Market Surveillance Administrator

Market Surveillance Administrator allegations against TransAlta Corporation et al.

Phase 2 Preliminary matters: Standing and Restitution

September 18, 2015
Alberta Utilities Commission
Decision 3110-D02-2015
Market Surveillance Administrator
Market Surveillance Administrator allegations against TransAlta Corporation et al.
Proceeding 3110
Phase 2
Standing and restitution

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1 Introduction

1. In Decision 3110-D01-2015, the Alberta Utilities Commission (AUC or Commission) found that TransAlta Corporation, TransAlta Energy Marketing Corp. and TransAlta Generation Partnership (collectively, TransAlta) contravened Section 6 of the Electric Utilities Act and sections 2(h) and (j) and 4 of the Fair Efficient and Open Competition Regulation in late 2010 and early 2011. Having found in Phase 1 of this proceeding that these contraventions occurred, the Commission must decide in Phase 2 of this proceeding on what sanctions, if any, to impose against TransAlta, pursuant to sections 56 and 63 of the Alberta Utilities Commission Act.

2. The Commission convened a process meeting at its hearing room in Calgary on August 17, 2015, to consider the process and timing for Phase 2 of the proceeding and to consider applications for standing to participate in Phase 2 by the Utilities Consumer Advocate (UCA) and Direct Energy Regulated Services (DERS).

3. One argument advanced by the UCA in support of its standing in Phase 2, was that its constituent consumers may be directly and adversely affected by the Commission’s decision if the Commission has the authority to order restitution, pursuant to the broad powers and authority conferred on it by sections 8, 11, 23, 56(4) and 63(1)(b) of the Alberta Utilities Commission Act. Because this issue was not fully addressed in the process meeting, the Commission asked interested parties to file written submissions on the issue. On August 28, 2015, the MSA, TransAlta, DERS and the UCA each filed submissions on the Commission’s authority to order restitution.

4. In this decision, the Commission rules on its jurisdiction to order restitution and the standing of the UCA and DERS. The Commission also sets out a revised process schedule for Phase 2 of Proceeding 3110.

2 Does the Commission have the authority to order restitution?

2.1 Introduction

5. Proceeding 3110 was initiated by the MSA, pursuant to sections 51 and 53 of the Alberta Utilities Commission Act. Section 56(3) of that act sets out the Commission’s jurisdiction to issue an order if it is of the opinion that a person contravened the Commission’s governing legislation or engaged in conduct that does not support the fair, efficient and openly competitive electricity market. Section 56(4) of the act describes what the Commission may include in an order against such a person and provides that the Commission may:

(i) impose an administrative penalty on the person under Section 63 of the act,

(ii) impose any terms and conditions the Commission considers appropriate on the person relating to the person’s future conduct in the electricity market or the natural gas market; and
(iii) prohibit the person from engaging in conduct specified in the order or direct the person to take action specified in the order.

6. Section 63(2) states that an administrative penalty issued by the Commission may require the person to whom it is directed to pay either or both of the following:

(a) an amount not exceeding $1,000,000 for each day or part of a day on which the contravention occurs or continues;

(b) a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention.

7. Section 63(5) states that “[a]n administrative penalty paid to the Commission under this section or pursuant to Section 67 shall be paid into the General Revenue Fund.”

8. The UCA submitted that sections 8, 11 and 23 of the Alberta Utilities Commission Act are also relevant when considering the AUC’s authority to order restitution.

9. Section 8 sets out the AUC’s general powers, which includes the authority to “do all things that are necessary for or incidental to the exercise of its powers and the performance of its duties and functions,” and, where it appears to the Commission to be just and proper, to “grant partial, further or other relief in addition to, or in substitution for, that applied for as fully and in all respects as if the application or matter had been for that partial, further or other relief.”

10. Section 11 provides that the Commission has some of the powers of a Queen’s Bench judge and states:

11 In addition to any other powers conferred or imposed by this Act or any other enactment, the Commission has, in regard to the attendance and examination of witnesses, the production and inspection of records or other documents, the enforcement of its orders, the payment of costs and all other matters necessary or proper for the due exercise of its jurisdiction or otherwise for carrying any of its powers into effect, all the powers, rights, privileges and immunities that are vested in a judge of the Court of Queen’s Bench.

11. Section 23 sets out the Commission’s general authority to issue an order against a person and reads in part, as follows:

23(1) The Commission may order any person

(a) to do any act, matter or thing, forthwith or within or at a specified time and in any manner directed by the Commission, that the person is or may be required to do under this Act or any other enactment or pursuant to any decision, order or rule of the Commission,

(b) to cease doing any act, matter or thing, forthwith or within or at a specified time, that is in contravention of this Act or any other enactment or any decision, order or rule of the Commission,…

Alberta Utilities Commission Act, Section 8(2).
Ibid., Section 8(5)(d).
The Utilities Consumer Advocate

12. The UCA submitted that the Commission’s authority to issue orders associated with a proceeding initiated by the MSA under Section 51 of the Alberta Utilities Commission Act is found in sections 56, 63 and 66 of the Alberta Utilities Commission Act. However, it argued that sections 8, 11 and 23 of that act also provide context when considering the scope of the Commission’s authority under sections 56 and 63. When read together, the UCA asserted that it is clear that the statutory scheme imbues the Commission with a “broad and flexible authority to craft appropriate remedies.” The UCA argued that this authority includes the ability to order restitution to consumers harmed by TransAlta’s anti-competitive conduct.

13. The UCA observed that Sections 56(4)(a)(iii) and 63(1)(b) and (3) of the Alberta Utilities Commission Act allow the Commission to impose any terms and conditions it considers appropriate, including a prohibition against specified conduct or a direction to take specified actions. The UCA argued that these provisions give the Commission considerable discretion when deciding on an appropriate order for a contravention of the statutory scheme. The UCA submitted that the authority granted in the above sections is analogous to the authority to grant a mandatory and prohibitive injunction. The UCA argued that mandatory injunctions may be restorative in nature.

14. The UCA submitted that the Commission’s authority to issue orders under sections 56 and 63 of the Alberta Utilities Commission Act must be interpreted in a manner that allows the Commission to address, through such orders, the wide spectrum of activities it regulates. Accordingly, it argued that the legislature’s failure to specify restitution as a remedy available under sections 56 and 63 is not determinative of the Commission’s authority to order restitution. To the contrary, the UCA argued that, given the broad language of both sections, the only limit on the Commission’s discretion to craft an order is its duty of care set out in Section 6 of the act.

15. The UCA stated that it is also important to consider the purposes and intent of the Electric Utilities Act when determining the breadth of the Commission’s discretion under sections 56 and 63. It stated that the intent of that act is clear – “to create an efficient market based on fair and open competition where no one market participant has an unfair advantage and where investment in generation assets is guided by competitive market forces.” The UCA stated that TransAlta’s conduct in timing outages to benefit its portfolio position was at odds with the purposes of the Electric Utilities Act. It submitted, therefore, that the Commission’s authority to issue an order under sections 56 and 63 must be interpreted in light of those purposes and allow the Commission to ‘rectify the market imbalance created as a result of the impugned conduct.” The UCA concluded that this end can only be achieved through an order awarding restitution to customers.

16. The UCA submitted that a restitution order would “significantly bolster the public’s confidence in the ability of Alberta’s regulatory regime to provide proper redress for the harm occasioned by anti-competitive conduct.” It added that a restitution order may be necessary to ensure that the penalty imposed would result in a specific deterrent and would force TransAlta to accept responsibility for its misconduct.

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3 Exhibit 3110-X0197, UCA Submissions on Jurisdiction to Order Restitution, August 28, 2015, paragraph 21.
4 Ibid., paragraph 39.
5 Ibid., paragraph 42.
6 Ibid., paragraph 49.
2.3 Direct Energy Regulated Services

17. DERS submitted that Section 11 of the *Alberta Utilities Commission Act* imbues the Commission with the powers of a judge of the Court of Queen’s Bench, which would

…allow the Commission to award grounded claims for remedial action, which could exceed the administrative penalties recommended by the MSA, as well as the provisions of Section 56(4)(a) which suggest the Commission can impose an administrative penalty and impose terms and conditions or make any direction or order it considers appropriate.\(^7\)

18. DERS stated that it would like to submit evidence of direct harm through detailed hourly loss information in the impacted hours. DERS pointed out that the Commission previously allowed similar evidence to be filed in Proceeding 1553. DERS noted that an important difference between this proceeding and Proceeding 1553 was that, in Proceeding 1553, the Commission was considering a settlement agreement wherein its role was limited to deciding whether or not to approve the proposed settlement. DERS argued that, in the current proceeding, the Commission is free to order penalties based on its broad powers under Section 11 of the *Alberta Utilities Commission Act*. It also noted that Section 63(1)(b) allows the Commission to impose any terms and conditions it considers appropriate, which, in the current circumstances, could include claims for remedial action.

2.4 The MSA

19. It was the MSA’s opinion that Section 63 of the *Alberta Utilities Commission Act* largely governs the AUC’s discretion to award administrative penalties. It stated that Section 63 has two essential components:

   a) a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention; and

   b) an administrative penalty in an amount not exceeding $1 000 000 for each day or part of a day on which the contravention occurs or continues.\(^8\)

20. The MSA stated that Section 63(5) makes it clear that administrative penalties must be paid into the General Revenue Fund. The MSA noted that there are no express provisions that it was aware of that provide for restitutionary relief or the payment to an entity other than the General Revenue Fund.

21. The MSA concluded that the jurisdiction of the AUC is expressly set out in Section 63 of the *Alberta Utilities Commission Act*. It submitted that in Phase 2 of this proceeding, the Commission has the authority to award a one-time amount to address economic benefit, a further penalty, and costs in the amount determined by the Commission. The MSA stated that the Commission has further authority to impose appropriate terms and conditions relating to the administrative penalties and costs awarded.

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\(^7\) Exhibit 3110-X0196, DERS Comments on Jurisdiction, August 28, 2015.

\(^8\) Exhibit 3110-X0194, MSA Submission to the AUC, August 29, 2015.
2.5 TransAlta

22. TransAlta submitted that the AUC was created by statute and that its powers are limited to those delegated to it by the legislature through the statutory scheme that it administers. TransAlta submitted that Section 63(1) of the *Alberta Utilities Commission Act* clearly prescribes the remedies that the AUC can order, upon finding a statutory breach. It stated that Section 63(1) does not contemplate the type of equitable remedy that the UCA intends to seek.

23. TransAlta submitted that in a recent decision called *Alberta v McGeady*, the Alberta Court of Appeal confirmed that any remedy awarded by an administrative tribunal must arise from the tribunal’s enabling legislation. TransAlta argued that the court’s decision confirms that tribunals do not have the authority to create a remedy on equitable grounds without an express grant of jurisdiction.

24. TransAlta argued that the AUC’s general powers set out in the *Alberta Utilities Commission Act* are “confined by the statutory scheme and the principles applicable to regulatory matters.” TransAlta submitted that this issue was considered by the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v Alberta (Energy and Utilities Board)*. TransAlta stated that the Supreme Court found that the broad power to impose any conditions “necessary and in the public interest” conferred on the Energy and Utilities Board by the *Alberta Energy and Utilities Board Act* are subject to such limits.

25. TransAlta submitted that the UCA’s contention that sections 8, 11, 56(4) and 63(1)(b) of the *Alberta Utilities Commission Act* authorize the Commission to order restitution is inconsistent with the Commission’s own description of the purposes of administrative penalties in the statutory scheme. TransAlta stated that the Commission previously described this purpose in Decision 2012-182 where it stated:

Retribution and other aspects of imposing punishment is not a proper regulatory sanctioning consideration in the Commission setting an administrative penalty. Administrative penalties may be directed towards achieving general or specific deterrence, to encourage compliance and to protect the public, but should not be designed to be punitive in nature. The legislative structure requires that payment of administrative penalties be made to the General Revenue Fund. The Commission views this as consistent with the general approach that administrative penalties be neither punitive nor remedial.

26. TransAlta argued that the UCA also ignored the mandatory language of Section 63(5), which requires administrative penalties to be paid into the General Revenue Fund. TransAlta concluded that the Commission cannot make an order for restitution because such an order would be contrary to the mandatory language of the act and would result in the Commission exceeding its jurisdiction.

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9 *Alberta v McGeady*, 2015 ABCA 54.
10 Exhibit 3110-X0198, Letter to the AUC re Jurisdiction to Order Restitution, August 28, 2015, page 2.
2.6 Commission findings

27. Whether the Commission has the jurisdiction to order restitution pursuant to sections 56 and 63 of the Alberta Utilities Commission Act, is a question of statutory interpretation. The modern principle of statutory interpretation provides that “the words of an act are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”

28. Sections 56 and 63 set out the Commission’s authority to impose sanctions against persons who have contravened its governing legislation or otherwise engaged in conduct that does not support the fair, efficient and openly competitive electricity market. They are an important part of a statutory scheme whose purpose is to “create an efficient electricity market based on fair and open competition and the amelioration of anticompetitive behaviour.” These principles are highlighted in the purposes section of the Electric Utilities Act (Section 5) and established in the provisions of that act and related regulations that govern market conduct and behavior. These principles are also reflected through the establishment of a Market Surveillance Administrator with broad powers and authority to engage in enforcement activities and by providing the Commission with the authority to impose meaningful measures to deter conduct that does not support the fair, efficient and openly competitive market, including the imposition of significant administrative penalties. It is within this context that the Commission must decide if its authority to impose sanctions following an MSA-initiated proceeding includes the authority to order restitution.

29. Regarding the wording of the provisions, neither Section 56 nor 63 expressly provide that the Commission may order restitution following a determination that a person has contravened the AUC’s governing legislation. However, several other Alberta statutes specifically identify restitution as an available remedy. For example, Section 197(4)(i) of the Securities Act provides that the court may make an order requiring a person or company to compensate or make restitution to an aggrieved company or person. Similar provisions are found in the Conflicts of Interest Act, the Gas Distribution Act, the Public Service Act, and the Loan and Trust Corporations Act. While not determinative, the Commission finds that the absence of an express power to order restitution when such authority is found in several other Alberta statutes, is a strong indication that the Legislature did not intend to authorize the Commission to order restitution.

30. Based on the plain and ordinary meaning of the words employed by the legislature, the Commission may order the following, pursuant to Section 56(4) of the Alberta Utilities Commission Act:

   a. impose an administrative penalty consisting of either or both of the following:

      i. an amount not exceeding $1 000 000 for each day or part of a day on which the contravention occurs or continues;

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14 Decision 3110-D01-2015, Market Surveillance Administrator Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly, Proceeding 3110, Phase 1, paragraph 168.
15 Conflicts of Interest Act, RSA 2000, c C-23, see sections 23.12(4), 23.72(3) and 29(2).
16 Gas Distribution Act, RSA 2000, c G-3, Section 9(e).
17 Public Service Act, RSA 2000, c P-42, Section 25.42(4).
18 Loan and Trust Corporations Act, RSA 2000, c L-20, Section 311(a).
ii. a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention;

b. impose any terms and conditions relating to the person’s future conduct in the electricity market;

c. prohibit the person from engaging in conduct specified in the order

d. direct the person to take action specified in the order.

31. Further, having regard to the plain and ordinary meaning of Section 63(5), administrative penalties imposed by the Commission must be paid into the General Revenue Fund.

32. The wording of Section 56 differs from Section 63 in that Section 63 authorizes the Commission to include any terms and conditions it considers appropriate, whereas Section 56 specifies that any terms and conditions included in an order must relate to the person’s future conduct in the electricity (or gas) market. The Commission finds that its authority to include terms and conditions in any order it issues in Proceeding 3110 is limited to terms and conditions relating to TransAlta’s future conduct in the electricity market based on the implied exception rule of statutory interpretation (generalia specialibus non derogant). That principle was described by the Alberta Court of Appeal in Proprietary Industries Inc. v Workum as follows:

…an implied exception may be found to exist where two provisions are in conflict, with one provision specifically addressing the matter in question while the second provision is of a more general application. In such a scenario, the conflict may be resolved by applying the specific provision to the exclusion of the general one…

33. Consequently, if the Commission has authority to order restitution in an MSA-initiated proceeding, it must either flow from its seemingly broad authority to direct a person “to take action specified in the order” under Section 56(4)(a)(iii) or from the Commission’s general powers found in sections 8, 11, and 23 of the Alberta Utilities Commission Act.

34. The Supreme Court of Canada considered how to interpret the broad, general powers provisions of the Commission’s predecessor, the Alberta Energy and Utilities Board, in ATCO Gas & Pipelines Ltd. v Alberta (Energy and Utilities Board) (ATCO). In that decision, the court considered whether the EUB improperly allocated a portion of the proceeds of a utility asset sale to customers pursuant to the EUB’s general powers under Section 15(3) of the Alberta Energy and Utilities Board Act and Section 37 of the Public Utilities Board Act.

35. Section 15(3) allowed the Board to “make any further order and impose any additional conditions that the Board considers necessary in the public interest.” Section 37 of the Public Utilities Board Act stated:

37 In matters within its jurisdiction the Board may order and require any person or local authority to do forthwith or within or at a specified time and in any manner prescribed by the Board, so far as it is not inconsistent with this Act or any other Act conferring jurisdiction, any act, matter or thing that the person or local authority is or may be required to do under this Act or under any other general or special Act, and may forbid

19 Proprietary Industries Inc. v Workum, 2006 ABCA 225, (CanLII), paragraph 17.
the doing or continuing of any act, matter or thing that is in contravention of any such Act or of any regulation, rule, order or direction of the Board.

36. The court found as follows, with respect to the above two sections:

... a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board’s discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation.20

37. The court specifically considered the scope of the EUB’s authority under Section 15(3) to “impose any condition that it considered necessary and in the public interest.” The court distinguished between “broadly drawn powers” and “narrowly drawn powers” and found that “broadly drawn powers will necessarily be limited to only what is rationally related to the purpose of the regulatory framework.”21

38. In accordance with the Supreme Court’s decision in ATCO, the Commission may only rely upon its broadly drawn powers under sections 56(4)(a)(iii), 8, 11 and 23 of the Alberta Utilities Commission Act as authority to order restitution, if restitution is rationally related to the purpose of the regulatory framework.

39. The Supreme Court of Canada has considered the purpose of sanctions in a regulatory context in two decisions: Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)22 (Asbestos) and Re Cartaway Resources Corp23 (Cartaway).

40. The Asbestos decision related to a decision of the Ontario Securities Commission and considered that Commission’s sanctioning authority. The Supreme Court noted that “[t]he purpose of the Commission’s public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario’s capital markets.”24

41. The Cartaway decision related to a decision of the British Columbia Securities Commission to impose the maximum penalty under its legislation against two individuals for breaches of securities laws. The Supreme Court upheld the penalties and discussed the concepts of general and specific deterrence. The court stated:

Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence…25

21 Ibid., paragraph 74.
22 Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission) (Asbestos), 2001 SCC 37.
23 Re Cartaway Resources Corp. (Cartaway), 2004 SCC 26.
24 Asbestos, at paragraph 42, see also paragraphs 41-45.
25 Cartaway, paragraph 52.
42. The court further stated that “It is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative.”

43. In Decision 2012-182, the Commission considered the rationale for its sanctioning authority for MSA-initiated proceedings under the Alberta Utilities Commission Act. The Commission’s approach in that regard was consistent with the principles established by the Supreme Court in the Asbestos and Cartaway decisions. The Commission stated as follows:

Retribution and other aspects of imposing punishment is not a proper regulatory sanctioning consideration in the Commission setting an administrative penalty. Administrative penalties may be directed towards achieving general or specific deterrence, to encourage compliance and to protect the public, but should not be designed to be punitive in nature. The legislative structure requires that payment of administrative penalties be made to the General Revenue Fund. The Commission views this as consistent with the general approach that administrative penalties be neither punitive nor remedial.

44. Like the Commission, the Alberta Securities Commission has the authority to impose significant administrative penalties (up to one million dollars per contravention) as well as the authority to order the payment of any economic benefit to the Commission through what it calls a “disgorgement order.” In a decision called Re Planned Legacies, the Alberta Securities Commission specifically commented on the deterrent effects of a disgorgement order:

This is typically referred to as disgorgement, which orders the removal of unlawfully-obtained money from a wrongdoer. The rationale for ordering disgorgement in a securities commission proceeding reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act. It is not a compensation mechanism for victims of the wrongdoing. A disgorgement order thus provides a further element of specific and general deterrence.

45. Based on the foregoing, the Commission finds that the purpose behind its authority to order sanctions, including administrative penalties, pursuant to Section 56, as against persons who have contravened the statutory scheme, is to achieve general or specific deterrence, to encourage compliance and to protect the public. The Commission further finds that this purpose can be effectively achieved through the sanctions expressly provided for in Section 56(4): the imposition of an administrative penalty consisting of a one-time amount and the disgorgement of the economic benefits associated with the impugned conduct. The Commission is not satisfied that the authority to order restitution is a practical necessity to accomplish these goals. Accordingly, the Commission finds that it cannot reasonably rely upon its broadly drawn powers under the Alberta Utilities Commission Act to infer the authority to order restitution in addition to, or instead of, the sanctions it is specifically authorized to impose.

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26 Cartaway, paragraph 60.
27 Supra, note 12, paragraph 67.
28 Securities Act, RSA 2000, c S-4, Section 199.
29 Ibid., Section 198(1)(i).
30 Planned Legacies Inc., Re, 2011 ABASC 278 (CanLII).
31 Ibid., at paragraph 71. The Alberta Securities Commission recently applied the same reasoning in Re Magee, 2015 ABASC 846 (CanLII), paragraph 83.
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46. The Commission concludes that its governing legislation gives it no jurisdiction or authority to order restitution in relation to a proceeding initiated by the MSA under Section 51. The Alberta Utilities Commission Act expressly sets out what monetary penalties it may order and to whom such penalties must be paid. The act does not include express authority to order restitution, and the Commission finds that it cannot infer such authority based on its broadly drawn powers because such authority is not a practical necessity to achieve the purposes of the act. In the Commission’s view, if the legislature had intended to authorize it to order restitution following an MSA initiated proceeding, it would have done so, as it has done in several other statutes, including the Securities Act.

3  Standing

3.1 Utilities Consumer Advocate

47. The UCA filed written submissions on standing with the Commission on August 12, 2015, and supplemented those submissions at the August 17, 2015, process meeting. The UCA stated that “it has a legislated mandate to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Commission.”

The UCA argued that, based on the Commission’s findings with respect to increases in pool price due to specific outage timing and the impact of those increases on forward prices, it was clear that the UCA’s constituents who were on a flow-through price or on default service throughout the relevant time frame, were directly and adversely affected by TransAlta’s conduct.

48. The UCA also submitted that recent media attention relating to Decision 3110-D01-2015 has weakened consumer and public confidence in the deregulated electricity market in Alberta. The UCA submitted that this lack of consumer confidence can best be restored by allowing the UCA standing in Phase 2 and ensuring both that “consumers are fully informed as to the issues and that their interests are fully represented during the Penalty Phase of this proceeding.”

49. The UCA proposed to file expert evidence on the harm to consumers including the identification and quantification of the impacts on the forward market, a topic the UCA submitted had not been fully explored in Phase 1. The UCA further proposed to file evidence regarding the form and purpose of “appropriate, stringent, clearly worded compliance procedures.” The UCA also stated it would provide submissions on the appropriate penalties to be levied against TransAlta. The UCA stated that it would advocate for restitution on behalf of aggrieved consumers and noted that the indemnification to be awarded to consumers, if any, is directly at issue in Phase 2.

50. The UCA submitted that its mandate and interests differ from those of the MSA. It argued that the MSA is “primarily imbued with facilitating the operation of a fair, efficient and openly competitive market, as opposed to the protection of consumer interests.” The UCA noted that the administrative penalty sought by the MSA would accrue to the General Revenue Fund and would, therefore, not directly address or alleviate the economic harm suffered by consumers as a result of TransAlta’s conduct. The UCA submitted that the Commission has broad powers to craft remedies for misconduct that could include a mechanism to provide

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32 Exhibit 3110-X0194, UCA submissions on Phase 2 participation and Process, August 8, 2015, paragraph 5.
33 Exhibit 3110-X0194, UCA submissions on Phase 2 participation and Process, August 8, 2015, paragraph 19.
34 Exhibit 3110-X0194, UCA submissions on Phase 2 participation and Process, August 8, 2015, paragraph 28.
restitution to consumers. It asserted that its involvement in Phase 2 is necessary to advance this view.

51. The MSA and TransAlta took no position on the standing of the UCA.

3.2 Direct Energy regulated Services

52. DERS filed written submissions on standing with the Commission on August 12, 2015, and briefly supplemented those submissions at the August 17 process meeting.

53. DERS explained that it is a provider of the regulated rate option in the ATCO Electric service territory. It stated that it is apparent from the evidence provided by the MSA in Phase 1 of the proceeding that DERS suffered significant financial harm. DERS stated that it experienced losses of $350,000 as a direct result of the increases in the hourly pool prices as shown in the MSA’s evidence. DERS confirmed that it contacted the MSA regarding participation in Phase 2 and provided the MSA with detailed hourly information regarding its losses. DERS stated that the MSA agreed to consider the analysis from DERS when assessing the appropriate penalty for TransAlta’s conduct. However, DERS stated that its direct participation in Phase 2 was necessary because the MSA told DERS that the MSA was not able to represent any one participant in the proceeding.

54. DERS stated that it is directly and adversely affected in the context of the Phase 2 proceeding because of the harm it suffered. It also stated that it has relevant and useful evidence to offer regarding the factors specified in AUC Rule 13.

55. The MSA and TransAlta took no position on the standing of DERS.

3.3 Commission findings

3.3.1 The Commission’s test for standing

56. Standing before the Commission is determined under Section 9(2) of the Alberta Utilities Commission Act. In Dene Tha’ First Nation v Alberta (Energy and Utilities Board)35 (Dene Tha’) the Alberta Court of Appeal interpreted Section 26(2) of the Energy Resources Conservation Act, the provision upon which Section 9(2) is based. The Court of Appeal characterized the standing test set out by Section 26(2) as follows:

The Board correctly stated here that that provision in s. 26(2) has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.36

57. In the Dene Tha’ decision, the Court of Appeal addressed the relationship between the legal and factual tests and stated “Some degree of location or connection between the work proposed and the right asserted is reasonable.”

35 Dene Tha’ First Nation v Alberta (Energy and Utilities Board), 2005 ABCA 68 (CanLII).
36 Ibid., paragraph 10.
58. In *Cheyne v Alberta (Utilities Commission)*, the Alberta Court of Appeal confirmed that two-part test described in the Dene Tha’ decision applies equally to Section 9(2) of the *Alberta Utilities Commission Act*.

59. The meaning of the phrase “directly affected” was considered by the Alberta Court of Appeal in two decisions arising from the Public Health Advisory and Appeal Board (PHAAB) under the *Public Health Act*. Under that act, only persons who were directly affected by a decision of a local board could appeal a local board’s decision to the PHAAB.

60. In *Canadian Union of Public Employees, Local 30 v WMI Waste Management of Canada Inc.* (CUPE decision) the Court of Appeal found as follows:

   [18] In our view, the Chambers Judge was correct in upholding the decision of PHAAB to give the words “directly affected” the common law interpretation enunciated by Lord Hobhouse in *Re Endowed Schools Act* where he stated:

   that term points to a personal and individual interest as distinct from the general interest which appertains to the whole community…

This court has previously held that it is necessary to interpret reasonably the term “affected” to make an Act having a right of appeal workable: *Re Pension Fund Properties and Development Appeal Board of City of Calgary*. The phrase “directly affected” must mean something more than “affected”. However, it cannot be given an expanded meaning simply by virtue of expanding social consciousness: *Canada (A.G.) v. Mossop*.

   [19] In our view, the inclusion of the word “directly” signals a legislative intent to further circumscribe a right of appeal. When considered in the context of the regulatory scheme, it is apparent that the right of appeal is confined to persons having a personal rather than a community interest in the matter. (Citations removed)

61. In *Friends of Athabasca Environmental Association v Public Health Advisory and Appeal Board*,(FOTA decision) which was issued at the same time as the CUPE decision, the Court of Appeal stated:

   The mandate of an administrative tribunal and its legal process must be construed in accordance with the legislative intent. In our view, that intent is clear. The use of the modifier “directly” with the word “affected” indicates an intent on the part of the Legislature to distinguish between persons directly affected and indirectly affected. An interpretation that would include any person who has a genuine interest would render the word “directly” meaningless, thus violating fundamental principles of statutory interpretation…

62. In *Kostuch v Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)* (Kostuch), the Court of Queen’s Bench had to determine if the Court of Appeal’s

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37 *Cheyne v Alberta (Utilities Commission)*, 2009 ABCA 94 (CanLII).
39 Ibid, paragraphs 18 and 19.
40 *Friends of Athabasca Environmental Association v Public Health Advisory and Appeal Board*, 1996 ABCA 11.
41 Ibid., paragraph 10.
42 *Kostuch v Alberta (Director, Air & Water Approvals Divisions, Environmental Protection)*, 1996 CanLII 10565 (AB QB).
interpretation of the phrase “directly affected” in the CUPE and FOTA decisions also applied to
the use of that phrase in the Environmental Protection and Enhancement Act. The court
concluded that the meaning of “directly affected” was the same in both acts and endorsed the
following analysis by the Environmental Appeal Board:

Two ideas emerge from this analysis about standing. First, the possibility that any given
interest will suffice to confer standing diminishes as the causal connection between an
approval and the effect on that interest becomes more remote. This first issue is a
question of fact, i.e., the extent of the causal connection between the approval and how
much it affects a person’s interest. This is an important point; the Act requires that
individual appellants demonstrate a personal interest that is directly impacted by the
approval granted. This would require a discernible effect, i.e., some interest other than the
abstract interest of all Albertans in generalized goals of environmental protection.
‘Directly’ means the person claiming to be ‘affected’ must show causation of the harm to
her particular interest by the approval challenged on appeal. As a general rule, there must
be an unbroken connection between one and the other.

63. The Commission’s test for standing is arguably more stringent than the tests described
above because it requires a person to demonstrate the potential for both direct and adverse effects
arising from the Commission’s decision. The Concise Oxford Dictionary succinctly defines the
word adverse as “harmful; unfavorable.” The Merriam-Webster Online Dictionary similarly
defines adverse as “bad or unfavourable: not good.” In accordance with those definitions and
the CUPE, FOTA and Kostuch decisions, this means that under Section 9(2), the potential effects
associated with a decision of the Commission must be personal rather than general and must
have harmful or unfavourable consequences. Further, those decisions, when read together with
the Dene Tha’ decision, highlight the need for persons seeking standing to demonstrate the
degree of connection between the rights asserted and potential effects identified.

3.3.2 The Commission’s approach to standing in enforcement proceedings

64. The Commission set out its general approach to assessing standing for enforcement matters
in Bulletin 2010-17. The Commission stated that for hearings resulting in an administrative penalty,
“the nature of this type of a proceeding is such that the only parties directly impacted by the
outcome of the Commission’s finding are the MSA who had brought the alleged contravention
before the Commission and the alleged contravener.” The Commission recognized, however,
that other parties may be interested in participating in such proceedings and stated that it would
consider participation requests from such parties based on the particular facts before it.

65. In Proceeding 1553, the Commission considered an application for a settlement
agreement, including provisions for an administrative penalty, between the MSA and TransAlta
relating to allegations that TransAlta had intentionally scheduled intertie activities to restrict or
prevent competition or a competitive response. Several parties, including the UCA, sought to
intervene in the proceeding. The Commission found that none of these parties had demonstrated

43 Ibid., paragraph 25.
45 Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/adverse, retrieved on September 17,
2015.
Before the Alberta Utilities Commission (AUC or Commission), April 23, 2010, paragraph 72.
47 Ibid., paragraph 72.
48 Proceeding 1553 concluded with Decision 2012-182: Application for Approval of a Settlement Agreement
how they may be directly or adversely affected by the Commission’s decision on the settlement agreement. However, the Commission found that it had “inherent authority and power to permit interventions on terms and conditions that it believes are appropriate in the circumstances.”

66. The Commission decided to allow the UCA and two other consumer groups to participate in the proceeding because each had “a special concern or insight different than that being provided by the MSA, together with knowledge of relevant evidence, which may be of assistance to the Commission.” The Commission noted that the specific decision before it was whether or not to approve the proposed settlement and decided that their participation would be limited to filing evidence and argument “addressing only in what respects each contends that the proposed settlement agreement does not adequately address the harm and loss to their members or the consumers it represents occasioned by the alleged misconduct and may not provide an adequate deterrence to prevent similar future market misconduct.” The Commission did not allow these interveners to sit witnesses or cross-examine the witnesses of the MSA and TransAlta.

67. The UCA previously sought to participate in Phase 1 of this proceeding. In a ruling dated June 17, 2014, the Commission found that the UCA had not demonstrated how the rights it had asserted may have been directly and adversely affected by its decision on the MSA’s application. The Commission also declined to exercise its discretion to allow the UCA to participate in the Phase 1 proceedings and concluded as follows:

The MSA has the burden and the sole responsibility of proving the allegations of misconduct set out in its notice. That burden is created by its statutory mandate which includes surveillance and, where applicable, investigation and enforcement in respect to, amongst other things, the conduct of electricity market participants. While any person with a concern about the conduct of a market participant may make a complaint to the MSA, the legislative framework provides that it is the MSA that ultimately decides whether to investigate the complaint and, where circumstances demand, pursue enforcement. It follows that, once the MSA decides to pursue enforcement by filing a notice under Section 51 of the Alberta Utilities Commission Act, the legislative scheme envisions that the MSA, and the MSA alone is responsible for advancing its case.

3.3.3 The Utilities Consumers Advocate

68. The UCA asserts that it has legally recognized rights or interests associated with its statutory mandate to represent Alberta residential, farm and small business consumers of electricity before proceedings of the Alberta Utilities Commission. However, it is the Commission’s view that this mandate cannot be considered in isolation. Rather, it must be viewed within the context of the overall statutory scheme having regard to the intent of the legislature.

69. The UCA’s fulfilment of its mandate by participating in AUC proceedings for the setting of gas and electricity rates is consistent with the statutory scheme. The customers represented by

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50 Ibid., paragraph 13.
51 Ibid., paragraph 13.
52 Exhibit 40.01, AUC Ruling on UCA request for standing, June 17, 2014, paragraph 14.
the UCA have the potential to be directly and adversely affected by the Commission’s decisions on rates and the establishment, through the Government Organization Act, of a single body to represent those interests is consistent with the efficient and effective regulatory process envisaged in the purposes section of the Electric Utilities Act.

70. In the Commission’s view, it is less clear that the legislature intended the UCA to play a similar role in proceedings initiated by the MSA against a market participant under Section 51 of the Alberta Utilities Commission Act. The MSA is expressly charged by law to investigate potential statutory non-compliances and, where necessary, initiate proceedings against market participants for non-compliance with the statutory scheme. In performing its duties, the MSA is required to act honestly, in good faith and in the public interest and is obliged by statute to carry out its mandate in a fair and responsible manner. Given its mandate and statutory duties, the MSA’s role is to safeguard the fair efficient and openly competitive electricity market and its interests are not tied or related to the interests of any particular subset of electricity consumers.

71. The UCA’s mandate is set out in Section 2 of Schedule 13.1 of the Government Organization Act, which states:

The Office of the Utilities Consumer Advocate has the following responsibilities:

(a) to represent the interests of Alberta residential, farm and small business consumers of electricity and natural gas before proceedings of the Alberta Utilities Commission and other bodies whose decisions may affect the interests of those consumers

(b) to disseminate independent and impartial information about the regulatory process relating to electricity and natural gas, including an analysis of the impact of decisions of the Alberta Utilities Commission, other bodies and the courts relating to electricity and natural gas;

(c) to inform and educate consumers about electricity and natural gas issues;

(d) to carry out such other responsibilities relating to electricity and natural gas as the responsible Minister determines.

72. Absent from the UCA’s mandate is any authority to investigate instances of non-compliance or to take enforcement steps. And, it is clear from the mandate that the UCA is responsible for representing a subset of rate payers in proceedings before the Commission.

73. The statutory scheme contemplates a limited but important role for third parties in enforcement matters falling under the jurisdiction of the MSA. Section 41 of the Alberta Utilities Commission Act provides that any person may make a complaint or refer a matter to the MSA. Further, third parties may be called as witnesses by the MSA in proceedings before the Commission, as ENMAX and Capital were in Phase 1 of this proceeding. However, once a complaint has been lodged with the MSA, Section 43 makes it clear that the decision of whether to pursue the complaint is left to the sole discretion of the MSA. Section 57 provides the MSA with the discretion to forbear from the exercise of any power or its mandate in circumstances where it finds as a question of fact that “a person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest”. In the event that a person is dissatisfied with a decision of the MSA regarding a complaint filed with the
MSA, that person may file a complaint about the conduct of the MSA with the Commission pursuant to Section 58 of the Alberta Utilities Commission Act.

74. When read together, the provisions described above strongly suggest that it was the intent of the legislature that the MSA alone would be responsible for pursuing enforcement matters falling under its mandate before the Commission. With those provisions in mind, the Commission is not convinced that the legislature intended the UCA’s mandate to include its direct participation in proceedings before the Commission initiated by the MSA pursuant to Section 51. However, even if the Commission was satisfied that the statutory scheme contemplated the participation of the UCA in Section 51 proceedings, the Commission finds that the UCA has failed to demonstrate how the rights or interests it represents may be directly and adversely affected by the Commission’s decision on the Phase 2 matters.

75. The Commission is prepared to accept that the UCA has legally recognized interests arising from its statutory mandate. The UCA submits that those interests may be directly and adversely affected by the Commission’s decision in two ways. First it asserts that the customers it represents were directly and adversely affected by TransAlta’s conduct. Second, it contends that it has the potential to be directly and adversely affected if the Commission has the jurisdiction to order restitution.

76. The Commission finds that neither assertion satisfies the factual component of the two part test for standing described in the Dene Tha’ decision. Even if the UCA has been directly and adversely affected by TransAlta’s conduct, this alone does not satisfy the test for standing. It remains incumbent upon the UCA to demonstrate that the rights or interests it has asserted may be affected by the Commission’s decision on the Phase 2 matters.

77. The decision that the Commission must make in Phase 2 is what sanctions, if any, it should impose upon TransAlta. The sanctions available include administrative penalties payable to the General Revenue Fund and directions to TransAlta regarding its future conduct in the electricity market. Such directions may require TransAlta to take certain actions, or prohibit TransAlta from taking certain actions. The purpose of such sanctions, as discussed above, is to achieve general and specific deterrence, encourage compliance and protect the public. Any sanction ordered by the Commission necessarily targets TransAlta and TransAlta alone.

78. Given the nature of the statutory scheme, the sanctions available, and the fact that the Commission has no jurisdiction to order restitution, the Commission finds that the UCA has not demonstrated the potential for the type of personal, harmful effects arising from the Phase 2 decision that the legislation requires a person to demonstrate to be granted standing. Further, the Commission finds that the UCA has failed to establish a sufficient degree of connection between the rights or interests it has asserted and the range of decisions available to the Commission under the statutory scheme. The Commission therefore concludes that the UCA does not have standing to participate in Phase 2 of Proceeding 3110.

3.3.4 Direct Energy Regulated Services

79. While it appears to the Commission that DERS may be asserting that it has a right of interest, as a market participant, to an electricity market that is fair, efficient and openly competitive, that conclusion is speculative because DERS failed to identify the rights or interests it was asserting in support of its request for standing. In its submissions, DERS explained, at a high level, the harm it suffered as a result of TransAlta’s conduct, but provided no submissions
regarding how its rights and interests may be affected by the Commission’s decision on Phase 2 matters other than to suggest that the Commission may have the authority to order remedial action.

80. The Commission finds that DERS failed to adequately address both the legal and the factual parts of the Commission’s standing test. As noted above, the fact that DERS may have suffered harm from TransAlta’s conduct is a different matter from establishing that it may be directly and adversely affected by the Commission’s decision on the Phase 2 matters. Given the sanctions available under the statutory scheme, the Commission finds that DERS has not demonstrated how the Commission’s decision on the Phase 2 matters may result in personal, harmful effects to the rights or interests it appears to be asserting. The Commission, therefore, concludes that DERS does not have standing to participate in Phase 2 of Proceeding 3110.

3.3.5 Discretionary participation

81. DERS and the UCA seek to provide the Commission with information regarding harm suffered by the consumers each represents as a result of TransAlta’s conduct. As the Commission understands it, this information would be provided to assist the Commission in determining a fitting administrative penalty.

82. The Commission finds that the circumstances in this proceeding are considerably different from those in Proceeding 1553 where the Commission granted the UCA and others limited participation rights, notwithstanding their lack of standing. One of the issues raised in that proceeding was the MSA’s determination of harm. In Decision 2012-182, the Commission stated:

There is little evidence on the record in this proceeding as to whether the MSA determined the harm that was caused by the contraventions made by TransAlta and how the MSA took this harm into account. Further, the MSA provided relatively few details regarding how it arrived at the proposed administrative penalty amount of $125,000…

83. It was the UCA’s position in Proceeding 1553 that the proposed negotiated settlement between the MSA and TransAlta did not adequately address the harm and loss suffered by the consumers represented by the UCA. The Commission allowed the UCA to participate on the basis that it had a special concern or insight different from that being provided by the MSA.

84. An important distinction between Proceeding 3110 and Proceeding 1553 is that Proceeding 3110 has been fully litigated. Consequently, the Commission has available to it a comprehensive record on the issues raised in the MSA’s notice. The issue of the harm occasioned by TransAlta’s conduct, was addressed by the parties in evidence and argument and by the Commission in its decision. The Commission further understands that the MSA intends to supplement this evidence in Phase 2.

85. The MSA is charged by the Alberta Utilities Commission Act with the responsibility of bringing matters such as Proceeding 3110 before the Commission. It has a clear statutory mandate to act honestly, in good faith and in the public interest and is required to carry that mandate in a fair and responsible manner. The MSA’s obligation in Phase 2 is to provide evidence and give argument regarding the appropriate sanctions for TransAlta’s conduct. Further, the Commission expects that the MSA will provide evidence and submissions regarding

53 Decision 2012-182, paragraph 18.
the harm associated with TransAlta’s contraventions and the resultant economic benefits. Given
the contested nature of the matter, the MSA’s statutory mandate and its expertise in the subject
matter, the Commission does not consider it necessary to hear directly from other parties
regarding the harm caused by TransAlta’s conduct. Accordingly, the Commission will not
exercise its discretion to allow the UCA and DERS to participate in the Phase 2 of Proceeding
3110. This of course, does not preclude the MSA from calling other market participants as
witnesses in Phase 2, should the MSA consider that to be necessary and appropriate.

86. The Commission’s decision not to grant the UCA and DERS participation rights in Phase
2 does not mean that they do not have a role to play. The Commission encourages the UCA and
DERS to work directly with the MSA to ensure that the MSA fully appreciates the impact of
TransAlta’s conduct on their respective constituent consumers and can pass that information on
to the Commission in its submissions.

87. Regarding consumer confidence in the regulatory process for Phase 2, the Commission
considers that informed consumers understand that the MSA has an obligation to act honestly, in
good faith and in the public interest and is the organization charged by law to advance
enforcement matters regarding the fair, efficient and openly competitive operation of the
electricity market before the Commission. The Commission’s hearing process is public and
transparent; all documents filed in the proceeding will be available through the Commission’s
efiling system, the hearing will be open to the public and will also be webcast. In the
Commission’s view, these measures will ensure that consumer confidence in the process will be
maintained and will also allow the UCA to achieve its mandate of keeping consumers fully
informed of the issues arising in the proceeding.

4 Process schedule

88. The MSA and TransAlta jointly proposed a process and schedule at the pre-hearing
meeting that the Commission considers to be reasonable in the circumstances. On September 3,
2015, the MSA wrote to the Commission and requested an extension of its filing date for its
submissions and evidence from September 15, 2015 to September 30, 2015. It stated that both
TransAlta and the UCA supported the proposed extension without further adjustments to the
remainder of the process schedule. On September 9, 2015, the Commission wrote to parties and
assented to the requested extension and approved the following process schedule.

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<th>Schedule item</th>
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<tr>
<td>Submissions and evidence of TransAlta</td>
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<td>Hearing commences</td>
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Dated on September 18, 2015

**Alberta Utilities Commission**

*(original signed by)*

Tudor Beattie, QC  
Panel Chair

*(original signed by)*

Henry van Egteren  
Commission Member