



## **Market Surveillance Administrator**

**Application for Approval of a Settlement Agreement  
Between the Market Surveillance Administrator and the  
Balancing Pool**

**August 1, 2019**

**Alberta Utilities Commission**

Decision 23828-D01-2019

Market Surveillance Administrator

Application for Approval of a Settlement Agreement

Between the Market Surveillance Administrator and the Balancing Pool

Proceeding 23828

Application 23828-A001

August 1, 2019

Published by the:

Alberta Utilities Commission

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## **1 Decision summary**

1. In this decision, the Alberta Utilities Commission considers an application by the Market Surveillance Administrator for approval of a settlement agreement between the Market Surveillance Administrator and the Balancing Pool, pursuant to sections 44 and 51(1)(b) of the *Alberta Utilities Commission Act*.
2. The Commission has decided to refer the settlement agreement back to the parties with reasons explaining the Commission's concerns, so that the Market Surveillance Administrator and Balancing Pool have an opportunity to understand and address the Commission's concerns.

## **2 Application and process**

3. On August 15, 2018, the Market Surveillance Administrator (MSA) filed an application<sup>1</sup> with the Alberta Utilities Commission pursuant to sections 44 and 51(1)(b) of the *Alberta Utilities Commission Act*, requesting that the Commission consider and approve the terms of a settlement agreement dated August 14, 2018, between the MSA and the Balancing Pool (settlement agreement).<sup>2</sup>
4. The Commission issued a notice of application<sup>3</sup> on August 28, 2018, in which it granted standing to the MSA and the Balancing Pool (the parties) and invited written submissions from any other party requesting standing to participate in the proceeding. On September 11, 2018, each of the Consumers' Coalition of Alberta (CCA)<sup>4</sup> and the Independent Power Producers Society of Alberta (IPPSA)<sup>5</sup> applied for standing. The Commission established a process to receive submissions on the standing applications. Following receipt of submissions, the Commission granted limited standing to IPPSA and denied the CCA's request for standing.<sup>6</sup>
5. The Commission established a written proceeding schedule that provided for information requests to both the MSA and the Balancing Pool, and allowed IPPSA to file evidence.
6. Following receipt of IPPSA's evidence, the Balancing Pool filed a motion requesting that IPPSA's evidence be struck from the record. The Commission established a process to receive response and reply submissions on the motion and, on November 15, 2018,<sup>7</sup> issued its ruling

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<sup>1</sup> The application was titled "Submission of the Market Surveillance Administrator Seeking Approval of a Settlement Agreement Under Section 44 of the *Alberta Utilities Commission Act*".

<sup>2</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018.

<sup>3</sup> Exhibit 23828-X0005, Notice of application (23828), August 28, 2018.

<sup>4</sup> Exhibit 23828-X0008, System generated PDF, September 11, 2018.

<sup>5</sup> Exhibit 23828-X0007, IPPSA SIP, September 11, 2018.

<sup>6</sup> Exhibit 23828-X0015, Ruling on Standing (23828), October 24, 2018.

<sup>7</sup> Exhibit 23828-X0041, Procedural suspension letter, November 15, 2018.

granting the Balancing Pool's motion<sup>8</sup> to strike IPPSA's evidence from the proceeding. Argument submissions from the MSA, Balancing Pool, and IPPSA were received on January 7, 2019, and reply argument submissions from all parties were received on January 15, 2019.

7. On April 26, 2019, the Commission requested further submissions from the MSA, Balancing Pool, and IPPSA on the potential guidance to be taken from the report prepared by the Independent Assessment Team to the Alberta Energy and Utilities Board on Implementing Deregulation of Electric Generation in Alberta (IAT report).<sup>9,10</sup>

8. Submissions on the IAT report were received on May 6, 2019, and the Commission considers the record for this proceeding closed as of that date.

9. In reaching the determinations set out in this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

### 3 Relevant statutory and regulatory provisions

10. The statutory provisions that are relevant to this settlement application are found in the *Alberta Utilities Commission Act*, the *Balancing Pool Regulation*, and the *Electric Utilities Act*.

11. Pursuant to Part 5 of the *Alberta Utilities Commission Act*, the MSA has the mandate to investigate matters and undertake activities, including enforcement, to address contraventions of the *Electric Utilities Act* and the regulations under that act, and to address conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

12. Section 44 of the *Alberta Utilities Commission Act* allows the MSA to enter into a settlement and, if a settlement agreement is reached, to file that agreement with the Commission for approval:

#### Settlement

44(1) The Market Surveillance Administrator may negotiate a settlement with a person to resolve any matter that relates to the mandate of the Market Surveillance Administrator and may enter into a settlement agreement with the person.

(2) The Market Surveillance Administrator shall file a settlement agreement with the Commission for approval under section 51(1)(b).

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<sup>8</sup> Exhibit 23828-X0047, Ruling on Balancing Pool motion to strike evidence, December 12, 2018.

<sup>9</sup> Exhibit 23828-X0057, AUC letter: request for submission on the IAT report, April 26, 2019.

<sup>10</sup> Independent Assessment Team Report to the Alberta Energy And Utilities Board on Implementing Deregulation of Electric Generation in Alberta, updated on August 27, 1999.  
[https://www.alberta.ca/documents/2\\_IAT\\_Report\\_Revised.pdf](https://www.alberta.ca/documents/2_IAT_Report_Revised.pdf)

13. Subsection 56(3) of the *Alberta Utilities Commission Act* allows the Commission to make an order regarding a matter that the MSA has submitted before it under Subsection 51(1)(b). Under Subsection 56(4), the Commission may provide direction, or make any order it considers appropriate, in respect of such matters:

**Decision of Commission**

56(1) Within 90 days after the conclusion of a hearing or other proceeding, the Commission shall make a decision.

...

(3) The Commission may make an order

...

(b) in respect of a matter that the Market Surveillance Administrator has brought before the Commission under section 51(1)(b).

(4) The Commission may

...

(b) provide direction or make any order it considers appropriate in respect of a matter referred to in subsection (3)(b).

(5) When making an order the Commission may take into consideration any failure or refusal of a person to co-operate with the Market Surveillance Administrator.

14. The reference to “other proceeding” in Section 56 of the *Alberta Utilities Commission Act* includes a settlement process pursuant to Section 44.<sup>11</sup>

## **4 History of the power purchase arrangements and their terminations**

### **4.1 Creation of the power purchase arrangements**

15. The Balancing Pool is a corporation established in Section 75 of the *Electric Utilities Act* to carry out the powers and duties set out therein.<sup>12</sup> Because it is a market participant as that term is defined in the act, it is also required by Section 6 to conduct itself in a manner that supports the fair, efficient and openly competitive operation of the market.

16. As part of the restructuring of Alberta’s electricity market, power purchase arrangements (PPAs) were introduced as a mechanism to facilitate an efficient electric generation market based on fair and open competition.<sup>13</sup> The PPAs are long-term arrangements that set forth the terms and conditions of the relationship between the owner of the generating unit (PPA owner) and the owner of the generating unit output (PPA buyer).<sup>14</sup> Although PPAs carry a 20-year term,

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<sup>11</sup> See, for example, Decision 23013-D01-2018: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., January 30, 2018, paragraph 20.; and Decision 23013-D01-2018: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., January 30, 2018, paragraph 20.

<sup>12</sup> The Balancing Pool duties are set out in Section 85 of *Electric Utilities Act*.

<sup>13</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 9, paragraph 54.

<sup>14</sup> *Power Purchase Arrangements Determination Regulation*, AR 175/2000 and *Power Purchase Arrangements Regulation*, AR 167/2003.

Article 4.3(j) of the PPA as amended, allows early termination by PPA buyers in the event that a change in law causes the PPA to become “more unprofitable”.<sup>15</sup>

17. Pursuant to Subsection 96(3) of the *Electric Utilities Act* a terminated PPA is deemed to have been sold to the Balancing Pool, and is to be held by the Balancing Pool in the capacity of a buyer for all purposes of the act, the regulations and the PPA. Once the Balancing Pool becomes a deemed buyer of a PPA, it has the duties, *inter alia*, set out in paragraphs (b) and (d) of Subsection 85(1) of the *Electric Utilities Act*:

...

(b) to manage generation assets in a commercial manner during the period the Balancing Pool holds generation assets;

...

(d) to sell generation assets, when, in the opinion of the BP, market conditions are such that a competitive sale of the assets will result in the Balancing Pool receiving fair market value for the generation assets;

18. Additional duties and powers are set out in Subsection 2(1) of the *Balancing Pool Regulation*:

**2(1)** The Balancing Pool must carry out the following powers and duties in accordance with the Act, the regulations and any arrangement:

...

(g) on receipt of notice in respect of an extraordinary event from a party to an arrangement or otherwise,

(i) conduct any investigation the Balancing Pool determines appropriate, and

(ii) participate to the extent determined appropriate by the Balancing Pool in any dispute resolution process between parties to the arrangement;

(h) when clause (g) applies,

(i) agree with the parties to the arrangement that the extraordinary event has occurred and that there is a need for a payment to be made to or by the Balancing Pool, or

(ii) assess and verify the occurrence of the extraordinary event and the need for any payment to be made by or to a party under the provisions of the arrangement, and participate in any dispute resolution proceedings under an arrangement pursuant to subsection (2);

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<sup>15</sup> *Power Purchase Arrangements Determination Regulation*, AR 175/2000, as amended by Alberta Energy and Utilities Board Order dated August 1, 2000.

19. In addition, Section 86 of the *Electric Utilities Act* compels the Balancing Pool to “exercise its powers and carry out its duties in a manner that is responsible and efficient.”<sup>16</sup>

20. The Balancing Pool may also terminate a PPA under Section 97 of the *Electric Utilities Act* subject to the conditions enumerated therein. Section 97 of the *Electric Utilities Act* provides:

**97** The Balancing Pool may, notwithstanding the terms and conditions of a power purchase arrangement held by the Balancing Pool under section 96(2) and (3), terminate the power purchase arrangement if the Balancing Pool

- (a) consults with representatives of customers and the Minister about the reasonableness of the termination,
- (b) gives to the owner of the generating unit to which the power purchase arrangement applies 6 months’ notice, or any shorter period agreed to by the owner, of its intention to terminate, and
- (c) pays the owner or ensures that the owner receives an amount equal to the remaining closing net book value of the generating unit, determined in accordance with the power purchase arrangement, as if the generating unit had been destroyed, less any insurance proceeds.

#### **4.2 Termination of the power purchase arrangements**

21. As described in the settlement agreement, low pool prices in 2015 and the widespread perception in the market that low prices would continue for the remaining term of the PPAs rendered the PPAs unprofitable for the PPA buyers. Concomitantly, in June 2015, the Government of Alberta announced amendments to the *Specified Gas Emitters Regulation*, which would come into force on January 1, 2016. The settlement agreement further described that it was widely understood in the industry that this regulation would have the effect of increasing the costs of coal-generated electricity, and that these increased costs would be borne by PPA buyers, making the PPAs more unprofitable.<sup>17</sup>

22. Interpreting the amendments to the *Specified Gas Emitters Regulation* as constituting a change in law under Article 4.3(j) of the PPA, PPA buyers chose to terminate the PPAs to which they were parties. ENMAX Corporation, a PPA buyer, gave notice of termination of its Battle River PPA to the Balancing Pool in December 2015. In the spring of 2016, within a two-month period, all remaining PPA buyers also sought to terminate their PPAs (the Five PPAs).<sup>18</sup> In most of those cases, the terminating buyers requested that their PPA terminations take effect within less than 24 hours.<sup>19</sup>

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<sup>16</sup> *Electric Utilities Act*, Section 86.

<sup>17</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF pages 4-5, paragraphs 25-26.

<sup>18</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 9, paragraphs 21-22. Footnote 5 of the settlement agreement notes that the Balancing Pool was, and remains, the buyer under the Genesee PPA, which has not been terminated. For purposes of greater clarity, the Genesee PPA is not included among the Five PPAs referenced above.

<sup>19</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 9, paragraph 24.

23. The Balancing Pool submitted that if it had immediately accepted the terminations, it would have acquired thousands of megawatts of unprofitable generation on behalf of consumers, increasing its market share percentage from 3.5 per cent to 29.3 per cent.<sup>20</sup>

24. Actions were filed in the Court of Queen’s Bench by a number of parties, including the Attorney General, ENMAX and other former PPA buyers. The Balancing Pool submitted that this affected the timing of its assessment and verification of the notices of termination.<sup>21</sup>

25. The Balancing Pool asserted in argument that had it accepted the terminations and become the buyer of all the PPAs, the PPA regime as originally conceived would have come to an end.<sup>22</sup> Indeed, on July 25, 2016 the Attorney General of Alberta filed an action that sought, *inter alia*, to quash the Balancing Pool’s acceptance of ENMAX’s Battle River PPA termination. The Balancing Pool was named as a respondent in this action, along with the Commission, ATCO Power (2000) Ltd, and each of the former buyers. The Balancing Pool argued that “had the Attorney General been successful, some or all of the Buyer PPA terminations would have been reversed.”<sup>23</sup>

26. At the time of the settlement, the Balancing Pool had terminated three of the PPAs, namely, Battle River and Sundance B and C. The Battle River and Sundance B PPAs were terminated as of March 31, 2018 and Sundance C was terminated as of September 30, 2018. A fourth PPA, Sundance A, expired on December 31, 2017.<sup>24</sup>

27. All remaining PPAs in Alberta are currently under the control of the Balancing Pool.<sup>25</sup>

### 4.3 The investigation and contraventions

28. The application and settlement agreement relate to the conduct of the Balancing Pool in the period following receipt of the notice of termination of the Battle River PPA, commencing in December 2015, until the Balancing Pool’s acceptance of the Keephills PPA notice of termination on December 6, 2017 and offer control on December 8, 2017.<sup>26</sup>

29. The MSA submitted that, following its investigation, it was satisfied that the Balancing Pool had breached Subsection 85(1)(b) of the *Electric Utilities Act* and subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation*.

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<sup>20</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 9, paragraph 23 and PDF page 10, paragraph 26.

<sup>21</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 10, paragraph 28.

<sup>22</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 10, paragraph 29.

<sup>23</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 11, paragraph 31.

<sup>24</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF pages 7-8, paragraph 40.

<sup>25</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 12, paragraph 33.

<sup>26</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, paragraph 2.

30. The Balancing Pool agreed at paragraph 3 of the settlement agreement that it contravened subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation* and Subsection 85(1)(b) of the *Electric Utilities Act*.<sup>27</sup> It also agreed that the operative elements of these contraventions were that it (1) “declined to or did not [promptly] assess and verify the validity of the terminations of the Five PPAs and did not unconditionally assume the Buyer role on a timely basis with respect to those PPAs” and (2) “failed to terminate the unprofitable PPAs on a timely basis.”<sup>28</sup>

## 5 Framework for assessing MSA settlement agreements

31. On October 17, 2011, the Commission released Bulletin 2011-22 dealing with settlement agreements filed by the MSA for Commission approval.

32. In the bulletin, the Commission noted that Subsection 44 (3) of the *Alberta Utilities Commission Act* exempts settlement agreements filed by the MSA from the settlement provisions in the *Electric Utilities Act* and *Gas Utilities Act*, but does not otherwise address the treatment of settlement agreements.

33. This led the Commission to establish a number of principles, the following of which are especially relevant here:

21. The Commission is of the view that sound public policy supports the use of the enforcement tool best suited to the circumstances of any particular case. In some cases this might be enforcement proceedings while in other cases it might be settlement or one of the other enforcement avenues set out in the legislation. The MSA has an important role in determining the enforcement tool that best fits the events under consideration. Further it must be recognized that the MSA would be a party to any settlement agreement, and that the MSA is responsible for supporting the fair, efficient and openly competitive operation of the electricity and natural gas markets.

22. The role of the Commission when considering an MSA-initiated proceeding is to ensure that the avenue selected by the MSA is an efficient and effective option for dealing with enforcement matters in order to discourage anti-competitive behaviour in the electric or natural gas industries and to support the fair, efficient and openly competitive operation of those markets...

63. The Commission considers that in order for it to impose an administrative penalty proposed under a settlement, Section 63 of the *Alberta Utilities Commission Act* requires that the approval application and settlement agreement provide the Commission with sufficient proof to find that a contravention has occurred, and to determine what administrative penalty or other terms or conditions, if any, are appropriate.....

93. The Commission remains open to returning settlement agreements that have not been approved, as it has in the past. The Commission will consider the circumstances on a case by case basis. If a settlement agreement is not approved and is returned to the parties, the parties have the opportunity to continue settlement negotiations if they choose.

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<sup>27</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 1, paragraph 3.

<sup>28</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, paragraph 6.

34. Following the release of this bulletin, the Commission issued several decisions concerning requests, by the MSA, for approval of settlements. In Decision 2012-182,<sup>29</sup> the Commission established the following additional principle:

21. It is important to distinguish that in this proceeding the Commission is serving in its supervisory capacity considering approval of a settlement rather than itself deciding in the first instance what sanctions should be imposed following a decision that alleged contraventions have occurred.

35. In Decision 3110-D03-2015: *Market Surveillance Administrator allegations against TransAlta Corporation et al.*,<sup>30</sup> the Commission confirmed that it has three options when considering a settlement in the form of a consent order under Section 54 of the *Alberta Utilities Commission Act*: (a) approve the order, (b) reject the order, or (c) refer it back to the parties with reasons explaining its concerns. The Commission also confirmed that it cannot unilaterally vary or amend a consent order.

36. In Decision 23013-D01-2018, the Commission stated that the purpose of its sanctioning authority is to achieve general and specific deterrence, encourage compliance and protect the public. It also explained that its sanctions are intended to be protective and preventative, and not punitive.<sup>31</sup>

37. Further, in Decision 3110-D03-2015,<sup>32</sup> the Commission was tasked with determining whether to approve a consent order between the MSA and TransAlta, affording it an opportunity to consider what principles to apply. It also reviewed sentencing and sanctioning principles from both the criminal law context and the perspective of professional disciplinary cases. The Commission concluded as follows:

...the Commission must not ask itself if the proposed consent order is the order that it would have issued. Rather, the Commission must decide if the consent order is fit and reasonable and falls within a range of acceptable outcomes given the circumstances. When making this assessment, the Commission is guided by the factors set out in Rule 013: *Rules on Criteria Relating to the Imposition of Administrative Penalties* (Rule 13) and other applicable sanctioning principles.

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<sup>29</sup> Decision 2012-182: Market Surveillance Administrator: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator and TransAlta Energy Marketing Corp., July 3, 2012.

<sup>30</sup> Decision 3110-D03-2015: Market Surveillance Administrator, Market Surveillance Administrator allegations against TransAlta et al., Application 1610350-1, Proceeding 3110, Phase 2 – request for consent order, October 29, 2015, paragraph 21.

<sup>31</sup> Decision 23013-D01-2018 (Errata): Market Surveillance Administrator: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., August 24, 2018, paragraph 30.

<sup>32</sup> Decision 3110-D03-2015: Market Surveillance Administrator, Market Surveillance Administrator allegations against TransAlta et al., Application 1610350-1, Proceeding 3110, Phase 2 – request for consent order, October 29, 2015, paragraph 20.

38. The Commission, in Decision 23535-D01-2018,<sup>33</sup> considered the provisions in Rule 013: *Rules on Criteria Relating to the Imposition of Administrative Penalties* when assessing the adequacy of the sanctions proposed in the settlement agreement.

Section 3 of AUC Rule 013 states that the Commission shall make its decision based on the factors relevant to each case, which include but are not limited to, the seriousness of the contravention and the cooperation of the person named in the contravention. To determine the seriousness of the contravention, the Commission is guided by the considerations listed in Section 4 of AUC Rule 013, which include the harm that was caused, possible manipulation, deceit or artifice that led to the contravention, the persistence and systematic nature of the contravention, the duration of the contravention and other factors. The sanctions are intended to be protective and preventative, but not punitive.

39. The Commission found in Decision 23013-D01-2018 that the same principles apply when considering a settlement agreement pursuant to sections 56 and 63 of the *Alberta Utilities Commission Act*.<sup>34</sup>

40. Rule 013 sets out the factors that the Commission may take into account when considering whether to impose an administrative penalty. Section 4 of that rule enumerates several considerations the Commission may take into account in determining the seriousness of a contravention. In this case, the MSA has not sought to impose an administrative penalty pursuant to Section 63 of the *Alberta Utilities Commission Act*. However, the Commission finds the following factors in Section 4 to be instructive in its consideration of the proposed terms and conditions of the settlement agreement:

- (1) What harm was caused by the contravention?
- ...
- (5) Was the harm widespread across markets or customers, or was it limited in scope and impact?
- (6) Did it involve significant sums of money?
- (7) Were others indirectly affected by the wrongdoing?
- (8) What benefit did the wrongdoer gain from the contravention?
- (9) Was the contravention the result of manipulation, deceit, or artifice?
- (10) Did the wrongdoer misrepresent material facts?
- (11) Was the conduct fraudulent?
- (12) Were the actions of the wrongdoer reckless or deliberately indifferent to the results?
- (13) Was the action willful? Was the contravention part of a broader scheme? Did the wrongdoer act in concert with others?
- (14) Is this a repeat offence or does the person have a history of contraventions?
- (15) Is this an isolated instance or a recurring problem?

<sup>33</sup> Decision 23535-D01-2018: Market Surveillance Administrator: Application for Approval of a Settlement Agreement, dated August 30, 2019, paragraph 26.

<sup>34</sup> Decision 23013-D01-2018 (Errata): Market Surveillance Administrator: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., dated August 24, 2018, paragraph 23.

- (16) Was the wrongdoing systematic and persistent?
- (17) How long did the wrongdoing last?
- (18) Was the wrongdoing related to actions by senior management, the result of pressure placed on employees by senior management to achieve specific results, or done with the knowledge and acquiescence of senior management?
- (19) Did management engage in a cover-up?
- (20) How did the wrongdoing come to light?
- (21) Did senior management resist or ignore efforts to inquire into actions or otherwise impede an inquiry into the contravention?
- (22) What effect would potential penalties have on the financial viability of the corporation that committed the wrongdoing?
- (23) What are other pertinent elements related to the contravention?

41. Sections 5 and 6 of Rule 013 deal respectively with internal compliance, self reporting or cooperation by the person named in the contravention and factors the Commission may consider in determining whether any mitigation is warranted in setting the amount of a penalty. The Commission is of the view that while the referenced sections of Rule 013 are not specifically applicable to terms and conditions other than administrative penalties, the factors listed therein could also be of assistance in assessing whether the terms and conditions fall within a range of acceptable outcomes.

## **6 Commission findings**

42. The central issue in this proceeding is whether approval of the settlement agreement is in the public interest. In this proceeding, as it did in the proceeding that led to Decision 2012-182,<sup>35</sup> the Commission is serving in its supervisory capacity to determine whether to approve a settlement. It is not deciding, at first instance, what sanctions to impose should it find that the alleged contraventions have occurred.

43. A two-stage process was established and confirmed in Decision 23535-D01-2018 and in prior decisions<sup>36</sup> to assess whether a negotiated settlement and the associated administrative

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<sup>35</sup> Decision 2012-182: Market Surveillance Administrator Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corp., July, 3, 2012, paragraph 35.

<sup>36</sup> This approach was taken by the Commission in Decision 23535-D01-2018: Market Surveillance Administrator Application for Approval of a Settlement Agreement, August 30, 2018, paragraph 25; Decision 2012-182: Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the, Market Surveillance Administrator and TransAlta Energy Marketing Corp., Application No. 1607868, Proceeding ID No. 1553, July 3, 2012, paragraphs 28 and 35; Decision 2011-430: Application for Approval of a Settlement Agreement between the Market Surveillance, Administrator and Milner Power Limited Partnership by it General Partner Milner Power Inc., Application No. 1607741, Proceeding ID No. 1480, October 27, 2011, paragraph 12; Decision 2010-502: Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and Syncrude Canada Ltd., Application No. 1606400, Proceeding ID. 750, October 22, 2010, paragraph 15; Decision 2010-540: Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and AltaGas Limited Partnership, Application No. 1606239, Proceeding ID. 670, November 23, 2010, paragraph 14; and Decision 2010-476: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator and TransAlta Energy Marketing Corp., Application No. 1606026, Proceeding ID. 563, October 1, 2010, paragraph 18.

penalties should be approved. First, the Commission must be satisfied that a contravention occurred. If this criterion is met, the second step requires it to determine whether the settlement falls within a range of acceptable outcomes. The Commission adopts the two-stage process to assess the settlement agreement before it in this proceeding.

### **6.1 Did the Balancing Pool contravene subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation*?**

44. Subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation* require the Balancing Pool, on receipt of notice of an extraordinary event, to conduct any investigation it determines appropriate and to assess and verify the extraordinary event. Based on the facts as presented, it is clear that the event (the amendment of the *Specified Gas Emitters Regulation* under Article 4.3(j) of the PPA, as amended) that resulted in the notices of termination of the PPAs was an extraordinary event as defined in Subsection 1(d) of the *Balancing Pool Regulation* and, as such, the Balancing Pool had a duty to take action as required by the regulation.

45. The evidence before the Commission, as set out in the settlement agreement, is that the Balancing Pool “declined to or did not promptly assess and verify the validity of the terminations of the Five PPAs and did not unconditionally assume the Buyer role on a timely basis with respect to those PPAs.”<sup>37</sup> Instead, despite questioning the effective dates of the terminations, the Balancing Pool began to make all required payments as the PPA buyer as of the dates set out in the termination notices, while simultaneously awaiting the outcome of the various legal actions.

46. The Commission finds that the Balancing Pool declined to or did not promptly assess or verify the validity of the terminations of the Five PPAs. However, the Commission has difficulty seeing how the failure to “unconditionally assume the Buyer role on a timely basis” with respect to the Five PPAs contravenes subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation* as both the MSA and the Balancing Pool suggest in the Settlement Agreement. Indeed, subsections 2(1)(g) and 2(1)(h) appear to impose certain conditions on the Balancing Pool before it can assume the buyer role. In particular, those subsections require that the Balancing Pool carry out specific powers and duties before it confirms the occurrence of an extraordinary event and thereby becomes a party to the PPA (i.e. assumes the buyer role).

### **6.2 Did the Balancing Pool contravene Subsection 85(1)(b) of the *Electric Utilities Act*?**

47. As noted earlier, once the Balancing Pool became the deemed owner of the PPAs, it was required by Subsection 85(1)(b) of the *Electric Utilities Act* to manage these PPAs in a commercial manner during the period in which it held them. The evidence before the Commission, as set out in the settlement agreement and which the Commission accepts, is that the Balancing Pool failed to take timely action to stem the losses from the unprofitable PPAs<sup>38</sup> by terminating them as soon as possible, and that in doing so, it failed to manage the PPAs in a commercial manner. The parties to the settlement agreement have agreed that this contravention occurred.<sup>39</sup> After conducting its own independent assessment of the facts presented in this proceeding, the Commission confirms the contravention.

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<sup>37</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 7, paragraph 36.

<sup>38</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 7, paragraphs 36-37.

<sup>39</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 1, paragraph 3.

### 6.3 The proposed settlement

48. The settlement agreement consists of four key parts: (1) the regulatory and legislative framework governing the impugned conduct of the Balancing Pool; (2) the history of the Power Purchase Arrangements and their termination; (3) the alleged contraventions; and (4) the agreed terms and conditions of settlement.

49. The terms and conditions of the settlement agreement, in turn, consist of two sets of interrelated undertakings: (1) to report publically in the Balancing Pool's quarterly and annual reports on the activities undertaken to operate the PPA units in a commercial manner; and (2) a series of commitments to consider a range of commercial activities pertaining to operational matters, as well as the potential sale (in whole or in part), or termination of the PPAs.

50. The undertakings<sup>40</sup> to which the Balancing Pool has agreed are as follows:

48. As part of its commitment to cooperate with the MSA's Investigation, the BP has undertaken to report publically in its quarterly and annual reports on the activities undertaken to operate the PPA units in a commercial manner, similar to the reporting done by commercial market participants in the Alberta market.

49. The MSA is satisfied that the public interest does not require that any terms and conditions beyond the BP's undertakings in paragraphs 56 and 57 below, or an administrative penalty or costs, be included in the Settlement.

55. ... from the date of this settlement to the conclusion of its management of the PPAs it will consider the full range of commercial activities open to market participants of similar size and implement such activities, where practical and prudent, that will seek to optimize its risk-adjusted returns from the portfolio of assets under its control, including but not limited to:

- (a) the forward sale of electricity into periodic auctions for the Regulated Rate Option;
- (b) the forward sale of electricity in an exchange or through a broker;
- (c) the forward sale of electricity through bilateral arrangements;
- (d) the sale of operating reserves or other ancillary services;
- (e) other arrangements where one or more of the above are achieved through the use of an agent;
- (f) the sale of PPAs or strip contracts relating to PPAs in accordance with the requirements of legislation; and
- (g) termination of the PPAs by the BP back to their owners in accordance with the requirements of legislation.

56. ... to report both quarterly and on an annual basis commercial activities undertaken, including but not limited to those listed above, in a manner similar to

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<sup>40</sup> The Commission notes that in paragraph 49 of the settlement agreement, the parties referred to the Balancing Pool's undertakings in paragraphs 56 and 57 of the agreement. However, paragraph 57 does not contain an undertaking.

commercial entities of a similar size. For example, the BP will report on how much of their portfolio is forward sold and at what average price. The purpose of such reporting is to provide transparency of BP activities, and a degree of confidence to other market participants without compromising the BP's commercial efforts.

57. Both parties acknowledge that the legislation anticipated that the BP might hold unprofitable PPAs, and that the legislation provided the BP with the ability to recover such losses through a consumer charge. Following the terminations by the Former Buyers and pursuant to legislation enacted for that purpose the GOA provided a loan to the BP to reduce or cover losses on unprofitable PPAs as an alternative to the mitigation or recovery of such losses through a consumer charge. In the MSA's view, the ability of the BP to recover its losses through a consumer charge or government loan does not, in itself, have any direct impact on competition in the electricity market.<sup>41</sup>

51. The MSA has not sought any administrative penalty under the terms of the settlement agreement. The MSA submitted that an administrative penalty would not be in the public interest for the following reasons:

Any administrative penalty paid in respect of a contravention is required to be paid into the General Revenue Fund under Section 63(5) of the *AUCA*. The BP is a non-profit statutory body and an administrative penalty would be funded either through loans to the BP from the Government of Alberta (paid from the very General Revenue Fund that would receive the administrative penalty) or from operational revenues – in either scenario, Albertans. Accordingly, imposition of costs or an administrative penalty would be circular in nature and serve no practical purpose.<sup>42</sup>

#### **6.4 Arguments of the MSA, Balancing Pool, and IPPSA**

52. The MSA considered the terms of settlement to fall within the range of acceptable outcomes given both the unprecedented nature of the situation that led to the violations and the losses that the Balancing Pool has already incurred by taking ownership of the money-losing PPAs. The MSA further asserted that the public reporting will promote competition in the marketplace,<sup>43</sup> and that an expeditious solution is in the public interest because the PPAs will expire at the end of 2020.<sup>44</sup>

53. The MSA recognized that the proposed settlement agreement was not without its imperfections. However, it "...also recognized that the alternative of a contested hearing had attendant concerns rendering it less preferable than the negotiated outcome. ...Moreover, that litigation would be taking place as the role of the Balancing Pool and the PPAs was quickly coming to an end in the Alberta regulatory framework. It was likely that by the time a decision

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<sup>41</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF pages 9-11, paragraphs 48 to 49, 55 to 57.

<sup>42</sup> Exhibit 23828-X0050, Argument of the Market Surveillance Administrator, January 7, 2019, PDF page 4, paragraph 6.

<sup>43</sup> Exhibit 23828-X0050, Argument of the Market Surveillance Administrator, January 7, 2019, PDF page 3, paragraph 3.

<sup>44</sup> Exhibit 23828-X0050, Argument of the Market Surveillance Administrator, January 7, 2019, PDF page 3, paragraph 3.

was reached the conclusion and outcome would be academic. In these circumstances the MSA redoubled its efforts to achieve a settlement that would be timely, practical, reasonable and in the public interest.”<sup>45</sup>

54. The MSA also submitted that it “is entitled to deference in its assessment of appropriate settlement terms and conditions.”<sup>46</sup>

55. The Balancing Pool pointed to the MSA's commitment to maintain a heightened level of scrutiny over the Balancing Pool's activities for the duration of the Balancing Pool's active mandate and that this scrutiny is “in excess of what is imposed upon similarly sized commercial entities.”<sup>47</sup>

56. The Balancing Pool argued that the public reporting of its commercial activities carries considerable reputational damage and is commensurate with the unique nature of the contraventions.<sup>48</sup>

57. IPPSA opposed the approval of the settlement agreement on the grounds that the remedy proposed is inadequate and will not deter what it considered to be the Balancing Pool's continuing misconduct and breach of statutory obligations to operate commercially.<sup>49</sup> It asserted that “BP continues to hold the BP PPAs, and has not reported publicly any clear timely intention either to employ a third party agent to dispatch the PPAs in a commercial manner while it continues to hold them,<sup>50</sup> or to divest itself of these PPAs, or make a truly concerted effort to do so, at any time in the future.”<sup>51</sup>

58. IPPSA also pointed out that the MSA has yet to determine whether the settlement agreement is achieving its desired purpose, because the time period since the Balancing Pool began reporting has been too short.<sup>52</sup>

59. IPPSA requested that the Commission send the settlement agreement back expressing concerns with the Balancing Pool's failure to:

- (a) Immediately divest itself of the PPAs that it continues to hold; or

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<sup>45</sup> Exhibit 23828-X0050, Argument of the Market Surveillance Administrator, January 7, 2019, PDF page 16-17, paragraph 59.

<sup>46</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 9, paragraph 52.

<sup>47</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 17, paragraph 57.

<sup>48</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 18, paragraph 58.

<sup>49</sup> Exhibit 23828-X0049, IPPSA Argument, January 7, 2019, PDF page 3, paragraph 5.

<sup>50</sup> As noted by the MSA at paragraph 44 of its reply argument, “the BP currently utilizes Capital Power Generation Services Inc..... as its agent to dispatch the units”. See also Table 1: Particulars of the PPAs at paragraph 26 of the settlement agreement.

<sup>51</sup> Exhibit 23828-X0049, IPPSA Argument, January 7, 2019, PDF page 7, paragraph 23.

<sup>52</sup> Exhibit 23828-X0049, IPPSA Argument, January 7, 2019, PDF page 10, paragraph 32; Exhibit 23828-X0023, MSA Responses to AUC Information Requests, November 7, 2018, PDF page 6.

- (b) Alternatively, at the least, ensure that it is using a third party agent to dispatch the PPAs in a commercial manner while it continues to hold them.<sup>53</sup>

## 6.5 Is the settlement within the range of acceptable outcomes?

60. As noted earlier, sections 3 and 4 of Commission Rule 013 set out a number of factors that the Commission finds helpful in assessing the settlement agreement. The Commission finds several to be particularly relevant in this case.

61. Contributing to the seriousness of the agreed-to contraventions is the fact that they were of significant duration, province-wide in scope, and resulted in significant harm. As the Balancing Pool acknowledged in its argument, “The basis for the second of the Alleged Contraventions is set out at paragraph 42 of the Settlement Agreement: ‘The PPA terminations triggered significant losses for the BP. In the MSA’s view, in order to satisfy its section 85(1)(b) obligations, the BP should have acted to stem its losses by terminating the PPAs as soon as possible.’”<sup>54</sup> In addition, as described more fully in paragraph 46 of the settlement agreement: “Furthermore, as the terminated PPAs moved under BP control, a substantial share of offer control devolved to the BP, peaking at approximately 29.3%, compared to a December 2015 offer share of 3.5%. This increased market power would have enabled the BP to materially influence the price of electric energy in the Power Pool.”<sup>55</sup>

62. On the question of the magnitude of the harm, the Commission notes that the Balancing Pool’s Q2 2018 condensed interim unaudited financial statements and review indicate a significant negative deferral account balance. This negative balance is attributable, at least in part, to the early termination of the PPAs by the former buyers. What is not clear to the Commission is what portion of this loss is attributable to the Balancing Pool’s delay in assessing and verifying the validity of the terminations and its failure thereafter to terminate the PPAs on a timely basis.

63. Another relevant factor for the Commission to consider in assessing the seriousness of the agreed-to contravention is whether it was an isolated or potentially recurring problem. While the Commission accepts that the Balancing Pool has neither agreed, nor has the MSA claimed, that the Balancing Pool remains in contravention of Subsection 85(1)(b), insofar as it relates to the Balancing Pool’s option to terminate, the possibility nevertheless exists for so long as the Balancing Pool holds PPAs, that it could again, at some point in the future, be in breach of that section of the act.

64. Rule 13 also requires the Commission to consider mitigating factors. In this regard, the MSA and Balancing Pool in paragraph 67 of the settlement agreement underscore that “[t]he circumstances that arose here were unprecedented and unexpected.”<sup>56</sup>

65. In response to a Commission information request, the Balancing Pool added that:<sup>57</sup>

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<sup>53</sup> Exhibit 23828-X0049, IPPSA Argument, January 7, 2019, PDF page 11, paragraph 36.

<sup>54</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 13, paragraph 40.

<sup>55</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF pages 8-9, paragraph 46.

<sup>56</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 12, paragraph 67.

<sup>57</sup> Exhibit 23828-X0029, BP Response, AUC IRs, November 7, 2018, PDF page 5.

The combination of the s.4.3(j) test and the obligation to step into the shoes of the PPA Buyer under s.96 of the EUA created a commercially untenable circumstance for the Balancing Pool. If the Buyers' assessment of the unprofitability was correct, the Balancing Pool would have no choice but to accept PPAs which were all by definition unprofitable. This meant that in a six month period, the Balancing Pool was faced with the unprecedented prospect of acquiring offer control of 4683 MW of money-losing generation, representing approximately 29.4% of total generating capacity in Alberta.

The Balancing Pool's statutory obligation to act commercially must be considered in light of the fundamentally non-commercial burden which the statutes placed upon it.

66. The parties further state in paragraph 66 of the settlement agreement that "(t)here were extenuating circumstances pertaining to the BP's contraventions that the MSA considers to be material to this Application and which should be taken into account."<sup>58</sup> The Commission agrees.

67. Among other mitigating circumstances that have been raised by the parties are the following:

- "The BP derived no economic benefit from its conduct and in the MSA's view did not act out of self-interest, bad faith or personal gain."<sup>59</sup>
- "The Alleged Contraventions are not trading violations or misuse of information for commercial advantage."<sup>60</sup>
- "The BP was cooperative, forthright and responsive in respect of all aspects of the MSA's Investigation."<sup>61</sup>
- "Section 12(d) of the APAGA [*Alberta Public Agencies Governance Act*] requires a Public Agency to inform its responsible Minister respecting significant activities and operations and any significant events that may affect those activities or operations."<sup>62</sup>
- "The BP's conduct took into account consultations with the Government of Alberta and with legal counsel as well as concerns related to the fact that the PPA basis for the terminations was the subject of legal challenge through the AG Action."<sup>63</sup>

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<sup>58</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 12, paragraph 66.

<sup>59</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 12, paragraph 64.

<sup>60</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 7, paragraph 18.

<sup>61</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 1, paragraph 4.

<sup>62</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 11, paragraph 30.

<sup>63</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 6, paragraph 36.

## 6.6 The Commission's concerns

68. The Commission's principal concern with the settlement agreement is that it fails to stand on its own as a clear and comprehensive statement of the agreed-to facts, contraventions, and remedial measures to be taken to address past breaches and deter similar breaches going forward.

69. A closely-related concern is that the MSA has combined its application with the settlement agreement.<sup>64</sup> Because it is styled as a submission, it is narrative in nature, making it difficult to discern which party is speaking and on whose behalf. Further, the document contains facts, some of which are agreed to and some of which are not. It also contains some, but, as discussed further below, possibly not all terms of settlement. In addition, woven throughout the document is argument and advocacy.

70. The combined document fails to clearly, and in one place, set out the conduct constituting the agreed-to contraventions. For example, the best and clearest statement of the Balancing Pool's impugned conduct, the statutory sections the MSA claims were contravened, and the Balancing Pool's express agreement thereto is found not in the settlement agreement but in paragraph 6 of the Balancing Pool's argument.

71. The agreed-to terms and conditions of settlement, while referenced in the section of the settlement agreement entitled "Agreed Terms of Settlement" are not to be found there. Instead, they appear elsewhere.

72. In paragraphs 44 to 47 of the settlement agreement, the MSA commented on the actions of the Balancing Pool and the manner in which it offers into the wholesale generation market for the remaining PPAs it holds. In paragraph 44, the MSA expressed "reservations regarding the Balancing Pool's offer strategy with respect to the terminated PPA units."<sup>65</sup> And, as stated in paragraph 47 of the settlement agreement, the parties did not come to an agreement on whether the Balancing Pool's offer strategy was also a breach under Subsection 85(1)(b) of the *Electric Utilities Act*. In no place in the settlement agreement, however, does the MSA assert that the Balancing Pool's past offer behaviour has actually contravened the legislation. Yet, in paragraph 55, the settlement agreement contains a number of terms and conditions expressly directed at modifying the future commercial conduct of the Balancing Pool in respect of the remaining assets under its control. In other words, much of what is found in paragraph 55 is preventative rather than remedial in nature. Instead of remedying past breaches, it addresses unrelated breaches that have yet to occur.

73. A further element of the settlement agreement which the Commission finds confusing is the entire discussion related to the Balancing Pool's reliance on an independent agent to handle day-to-day commercial operations, including offer management. In particular, it remains unclear to the Commission precisely what the MSA's concerns are with respect to the use of an agent.

74. In argument,<sup>66</sup> the Balancing Pool referred to the "heightened scrutiny" by the MSA for the duration of the Balancing Pool's active mandate and suggested that the MSA's monitoring is

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<sup>64</sup> As noted in paragraph 3, for purposes of this decision, the Commission refers to the combined document as the settlement agreement.

<sup>65</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 10, paragraph 44.

<sup>66</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 17, paragraph 57.

in excess of that of commercial entities of a similar size. In response to an information request, the MSA, by comparison, described its monitoring of the Balancing Pool's quarterly reports, but made no mention of heightened scrutiny or monitoring on its part that goes beyond that undertaken in respect of commercial activities by entities of similar size.<sup>67</sup> Indeed, in its argument, the MSA stated that it "... monitors the conduct of every market participant on an ongoing basis, including the BP, and it will also be monitoring the BP's reporting and compliance with the terms and conditions in the Settlement Agreement and as ordered by the Commission."<sup>68</sup> The Commission's concern is that the settlement agreement makes no mention of any monitoring or enforcement activities being undertaken by the MSA, and that the parties appear to be of different minds as to what the full scope of the agreement entails.

75. A further concern, as mentioned earlier in this decision, is the Commission's difficulty in seeing how the failure to "unconditionally assume the Buyer role on a timely basis" with respect to the Five PPAs contravenes subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation*, as both the MSA and the Balancing Pool suggest in the settlement agreement. It would assist the Commission if the parties were able to explain why the above-quoted conduct constitutes a contravention of subsections 2(1)(g) and 2(1)(h) of the regulation.

76. The Commission has reviewed the Balancing Pool's Q3 2018, Annual 2018, and Q1 2019 financial reports<sup>69</sup> and can confirm that the Balancing Pool has been reporting on its commercial activities in the manner specified in the settlement agreement. The Balancing Pool has also indicated that, unlike other comparable commercial entities, "it is required to provide the entire electricity market and the MSA with a statement every three months indicating not only what commercial measures it has undertaken but what commercial measures it has considered and deemed impractical or imprudent. The Balancing Pool has chosen to provide considerable detail in its reporting."<sup>70</sup> The Commission considers the scope of the Balancing Pool's reporting to be appropriate. However, the Commission is concerned that the level of detail the settlement agreement requires of the Balancing Pool in its reporting falls short of the level of detail actually provided by the Balancing Pool. As a result, the detail provided from one report to the next depends largely on the discretion of the Balancing Pool.

77. Paragraph 57 of the settlement agreement includes an assertion from the MSA that the "ability of the BP to recover its losses through a consumer charge or government loan does not, in itself, have any direct impact on competition in the electricity market."<sup>71</sup> This statement appears in isolation with no supporting justification or rationale. It remains unclear to the Commission why this statement appears in the settlement agreement and on what basis it was made. The potential significance of the statement only heightens the Commission's concern.

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<sup>67</sup> Exhibit 23828-X0023, MSA Responses to AUC Information Requests, November 7, 2018, PDF page 6.

<sup>68</sup> Exhibit 23828-X0050, Argument of the Market Surveillance Administrator, January 7, 2019, PDF page 26, paragraph 87.

<sup>69</sup> All financial reports are posted on the Balancing Pool's website (<http://www.balancingpool.ca/financial-reports/>). The Balancing Pool has not released a separate Q4 report since its reporting began.

<sup>70</sup> Exhibit 23828-X0048, Balancing Pool Argument in Support of Approval of a Settlement, January 7, 2019, PDF page 17, paragraph 56.

<sup>71</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 11, paragraph 57.

## 6.7 Final conclusions

78. The Commission said in Decision 3110-D03-2015:

Should the Commission decide that the sanctions proposed in the consent order fall outside the range of acceptable outcomes, the Commission must either refer the consent order back to the parties, so that each has an opportunity to understand and address the Commission's concerns, or reject the consent order.<sup>72</sup>

79. The Commission considers, however, that the evaluation of every settlement agreement must be undertaken on a case-by-case basis, consistent with the principles established in Bulletin 2011-22. In particular:

93. The Commission remains open to returning settlement agreements that have not been approved, as it has in the past. The Commission will consider the circumstances on a case by case basis. If a settlement agreement is not approved and is returned to the parties, the parties have the opportunity to continue settlement negotiations if they choose.

80. The parties have described the events leading to the application and settlement agreement as “unprecedented and unexpected.”<sup>73</sup> In the circumstances of this case, and for the reasons set out above, the Commission is unable to make a finding on whether the proposed settlement agreement falls within a range of acceptable outcomes. Instead, it will be referring the settlement agreement back to the parties so that they have an opportunity to understand and address the above-discussed list of concerns.

81. Notwithstanding, the Commission makes the following findings with respect to various elements or features of the settlement agreement.

82. As previously noted, the purpose of the Commission's sanctioning authority is to achieve general and specific deterrence, encourage compliance and protect the public. The Commission also explained that its sanctions are intended to be protective and preventative, but not punitive.<sup>74</sup>

83. With respect to the Balancing Pool's failure to assess and verify the validity of the PPA terminations, the first contravention under subsections 2(1)(g) and 2(1)(h) of the *Balancing Pool Regulation*, the Commission agrees with the MSA's assertion that it is not possible for the breach to re-occur, because the Balancing Pool now holds all remaining PPAs. Therefore, specific deterrence is not a consideration in assessing the undertakings in respect of this contravention.

84. With respect to the second contravention, as it relates to the timeliness of the Balancing Pool's termination of the PPAs, which is framed by the parties as a breach of Subsection 85(1)(b) of the *Electric Utilities Act*, the parties have asserted that the Balancing Pool is unlikely to repeat this contravention. The Commission is less certain. As long as the

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<sup>72</sup> Decision 3110-D03-2015: Market Surveillance Administrator, Market Surveillance Administrator allegations against TransAlta et al., Application 1610350-1, Proceeding 3110, Phase 2 – request for consent order, October 29, 2015, paragraph 21.

<sup>73</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 12, paragraph 67.

<sup>74</sup> Decision 23013-D01-2018 (Errata): Market Surveillance Administrator: Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator, TransAlta Corporation and Capital Power Generation Services Inc., August 24, 2018, paragraph 30.

Balancing Pool continues to hold PPAs, it remains possible that it may once again be in breach of this statutory provision. However, given the discretionary nature of both Subsection 85(1)(d) and Section 97 of the *Electric Utilities Act*, the Commission finds it difficult to envision any sanction that could deter a similar breach by forcing the Balancing Pool to terminate a PPA. In other words, it is very difficult to force a statutory body to do that which it has the legislative discretion not to do. For these reasons, the Commission considers that specific deterrence is not a consideration in assessing the undertakings in respect of this contravention.

85. The Commission agrees with the parties to the proceeding that an administrative penalty would not be appropriate or in the public interest.

86. The Commission is of the view that the Balancing Pool's reporting requirements imposed by the settlement agreement together with the MSA's monitoring will provide information on whether the Balancing Pool is managing its assets in a commercial manner and, in so doing, will "encourage a culture of compliance and accountability with the *EUA* and *BP Regulation* by the Balancing Pool and other market participants in the future."<sup>75</sup> The Commission considers that the transparency and accountability associated with the public reporting and MSA monitoring will contribute to the protection of the public.

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<sup>75</sup> Exhibit 23828-X0002, MSA BP Settlement Agreement, August 15, 2018, PDF page 12, paragraph 68.

**7 Order**

87. It is hereby ordered that the settlement agreement be referred back to the Market Surveillance Administrator and Balancing Pool so that they have an opportunity to understand and address the Commission's concerns.

88. It is further ordered that the parties advise the Commission of how they propose to proceed in light of the Commission's concerns.

Dated on August 1, 2019.

**Alberta Utilities Commission**

*(original signed by)*

Anne Michaud  
Vice-Chair

*(original signed by)*

Kristi Sebalj  
Commission Member

*(original signed by)*

Bohdan (Don) Romaniuk  
Acting Commission Member