference as the basis upon which the consultation will proceed to include, for example, the purpose for the rule, the objectives, a list of stakeholders involved in the process and a draft schedule of consultation events;
- documenting comments from stakeholders and rationale for why the ISO has accepted or rejected stakeholder recommendations;
- encouraging stakeholders to raise all concerns or suggestions for initial design or improvement to the rule in question, to provide those concerns or suggestions for improvement in writing for discussion with others in the consultation process and to share information necessary for others to understand and evaluate those concerns or suggestions for improvement in a full and effective manner;
- requiring stakeholders to submit a position letter with written reasons for their position to the ISO and other parties before the new or amended rule is internally approved by the ISO; and
- providing stakeholders with an opportunity to provide the ISO with comments or suggestions for future consultation, which, in conjunction with the discussion to develop the terms of reference for each rule consultation should ensure that the ISO rule consultation process continues to meet the needs of all parties on an ongoing basis.¹²

Respecting the rules and OPPs the ISO now seeks to include in AUC Rule 019, AltaLink is not aware of any ISO consultation with stakeholders, let alone ISO's execution of the foregoing procedural steps. To the extent that the ISO proposes to have Affected

¹¹ <http://www.aeso.ca/rulesprocedures/21369.html>

¹² ISO Submissions on Bulletin 2009-20, pages 2-3.

Rules/OPPs subject to specified penalties, AltaLink submits that industry-wide consultation on the rules and OPPs is required in order to determine whether any changes to the rules and OPPs is appropriately required to enable a penalty compliance framework being now applied to the rules and OPPs that were initially developed as detailed industry processes.

The Amendments to AUC Rule 019 are Unnecessary

There is no basis for the July 20, 2011 amendments to AUC Rule 2011-17. The Affected Rules/OPPs do not address the core transmission requirements of safety and system reliability. The amendments are primarily associated with detailed industry processes in respect of administrative practices and reporting obligations between market participants and the ISO. There is no evidence of harm created by the Affected Rules/OPPs remaining outside of AUC Rule 019. The inclusion of the Affected Rules/OPPs in AUC Rule 019 is unnecessary. Moreover, the July 20, 2011 amendments create no identified benefits and accordingly, their effects on TFOs are disproportionate and unwarranted.

Unequal Application

Many of the Affected Rules/OPPs, such as ISO Rules 9.1.2.3, 9.1.3.5, 9.1.3.7 and 9.1.5.8, create bilateral performance obligations on both the TFO and the ISO. For example, under ISO Rule 9.1.3.5 the ISO must review and take action on a TFO's project change proposal by not later than 15 days following receipt of the proposal.¹³ The July 20, 2011 amendments establish penalties on TFOs but not on the ISO for non-compliance with the Affected Rules/OPPs.

In order to ensure effective operation of AUC Rule 019 and Affected Rules/OPPs, the specified penalties framework must apply fairly and equitably to all market participants, including the ISO. A lack of reciprocity between market participants creates particular concern with respect to rules that operate bilaterally such as ISO Rule 9.1.3. If both

¹³ **9.1.3.5 Project Change Proposal Review**

The **ISO** shall review the **Project Change Proposal** submitted by the **Designated TFO** pursuant to **rule 9.1.3.4**. As soon as reasonably practical, and no later than **15 days** following receipt of the **Project Change Proposal**, the **ISO** must do one or more of the following:

- a) approve such proposal, with or without amendments, in which event the **Project** shall be deemed amended;
- b) reject such proposal with or without requesting a revised **Project Change Proposal**;
- c) cancel the **Project**; and/or
- d) recommend that the **TFO** apply to the **Commission** for an amendment to any approval it may have obtained pursuant to the **HEEA**.

parties are not equally at risk of penalty to meet their obligations under an ISO rule, the operation of the rule and ultimately the matters addressed by the rule are at risk.

The unequal treatment of market participants under ISO Rules and OPPs reflects a major policy reversal. AltaLink is not aware of any ISO Rule or OPP in Alberta which, if parties are subject to penalties for non-compliance, does not have reciprocal sanctions enforcing bilateral requirements. The entire framework for dealings between the ISO and market participants is based on equitable treatment. Under the TFO Terms and Conditions of Service, for example, the ISO is subject to compliance requirements.¹⁴

Not only does Bulletin 2011-17 create an unequal penalty structure, it is unclear how ISO obligations under the Affected Rules/OPPs would be enforced and monitored, who would monitor ISO compliance, and in the case of an ISO infraction, the reporting requirements and sanctions that would apply. Accordingly, while AltaLink opposes the inclusion of Affected Rules/OPPs in AUC Rule 019, to the extent that the Commission determines that they must be included, AltaLink requests that those amendments are drafted to apply equally to the ISO. Additionally, the AUC should provide clarity on the compliance framework (monitoring, audit, penalty process, complaint process) that would apply to the ISO.

Retroactivity

AltaLink further submits that the proposed rule changes cannot apply retroactively and if implemented, require a future implementation date(s) in order for TFOs and the ISO to establish penalty-based compliance processes. Section 6 of AUC Rule 019 states that assessment of Category 1 or 2 penalties shall be “from the first contravention that occurred on or after July 1, 2008.” Section 6, if approved, would have retroactive application and result in changing the legal effect of activities which occurred in the past. Under principles of statutory interpretation and administrative law, retroactive applications “are generally considered to be the most objectionable since they involve changing the past as well as the future effects of a past situation” and may interfere with vested rights.¹⁵ Reaching into the past and declaring the law to be different from what it was, “is a serious violation of the rule of law”.¹⁶

A fundamental principle on which the rule of law is based is advance knowledge of the law.¹⁷ TFOs operating under the Affected Rules/OPPs could not have known that their actions would be retroactively subject to specified penalties or what the nature of those penalties would be. The backward-reaching application of penalties to actions which occurred years ago, and not subject to sanction at the time, is unfair as well as arbitrary. Even for market participants who are not directly affected by changes to AUC Rule 019, the certainty and stability of electricity regulation in Alberta are diminished by retroactive

¹⁴ See, for example, section 3.1(c) and (h) of the TFO Terms and Conditions set out under AUC *Decision 2010-116*.

¹⁵ *Sullivan on the Construction of Statutes* (5th ed.), Ruth Sullivan (LexisNexis, 2008), page 669.

¹⁶ *Ibid.*, page 677.

¹⁷ *Ibid.*, page 677.

rulemaking. AUC Rule 019 must be amended so that it does not attach new consequences to past events, and in particular, that section 6 be deleted.

The Amendments Create Regulatory Uncertainty

In addition to being unclear on the ISO's compliance responsibilities, the amendments to AUC Rule 019 create the risk of redundancy and inconsistent application. Examples include the following:

- OPP 1306, proposed Alberta reliability standard MOD-10 and MOD-12, as well as North American Electric Reliability Corporation standards PRC-001, FAC-008 and FAC-009 have similarities and may overlap, creating the significant risk of double jeopardy and mandated specific penalties for the same or related non-compliance incidents.
- Self-reporting requirements for Alberta reliability standards may not comport with a reporting regime on specified penalties ultimately established by the ISO.
- The ISO has provided no explanation of how the specified penalty regime would correspond to the Market Surveillance Administrator's ("MSA") ability to seek administrative penalties.

With respect to general dispute resolution principles, the ISO has historically proposed a framework which avoids the application of specified penalties where possible. The ISO's preferred "process design" for resolution of disputes between market participants and the ISO, including in respect of ISO Rules, involves varied options and flexibility¹⁸ but does not mention the application of specified penalties. A further example is the ISO's statement that penalties with respect to constraints management, the subject matter of numerous ISO Rules and OPPs, are not mandatory.¹⁹ These positions now appear out of step with Bulletin 2011-17, creating additional uncertainty.

AltaLink is concerned that the amendments to AUC Rule 019 are proposed in the absence of clarity on a broader compliance framework. To ensure the regulatory certainty critical to Alberta's electricity market, a broader review of, and further consultation on, the compliance framework applicable to the ISO and TFOs is likely necessary prior to approving the proposed amendments to AUC Rule 019.

Discretion and Business Judgment

The application of specified penalties to the Affected Rules/OPPs, and particularly ISO Rules 9.1.2, 9.1.3, and 9.1.5, will impair current, workable business practices and the application of reasonable business judgment. The use of business judgment is established on the wording of the Affected Rules/OPPs and reflects the historical practices of market participants. The ISO has acknowledged that discretion is inherent in its rules.²⁰

¹⁸ For example, AESO Dispute Resolution Process Discussion Paper (December 20, 2007), page 8.

¹⁹ AIES Transmission Constraints Management Discussion Paper (October 13, 2005), page 12.

²⁰ AESO Recommendation Paper Rule 6.6 Review (October 30, 2008), pages 2 and 4.

Moreover, the retention of a flexible approach to ISO Rules is consistent with the ISO's duty under section 17 of the *Electric Utilities Act* to facilitate an efficient transmission system.

The July 20, 2011 amendments result in the inflexible enforcement of OPP 601 and ISO Rules 9.1.2, 9.1.3, and 9.1.5 under AUC Rule 019. Discretionary practices under the Affected Rules/OPPs which are currently functional would become subject to sanction under the July 20, 2011 amendments. Examples of such flexible past practices include:

- monthly TFO reporting which occurs on or before the 15th **Business Day** of each month;
- actions by the ISO which occurs on or before the 15th **Business Day** of each month; and
- as consented to by the ISO, the provision of outage plans by TFOs as commercially and technically required rather than strictly by 12:00 noon as indicated.

The types of practices captured under the Affected Rules/OPPs, such as those described above, are administrative in nature and do not impact system safety or reliability. Where the Affected Rules/OPPs require parties to meet specific deadlines for reporting or other exchange of information, AltaLink's experience is those deadlines are generally met. In instances where discretion with strict compliance is applied, delay of information provision is not more than a day or two. Both the ISO and TFOs have been subject to delays.

AltaLink is not aware of disputes respecting the ISO's and TFOs' application of the Affected Rules/OPPs. AltaLink's experience is that TFOs and the ISO work within the spirit of the ISO Rules and that parties have been able to accommodate reasonable requests for diversions from strict application of the rules. There is no business or safety concern if parties continue to apply discretion to the Affected Rules/OPPs without penalty, and some risk that the application of such penalties will create inefficiencies in workable business practices. Additional enforcement through the application of specified penalties is therefore unnecessary.

Relief Requested

Based on the foregoing, AltaLink submits that the Commission should not approve the July 20, 2011 amendments to AUC Rule 019 and should direct the ISO to perform proper consultation on the matter. AltaLink further submits that, consistent with the *Transmission Regulation* and stated ISO policies, the ISO must first consult with stakeholders on those amendments. Moreover, specified penalties for non-compliance with the Affected Rules/OPPs must apply equally to all market participants, including the ISO.

If the Affected Rules/ OPPs ultimately become subject to specified penalties, AltaLink requests an effective date that is a minimum of nine months after the approval date of the rule changes. This transition period is required for TFOs to assess and implement appropriate compliance programs to ensure adherence, and is consistent with prior ISO Rule change initiatives.

AltaLink appreciates the Commission's consideration of its comments. If you have any question of concerns, please do not hesitate to contact the undersigned at 403.267.3450.

Sincerely,

(Original signed by)

Zora Lazic

Senior Vice President Regulatory & Client Services