Market Surveillance Administrator

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

January 14, 2020
Alberta Utilities Commission
Decision 23828-D02-2020
Market Surveillance Administrator
Application for Approval of a Revised Settlement Agreement
Between the Market Surveillance Administrator and the Balancing Pool
Proceeding 23828
Application 23828-A001

January 14, 2020

Published by the:
Alberta Utilities Commission
Eau Claire Tower, 1400, 600 Third Avenue S.W.
Calgary, Alberta T2P 0G5

Telephone: 310-4AUC (310-4282 in Alberta)
1-833-511-4AUC (1-833-511-4282 outside Alberta)
Email: info@auc.ab.ca
Website: www.auc.ab.ca

The Commission may, within 30 days of the date of this decision and without notice, correct typographical, spelling and calculation errors and other similar types of errors and post the corrected decision on its website.
Contents

1 Decision summary ................................................................................................................. 1
2 Background and procedural history ................................................................................... 1
3 Relevant statutory and regulatory provisions ................................................................. 3
4 Power purchase arrangements ............................................................................................ 6
5 Agreed statement of facts ..................................................................................................... 7
6 The investigation and contraventions ................................................................................. 8
7 Commission findings ............................................................................................................. 9
   7.1 Did the Balancing Pool contravene Subsection 85(1)(b) of the Electric Utilities Act? 9
   7.2 The public interest and reasonableness of the proposed settlement ......................... 10
8 Order .................................................................................................................................... 15
1 Decision summary

1. In this decision, the Alberta Utilities Commission considers an application by the Market Surveillance Administrator for approval of a revised 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, and for an order requiring the Balancing Pool to comply with particular monitoring requirements set out in the revised settlement agreement. The application and the revised settlement agreement pertain to the timing of the Balancing Pool’s termination of the Sundance B and C power purchase arrangements (PPAs) and the Battle River 5 PPA. The parties to the revised settlement agreement agreed that the Balancing Pool failed to terminate these PPAs on a timely basis contrary to Subsection 85(1)(b) of the Electric Utilities Act.

2. The Commission approves the revised settlement agreement as submitted.

2 Background and procedural history

3. On August 15, 2018, the Market Surveillance Administrator (MSA) filed an application 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 (2018 agreement).

4. The Commission issued a notice of application on August 28, 2018, granting standing to the MSA and the Balancing Pool and inviting 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) and the Independent Power Producers Society of Alberta (IPPSA) applied for standing. The Commission established a process to receive submissions on the standing applications and, following receipt of submissions, granted limited participatory intervention to IPPSA. IPPSA’s permission to participate was “restricted to addressing what the Balancing Pool has undertaken to disclose in its quarterly and annual public reports about its activities to operate its PPA units in a commercial manner and whether this proposed remedy in the settlement agreement provides adequate deterrence to prevent similar future alleged contraventions.”

---

1 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.”


3 Exhibit 23828-X0005, Notice of application (23828), August 28, 2018.

5. The established written proceeding schedule included information requests to both the MSA and the Balancing Pool, and the filing of evidence.

6. Following receipt of IPPSA’s evidence, the Balancing Pool filed a motion requesting that IPPSA’s evidence be stricken from the record. The Commission established a process to receive submissions on the motion and, on December 12, 2018, issued its ruling granting the Balancing Pool’s motion. Argument and reply argument from each of the MSA, Balancing Pool, and IPPSA were received on January 7 and 15, 2019, respectively. Further submissions were received from parties in June 2019 and, on August 1, 2019, the Commission released Decision 23828-D01-2019. The Commission did not approve the 2018 agreement; instead, it referred the agreement back to the parties with reasons explaining its concerns, and gave the parties an opportunity to address those concerns.

7. In September and October 2019, the MSA filed a number of updates on its efforts to reach a revised settlement agreement with the Balancing Pool.

8. The MSA filed a revised settlement agreement, dated October 1, 2019, between the MSA and the Balancing Pool (revised 2019 agreement) on October 8, 2019, pursuant to Subsection 44(2) of the Alberta Utilities Commission Act. In accordance with Subsection 51(1)(b) and Section 52 of the act, the MSA advised that the terms of the revised settlement agreement consist of the parties’ agreement that (i) the Balancing Pool has contravened Section 85 of the Electric Utilities Act, (ii) an administrative penalty is not in the public interest, (iii) Section 2 of the Balancing Pool Regulation has not been breached and (iv), that the Balancing Pool will adhere to a new proposed monitoring procedure set out in Section IV of the settlement agreement. In conclusion, the MSA requested that the Commission approve the revised settlement agreement pursuant to sections 44 and 51 of the Alberta Utilities Commission Act, make the findings referred to above, and issue an order that the Balancing Pool comply with the monitoring requirements set out in Section IV of the revised settlement agreement.

9. On receipt of the MSA’s application and revised 2019 agreement, the Commission established a written proceeding schedule that provided for the receipt of submissions from IPPSA and replies from each of the MSA and the Balancing Pool. It also advised that its previous ruling on standing would continue to apply.

---

5 Exhibit 23828-X0047, Ruling on Balancing Pool motion to strike evidence, December 12, 2018.
7 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 3, 2019.
8 Section 44(2) of the Alberta Utilities Commission Act states: The Market Surveillance Administrator shall file a settlement agreement with the Commission for approval under section 51(1)(b).
9 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 3, 2019, PDF page 1.
10 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 1.
11 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 2.
12 Exhibit 23828-X0068, AUC letter – process regarding new settlement agreement, October 21, 2019, paragraph 7.
10. In an October 25, 2019 submission on the revised 2019 agreement, the Balancing Pool filed additional narrative on the litigation events that were ongoing during the time it continued to hold the Sundance and Battle River PPAs, and on the requirements of Section 97 of the *Electric Utilities Act* that apply to the termination of a PPA. It also further explained why it had agreed to include “monitoring provisions as a package” despite the statement in paragraph 24 of the revised 2019 agreement that the Balancing Pool’s offer control behaviour during the investigation period did not contravene Subsection 85(1)(b) of the *Electric Utilities Act.*

11. On November 1, 2019, IPPSA indicated that given the scope established by the Commission for this proceeding, it believed that the remedies proposed in the revised 2019 agreement were adequate.

12. On November 5 and 8, 2019 respectively, the Balancing Pool and the MSA stated that in light of IPPSA’s response, neither of them would be making further submissions.

13. The Commission considers that the record for its consideration of the revised 2019 agreement closed on November 8, 2019.

14. 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

15. As set out in AUC Bulletin 2011-22: *Consultation on Market Surveillance Administrator (MSA) settlement applications before the Alberta Utilities Commission,* the legislative scheme “contemplates a number of avenues by which enforcement matters may be addressed.” Options under the *Alberta Utilities Commission Act* can include a settlement agreement, consent orders, the use of specified penalties, and hearings or other proceedings.

16. 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.

17. Following the completion of its investigation, the MSA has the mandate to choose the enforcement tool that best fits the events under consideration. It may choose to enter into a settlement agreement (sections 44 and 51(1)(b) of the *Alberta Utilities Commission Act*) or to pursue a request for a full enforcement hearing (Subsection 51(1)(a) of the

---

13 Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019.
14 Exhibit 23828-X0072, Response Regarding Revised Settlement Agreement, November 1, 2019.
15 Exhibit 23828-X0073, 2019 11 05 LT AUC, November 5, 2019.
Alberta Utilities Commission Act. If the MSA reaches a settlement, it must file that settlement agreement with the Commission for approval.

18. Subsection 56(1) of the Alberta Utilities Commission Act requires the Commission to make an order regarding a matter that the MSA has submitted before it under Subsection 51(1)(b) within 90 days after the conclusion of a hearing or other proceeding. Under Subsection 56(4), the Commission may provide direction, or make any order it considers appropriate, in respect of such matters. The reference to “other proceeding” in Section 56 of the Alberta Utilities Commission Act includes a settlement process pursuant to Section 44.\(^\text{18}\)

19. In this proceeding, the MSA has chosen to present a settlement agreement to the Commission for approval. The Commission set out the framework for assessing MSA settlement agreements in Section 5 of Decision 23828-D01-2019. The Commission has adopted this framework for the purposes of its examination of the revised 2019 agreement.

20. For completeness, the applicable portions of Section 5 of Decision 23828-D01-2019 are reproduced here:


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.

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, 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., 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.

37. Further, in Decision 3110-D03-2015, 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.

38. The Commission, in Decision 23535-D01-2018, 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*.

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…

[footnotes omitted]

### 4 Power purchase arrangements

21. As part of the restructuring of Alberta’s electricity market, power purchase arrangements were introduced as a mechanism to facilitate an efficient electric generation market based on fair and open competition. 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). Although a PPA carries a 20-year term, 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”.

22. 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 paragraph (b) 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;

23. 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.”

---


21 *Electric Utilities Act*, Section 86.
24. The Balancing Pool may terminate a PPA under Section 97 of the *Electric Utilities Act* subject to the conditions enumerated therein. Section 97 states:

   **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.

5 **Agreed statement of facts**

25. The agreed facts, set out in Article I of the revised 2019 agreement, are summarized below.

26. In June 2015, the Government of Alberta announced amendments to the *Specified Gas Emitters Regulation*, which would come into force on January 1, 2016, and issued an order pursuant to the *Climate Change and Emissions Management Act* that would increase the costs of producing coal-generated electricity.

27. 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. Table 1 to the revised 2019 agreement sets out the particulars of the PPA terminations. In each instance, the former PPA buyer sought immediate termination.

28. The Balancing Pool began making all payments required of it as PPA buyer as of the dates set out in the termination notices and, concurrent with this action, it questioned the effective dates of the terminations and advised the former PPA buyers of its dispute. Ultimately, the Balancing Pool accepted or verified all of the PPA terminations.

29. The Balancing Pool consulted with customers and the Minister as required under Subsection 97(a) of the *Electric Utilities Act* and the PPA owners were provided with six months notice, as required under Subsection 97(b) of the act, with regard to the three PPAs that are the subject of the agreed to contravention, namely, Sundance B and C and Battle River 5. A fourth PPA, Sundance A, expired on December 31, 2017. The terminations occurred roughly two years after the Balancing Pool had received the termination notices for the Sundance B and C units.

---

22 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 5, paragraph 3.
from the former PPA buyers, and approximately three years after receipt of the termination notice for the Battle River 5 PPA from the former buyer of that PPA.\textsuperscript{23}

30. As noted above, the Balancing Pool made additional submissions on the requirements that must be met to terminate a PPA under Section 97 of the \textit{Electric Utilities Act}. It submitted that it:

\[
\ldots \text{first had to be confirmed as the PPA Buyer before it could begin to consider terminating a PPA and, where appropriate, to initiate the consultation process and notice period required under s.97 of the Electric Utilities Act. The actual period during which the Balancing Pool was PPA Buyer and believed that it could terminate without violating GOA policy is much shorter than paragraph 11 might suggest.} \textsuperscript{24}
\]

31. The Sundance and Battle River PPAs were unprofitable and the Balancing Pool acknowledged that it incurred significant losses by failing to terminate these PPAs during the period from December 11, 2015 to December 8, 2017. The Balancing Pool advised that following receipt of the notices from the former PPA buyers, it offered the PPA units into the market under what it described as a variable cost offer strategy.\textsuperscript{25}

32. The Balancing Pool now holds and manages the Genesee, Keephills and Sheerness PPAs. As of the first quarter of 2019, its market share was 14.7 per cent, down from 16.9 per cent in September 2018. These remaining PPAs expire on December 31, 2020.\textsuperscript{26}

6 \quad \textbf{The investigation and contraventions}

33. The revised 2019 agreement addresses 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 (investigation period).

34. As set out in the revised 2019 agreement, following the MSA’s investigation, there was “no evidence that the BP acted out of self-interest, bad faith or personal gain.” Moreover, there was no evidence that the “BP was involved in trading violations or misuse of information for commercial advantage.”\textsuperscript{27}

35. The sole contravention agreed to by the parties concerns the losses sustained by the Balancing Pool as a result of its failure to terminate the Sundance and Battle River PPAs as soon as possible, contrary to Subsection 85(1)(b) of the \textit{Electric Utilities Act}.\textsuperscript{28}

\textsuperscript{23} Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 7, paragraph 11.
\textsuperscript{24} Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019, PDF pages 2-3, paragraph 12.
\textsuperscript{25} Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 7, paragraphs 12-13.
\textsuperscript{26} Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF pages 8-9, paragraphs 22-24.
Commission findings

36. The central issue in this proceeding is whether approval of the revised 2019 agreement is in the public interest. In this proceeding, as in the proceeding that led to Decision 2012-182, the Commission is serving in its supervisory capacity to determine whether to approve a settlement. As emphasized by the Commission in Decision 2012-182, in these circumstances, it is not for the Commission itself to decide, at first instance, what sanctions to impose should it find that alleged contraventions have occurred as would be required of it had the MSA chosen to initiate enforcement proceedings pursuant to Subsection 51(1)(a) of the Alberta Utilities Commission Act.

37. A two-stage process was established and confirmed in Decision 23535-D01-2018 and in prior decisions to assess whether a negotiated settlement and any associated administrative 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 has adopted the two-stage process to assess the revised 2019 agreement before it here.

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

38. 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 agreed facts in the revised 2019 agreement and which the Commission accepts, is that the Balancing Pool failed to take timely action to mitigate losses by continuing to hold the Sundance and Battle River PPAs rather than terminating them as soon as possible. Its failure to do so constituted a failure to manage these PPAs in a commercial manner, contrary to Subsection 85(1)(b) of the act. The parties to the revised 2019 agreement have agreed that this contravention occurred. After conducting its own independent assessment of the facts presented in this proceeding, the Commission confirms the contravention.
7.2 The public interest and reasonableness of the proposed settlement

39. The Commission must decide whether the proposed settlement falls within a range of acceptable outcomes appropriate to the facts and the applicable sanctioning principles; it is not determining whether it might have chosen to impose the same sanctions itself.

40. In Decision 23535-D01-2018, the Commission 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.

41. Although the Commission acknowledged that the MSA did not seek any administrative penalty under the terms of the 2018 agreement, it found certain of the factors in Section 4 to be instructive in considering the proposed terms and conditions of the 2018 agreement. While the MSA has also not sought any administrative penalty under the terms of the revised 2019 agreement, the Commission continues to view the Rule 013, Section 4 factors enumerated in Decision 23535-D01-2018 as instructive.

42. The sanctions to which the Balancing Pool has agreed, as a consequence of the admitted contravention, are set out in Article IV of the revised 2019 agreement, primarily in paragraphs 27 and 28.

43. Paragraph 27 states:

27. With regard to the Agreed Contravention the BP agrees to:

(a) Consider whether activities such as forward sales of electricity, sale of operating reserves or other ancillary services, sale of PPA strip contracts or termination of Remaining PPAs are available and commercially reasonable;

(b) Provide written monthly reports to the MSA ("PPA Report") as follows:

(i) Indicating if, at the report’s date, the BP considers that it is commercially reasonable for it to terminate any of the Remaining PPAs. The PPA Report shall address the following factors:

   A. the BP’s estimate of the Termination Payment that it would be required to pay the Owner upon termination under section 97(c) of the EUA for each of the Remaining PPAs;

B. the losses or profits that the BP anticipates it will incur or receive if it continues to hold each of the Remaining PPAs to the end of 2020; and

C. any other factors that the BP deems relevant in exercising its discretion to retain or terminate each of the Remaining PPAs.

(ii) The PPA Report shall also set out the specifics of any forward sales of electricity, sale of operating reserves or other ancillary services, or sale of PPA strip contracts, or other commercial transactions, considered by the BP in that quarter, and their rationale for proceeding or not proceeding with any such activities.

(c) Provide public reporting through its quarterly and annual public reports indicating activities consider and undertaking to operate the PPA Units in a commercial manner including:

(i) Forward sale of electricity;

(ii) Sale of operating reserves or other ancillary services;

(iii) Sale of PPA strip contracts; and

(iv) Termination of Remaining PPAs.

(d) The level of detail to be provided in the public reporting required under item (c) above shall be consistent with the level of detail that the Balancing Pool has provided to date in its public report pursuant to the 2018 Agreement.

44. In addition to this commitment, which was directly related to the agreed contravention, the revised 2019 agreement also addressed the Balancing Pool’s ongoing offer control behaviour. The MSA stated, as part of the agreed contravention provisions, that it was unable to conclude that the Balancing Pool’s offer control behaviour, which had included a variable cost offer strategy, contravened Subsection 85(1)(b) of the Electric Utilities Act during the investigation period, the circumstances of which the MSA considered to be unprecedented and unexpected. The MSA nevertheless considered that a variable cost offer strategy could constitute a breach under normal circumstances. Paragraph 28 addresses this concern:

28. With regard to the BP’s offer control behaviour, the BP agrees to:

(a) Manage its offer control strategy in a commercially reasonable manner;

(b) Provide the monthly data on each Remaining PPA as specified in Appendix A;

(c) Provide monthly written reports (“Offer Control Report”) to the MSA providing an analysis of the commercial reasonableness of the BP’s offer control behaviour in the context of the information contained in the Offer Control Report, the PPA Report and its public reporting through its quarterly and annual public reports. In any month when the costs exceed the revenues, the MSA would expect the BP to show that the

---

32 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 9, paragraph 24.
cost of terminating each individual PPA at a minimum exceeds the cost of incurring an operating loss of the PPA.\[\]

45. The parties also agreed that, in the event the Balancing Pool fails to comply with the agreed sanctions, the MSA may reopen its investigation into the Balancing Pool’s conduct.\[33\]

46. The Balancing Pool further explained the nature of the agreed remedy, stating:

14. The remaining PPAs expire on their terms on December 31, 2020. There are two reasons why a termination of a PPA after the first quarter of 2020 would be imprudent and unnecessary when s.97’s six month notice requirement is taken into account. First, such a termination would be moot because the PPA would be expiring on its terms during or shortly after the notice period. Second, and worse, such a termination would result in the Balancing Pool incurring tens of millions of dollars of termination payments under s.97(c) to terminate a PPA that will expire naturally without penalty during or soon after the notice period.

15. The 2019 Agreement’s monitoring and reporting requirements in relation to the alleged contravention will only be relevant for a short window of time. This fact informs the additional remedies that the Balancing Pool has agreed to in the area of offer control.

20. The Balancing Pool ultimately agreed to provide the Offer Control Report in the interests of resolution. Offer behaviour is the Balancing Pool’s principal day to day commercial conduct. Given the strong reasons against the imposition of an administrative penalty and the limited window for termination of a PPA under s.97 of the Electric Utilities Act, the Balancing Pool has agreed to the MSA’s monitoring provisions as a package in order to provide transparency and further assurances of good faith to the MSA, to the Commission, and to the market at large. This agreement should not be interpreted by the MSA, by the Commission, or by any market participant as a concession that the Balancing Pool has contravened or will contravene any applicable rule, regulation or law in relation to its past or future offer behaviour.\[34\]

47. As mentioned earlier, IPPSA submitted that based on its review of the revised 2019 agreement and the Balancing Pool’s submissions, “the steps proposed in the Revised Settlement Agreement appear adequate to ensure the BP’s compliance with the terms of the Revised Settlement Agreement.”\[35\] It added that “it is also helpful that the market has returned to one driven more by supply/demand fundamentals, thus likely reducing the rationale for termination of the Power Purchase Arrangements over their remaining life.”\[36\]

AUC Rule 013 factors

48. The Commission finds it helpful (as it did in Decision 23535-D01-2018) to consider the factors listed in Rule 013 in assessing the reasonableness of the revised 2019 agreement, bearing

---

33 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 10, paragraphs 29-30.
34 Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019.
35 Exhibit 23828-X0072, AUC.Wall.Response Regarding Revised Settlement Agreement, November 1, 2019, PDF page 1.
36 Exhibit 23828-X0072, AUC.Wall.Response Regarding Revised Settlement Agreement, November 1, 2019, PDF page 1.
in mind that sanctions are intended to be protective and preventative, but not punitive. Several of these factors are particularly relevant in this case.

Harm

49. The Balancing Pool’s misconduct under consideration resulted in the Balancing Pool incurring significant losses by failing to terminate, as soon as possible, the Sundance and Battle River PPAs which, by definition, were unprofitable. It is clear to the Commission that consumers were harmed as a result of this contravention.

Isolated or recurring problem

50. Another relevant factor for the Commission to consider in assessing the seriousness of the agreed contravention is whether it was an isolated or potentially recurring problem. 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). Nevertheless, for as long as the Balancing Pool holds PPAs, which expire on their terms on December 31, 2020, it could again, at some point in the future, be in breach of that section of the act.

Unprecedented and unexpected event

51. The MSA and Balancing Pool, in paragraph 17 of the revised 2019 agreement, underscore that “[t]he circumstances that arose during the Investigation Period were unprecedented and unexpected.”

52. In its submissions, the Balancing Pool emphasized the uniqueness of the circumstances in which it found itself. It explained that, as a public agency defined under the Alberta Public Agencies Governance Act, it must consult with the Minister of Energy and fulfill its mandate in a manner that is aligned with the objectives and policies of the Government of Alberta. At the time, the Government of Alberta had challenged the legal grounds upon which the former PPA buyers had terminated their PPAs and sought to quash the Balancing Pool’s acceptance of the Battle River termination. Moreover, the Government of Alberta had initiated “high-profile litigation and a public relations campaign to prevent them from proceeding.”

Given these circumstances, the Balancing Pool explained that it:

… could not simply accept the former Buyers’ notices of termination in the face of clear GOA policy to the contrary. To have done so would have been an imprudent and irresponsible breach of the Balancing Pool’s statutory obligations under APAGA and the Electric Utilities Act. It would also have ended the PPA regime as originally conceived by the GOA (since one of the goals of that regime was to disaggregate Alberta’s electricity industry) and would therefore have had major policy ramifications for the GOA.

At the same time there were a number of novel legal questions which had to be determined by the courts before the Balancing Pool could become deemed Buyer under the terminated PPAs. Given the unprofitability of the PPAs it would not have been

37 Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 8, paragraph 17.
38 Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019, PDF page 2, paragraph 9.
commercial for the Balancing Pool to have simply accepted all PPA terminations without obtaining judicial determinations of these questions, which included a ruling as to the operative termination date.\textsuperscript{39}

53. The Commission agrees that these circumstances were unprecedented and unusual, and that they affected both the timing and the ability of the Balancing Pool to respond to the termination notices it had received, and left it unexpectedly as the PPA buyer for the Sundance and Battle River PPAs.

\textit{Economic benefit}

54. The Balancing Pool is a corporation established in Section 75 of the \textit{Electric Utilities Act} to carry out the powers and duties set out therein.\textsuperscript{40} Because it is a market participant, as that term is defined in the act, it is also required by Section 6 of that act to conduct itself in a manner that supports the fair, efficient and openly competitive operation of the market.

55. The revised 2019 agreement specifically states that there is no evidence that “the BP acted out of self-interest, bad faith or personal gain” nor was there evidence that “the BP was involved in trading violations or misuse of information for commercial advantage.”\textsuperscript{41} The Commission accepts the MSA’s findings in this regard.

56. In considering the revised 2019 agreement, the Commission has balanced the need for deterrence against the need to ensure that the proposed sanctions are commensurate with the impugned conduct once all relevant facts and circumstances are taken into account.

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

58. The revised 2019 agreement is unequivocal that during the investigation period, the Balancing Pool’s offer control behaviour did not contravene Subsection 85(1)(b) of the \textit{Electric Utilities Act}. In paragraph 28, the Balancing Pool agreed to certain reporting requirements with respect to its ongoing offer control behaviour. It also explained that the monitoring and reporting provisions agreed to in paragraphs 27 and 28 were presented as a package to serve as a general deterrent against similar contraventions for so long as the Balancing Pool continues to hold the remaining PPAs. The Commission accepts the Balancing Pool’s explanation that the packaged reporting and monitoring provisions set out in the revised 2019 agreement, “will provide transparency and further assurances of good faith to the MSA, to the Commission, and to the market at large.”\textsuperscript{42}

59. For all the reasons stated above, the Commission finds that the proposed terms of the revised 2019 agreement are fair, reasonable and fall within a range of acceptable outcomes, and that because the resulting settlement adequately addresses the contraventions of

\textsuperscript{39} Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019, PDF page 2, paragraphs 10-11.

\textsuperscript{40} The Balancing Pool duties are set out in Section 85 of \textit{Electric Utilities Act}.

\textsuperscript{41} Exhibit 23828-X0066, MSA request for Commission approval of revised settlement agreement, October 8, 2019, PDF page 8, paragraph 19.

\textsuperscript{42} Exhibit 23828-X0071, 2019 10 25 LT AUC re submission by the Balancing Pool, October 25, 2019, PDF page 4, paragraph 20.
Subsection 85(1)(b) of the Electric Utilities Act, the approval of the revised 2019 agreement is in the public interest.

60. The Commission agrees with the MSA that the events leading to the application and the revised 2019 agreement were unprecedented and unexpected and that the proposed monitoring and reporting package recognizes the seriousness of the contravention, while serving to deter future contraventions.

8 Order

61. The Commission orders as follows:

   a. The Commission approves the revised 2019 settlement agreement between the Market Surveillance Administrator and the Balancing Pool.

   b. The Balancing Pool is directed to comply with the reporting and monitoring requirements set out in Article IV of the revised 2019 settlement agreement.


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