Alberta Utilities Commission  
#400, 425- First Street SW  
Calgary, AB T2P 3L8  

Attention: JP Mousseau, Commission Counsel  
Greg Andrews, Market Analyst  

Dear Sirs:  

RE: Bulletin 2016-19 and 2016-20  

On November 1, 2016, the Alberta Utilities Commission (Commission) issued Bulletin 2016-20 inviting market participants to comment on the Commission’s enforcement procedures and practices described in Bulletin 2016-010, and the enforcement-related provisions of AUC Rule 001: Rules of Practice. This letter sets out ENMAX Energy Corporation’s (ENMAX) comments.  

Comment #1: The potential for overlapping investigative roles between the MSA and the AUC  

Bulletin 2016-20 does not address the potential for market participants to be subject to concurrent and uncoordinated investigations by the Market Surveillance Administrator and the Alberta Utilities Commission. Concurrent investigations could occur because the mandate of each organization overlaps.1 Bulletin 2016-010 does not describe how the Commission and the Market Surveillance Administrator will co-operate or coordinate their investigations and potentially share information. This elevates potential for duplication and conflict and may increase the regulatory burden on those subject to an investigation from both bodies.  

ENMAX recommends that the Market Surveillance Administrator and the Alberta Utilities Commission enter into a memorandum of understanding setting out how both bodies will co-ordinate investigations where their mandates overlap. A memorandum of understanding is a common tool used by administrative decision makers to co-ordinate the exercise of their statutory overlapping functions. Memoranda of understanding are usually made public so that those regulated by the administrative bodies understand how their powers and functions will be carried out.2  

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1 The Market Surveillance Administrator has express authority to investigate contraventions of the Electric Utilities Act and the Gas Utilities Act, regulations under each of these enactments and Commission rules, orders and decisions: Alberta Utilities Commission Act, subparagraph 39(1)(b)(l). The Commission describes its authority to commence enforcement actions with respect to certain Commission rules, contraventions of the Hydro and Electric Energy Act and the Pipeline Act, regulations made under each of these enactments and Commission regulatory authorizations under them: Bulletin 2016-010, para. 6.  

2 The Commission should also consider executing a memorandum of understanding with the Alberta Electric System Operator. The Alberta Electric System Operator has compliance and enforcement functions that may overlap with those of the Commission: see, Electric Utilities Act, ss.17(l.1) and https://www.aeso.ca/rules-standards-and-tariff/compliance/.
Comment #2: Notification of an investigation and its outcome

Bulletin 2010-20 does not ensure that market participants would receive notice of a Commission-initiated investigation into their conduct. Notice of an investigation enables market participants to identify and assign resources to respond to the investigation. This makes the investigatory process more efficient and effective. Participants should also be informed about the outcome of an investigation – especially when the investigation is discontinued – so their resources can be reassigned.

ENMAX recommends that the Commission’s notice of an investigation: (i) include a summary of the scope of the investigation; (ii) indicate whether a complaint has been made and, if so, describe the substance of the complaint; (iii) identify the Commission’s statutory authority for conducting the investigation; and (iv) identify the responsible investigator and provide that investigator’s contact information. This information would allow market participants to respond effectively to the Commission’s investigators.

Comment #3: Bulletin 2016-10 does not establish clear separation between Commission members and Commission staff members involved in the investigatory and adjudicative stage

Bulletin 2014-05 indicates that a Commission member will be involved in investigations and that such a member will not “sit on any subsequent adjudication panel.” This is standard of non-involvement is different from the standard imposed on Commission staff in Bulletin 2016-10. There, the Commission specifies that “assigned staff members” involved at the investigation stage will have “no contact regarding the investigation” with Commission members and staff members involved in an adjudication.3

The prohibition in Bulletin 2016-10 should also apply to Commission members involved in an investigation. Commission members should have “no contact regarding the investigation” with Commission members and staff members involved in an adjudication. The prohibition should also be clarified or defined to include all staff members that have been involved in an investigation because the phrase “assigned staff members” is ambiguous.

Comment #4: The Bulletin and draft rule erode the right of participants to know the case against them

The right of market participants to know the case against them has been eroded through Bulletin 2016-10 and Rule 001 in two ways: (i) the standard of disclosure in enforcement proceedings is not prescribed; and (ii) the right of participants to ask information requests has been removed.

(i) Prescribing the level of disclosure

ENMAX recognizes that the Commission made a choice not to prescribe the level of disclosure required in enforcement proceedings.4 ENMAX respectfully suggests that this creates uncertainty in how enforcement proceedings will be conducted, potentially resulting in more Commission and participant resources expended on disputes over the applicable standard of disclosure – for example, during pre-hearing conferences. Prescribing the standard of disclosure in Commission enforcement proceedings avoids uncertainty. Indeed, this is the approach followed by the Ontario Energy Board in its enforcement

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3 Bulletin 2016-10, para. 16.
proceedings. That Board, by rule, has established a standard of disclosure based on relevance and has avoided expending resources on disputes over the applicable standard.\textsuperscript{5}

ENMAX is of the view that a prescribed standard of disclosure would not impose an unreasonable burden on the Commission or the Market Surveillance Administrator. This would be the case even if the prescribed standard were on the higher end of the spectrum – which is supported by ENMAX – because more straightforward proceedings inherently have straightforward disclosure.\textsuperscript{6} Moreover, prescribing the standard of disclosure would enable the Commission or the Market Surveillance Administrator to implement processes and procedures in advance of the commencement of a proceeding to ensure that they achieve the required standard.

(ii) The right to ask information requests

Rule 001 removes the right of market participants to ask information requests in enforcement proceedings. This removal is peculiar given that the Commission’s enforcement proceedings involve serious consequences to market participants, including the potential for the Commission to issue substantial administrative monetary penalties and revoke a participants operating permit or license.\textsuperscript{7} The right to ask information requests enables participants to know the case against them and learn information beneficial to their own case. Given the nature of the enforcement proceedings market participants should, by rule, possess more, not less, procedural rights.

If you have any further questions, please feel free to contact the undersigned.

Yours truly,

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\textit{[Signature]}
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Mark McGillivray
Director, Public Policy and Government Relations

\textsuperscript{5} Rules of Practice and Procedure for Enforcement Proceedings, section 16.03.
\textsuperscript{6} For example, information in the Crown’s possession for a parking violation is disclosed to the Stinchcombe standard. In practice, disclosure in such cases is less burdensome than Stinchcombe disclosure involving a more serious offence because of the limited nature of the information in the Crown’s possession.
\textsuperscript{7} See, for example, the Hydro and Electric Energy Act