Market Surveillance Administrator

Application to Make Public a Record that Identifies a Market Participant by Name

September 2, 2020
Alberta Utilities Commission
Decision 25809-D01-2020
Market Surveillance Administrator
Application to Make Public a Record that
Identifies a Market Participant by Name
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1 Decision summary

1. In this decision, the Alberta Utilities Commission considers whether a determination made by the Market Surveillance Administrator under Subsection 6(4)(b) of the Market Surveillance Regulation to make public a record that identifies a market participant by name is reasonable.

2. For the reasons set forth below, the Commission finds that the determination of the Market Surveillance Administrator is reasonable, and pursuant to Subsection 6(10)(a), the Market Surveillance Administrator may identify the market participant by name when making the document public.

2 Introduction and procedural background

3. On August 19, 2020, the Market Surveillance Administrator (MSA) filed an application under Section 6 of the Market Surveillance Regulation (MSR), requesting that the Commission issue a determination of whether the MSA may make public a record that identifies a market participant by name, based on the MSA’s consideration of the various factors involved in the case and the objection it received from the market participant.

4. In accordance with Subsection 6(4)(c) of the MSR, the MSA must notify a market participant before publicly releasing a document that names the market participant. On August 5, 2020, the MSA contacted the market participant in question, indicating that it intended to publicly release a notice that would both name the market participant and summarize the MSA’s intended actions toward this market participant. The MSA provided the text of its proposed public document (Public Document) as part of its application.

5. Subsection 6(5) of the MSR states that if the market participant objects to being publicly named, it must file an objection with the MSA within seven days of the MSA’s notice. On August 12, 2020, the market participant in question filed such an objection with the MSA.

6. After reviewing the concerns in the market participant’s objection, the MSA remained of the view that publicly disclosing the name of the market participant in the Public Document was within the MSA’s mandate, might enhance fair, efficient and open competition in the market, and would not result in undue financial loss or harm significantly the competitive position of the market participant. Consequently, pursuant to Subsection 6(7)(b) of the MSR, the MSA brought the current application to the Commission, requesting a private proceeding to review whether or not the MSA’s determination was reasonable.
7. Although the Commission issued a public filing announcement on August 19, 2020, it has processed this application as a private proceeding. The record for this proceeding closed on August 19, 2020.

8. In reaching the determinations contained within 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 legislation

9. Subsection 6(2)(b) of the MSR enables the MSA to publicly disclose the following activities, provided it has considered the factors in Subsection 6(4):

(2) The MSA may make public the following:

... 
(b) the commencement, progress or completion of a MSA investigation, including the subject-matter of the investigation and the name of any relevant market participant in accordance with subsection (4);

... 

(4) Before the MSA makes public a record that will identify a market participant by name, the MSA must, except when disclosure of the name of a party is permitted or required under the rules of the Commission or the Court,

(a) consider

(i) the benefits that might reasonably be foreseen of making public the name of the market participant for the purpose of carrying out the mandate of the MSA,

(ii) whether making public the name of the market participant could reasonably be expected to

(A) result in undue financial loss to the market participant, or

(B) harm significantly the competitive position of the market participant,

(iii) the implications of not making public the name of the market participant to other market participants,

(iv) any practical alternatives reasonably known to the MSA, and

(v) any other factors the MSA considers relevant,

(b) determine that, on balance, the factors considered under clause (a) favour making public the name of the market participant, and
(c) give written notice to the market participant of its intention to make the record public, and the notice

(i) must include a copy of the content of the record that it intends to make public, and

(ii) must provide at least 7 days for the market participant to file an objection with the MSA in respect of being identified by name in the record that the MSA intends to make public.

10. Subsection 6(5) of the MSR outlines the process for a market participant to object:

(5) An objection referred to in a notice given under subsection (4)(c) must be filed with the MSA in writing within the period specified in the notice and must include reasons for the objection.

11. If a market participant objects, Subsection 6(7) of the MSR gives the MSA two options:

(7) If an objection is filed in accordance with subsection (5), the MSA must, within 7 days of receiving the objection, either

(a) decide not to identify the market participant by name when making the record public and notify the market participant of that decision, or

(b) give written notice to the Commission, pursuant to section 51(1)(b) of the Act, requesting that the Commission initiate a proceeding in private to review whether or not the determination made by the MSA under subsection (4)(b) is reasonable.

12. On receipt of an application from the MSA, the Commission must assess the application in accordance with Subsection 6(9) of the MSR:

(9) The Commission, in respect of a proceeding initiated in response to a request under subsection (7)(b),

(a) must not consider any new reasons for an objection other than those contained in the objection filed by the market participant, and

(b) must conclude the proceeding and provide the MSA and the market participant with a decision within 14 days of receiving the notice requesting the proceeding, unless otherwise agreed to by the parties.

13. Subsection 6(10) of the MSR permits the MSA to make public a record identifying the market participant if the Commission finds that the MSA’s determination under Subsection 6(4)(b) is reasonable. Any decision made by the Commission pursuant to Subsection 6(9)(b) is final and not subject to appeal.¹

¹ Market Surveillance Regulation, Subsection 6(11).
4 The Market Surveillance Administrator’s determination

4.1 Benefits: Subsection 6(4)(a)(i)

14. The benefits identified by the MSA are summarized as follows:

(a) The proposed naming of the market participant in the Public Document assures the public that the MSA is fulfilling its legislated mandate, which is particularly important when the MSA has committed to actively scrutinize the conduct of the market participant in question.

(b) Certain other parties had expressed great interest in the previous conduct of the market participant in question and will likely want to be made aware of the information proposed in the Public Document, which is based in part on these prior matters. The proposed Public Document will:

(i) Prevent duplicative work in the form of other market participants raising complaints about the same issues; and

(ii) Signal an opportunity for other market participants who have relevant information in this matter to come forward.

(c) There is speculation around the recent conduct of the market participant in question, due to a recent public announcement from the market participant. The release of the market participant’s name in the proposed Public Document is intended to control the release of information, reduce further speculation, and encourage fairness and transparency.

4.2 Financial loss or competitive harm: Subsection 6(4)(ii)

15. The market participant objected to the public release of its name in the Public Document asserting that the consequences of this release would cause undue financial loss. In particular, it was concerned about the effect the actions of the MSA might have on current or future litigation proceedings.

16. The MSA rejected the market participant’s position that naming the market participant will result in undue financial loss or harm to the competitive position of the market participant. In support of this determination, the MSA referred to a prior public notice involving the same market participant and a similar subject matter of investigation. It submitted that there is no evidence that this previous public notice caused undue financial loss or harm to the market participant’s competitive position. Although the market participant was subject to litigation after the previous public notice, this did not arise until much later, and the MSA does not consider that the litigation was the result of the previous public notice. Further, the MSA considered that the public is also aware of much of the market participant’s conduct.
4.3 Potential implications of not naming the market participant: Subsection 6(4)(iii)

17. The potential implications of not releasing the name of the market participant in the Public Document identified by the MSA are summarized as follows:

(a) It could result in information inequality, particularly because the MSA may have to request records from certain asset owners who would then be informed of the MSA’s activities, while other market participants remained ignorant. The same is true of confidential records, as the market participant would have to inform the asset owners of their release to the MSA.

(b) Any notice describing the scope of the MSA’s activities will necessarily reference certain legislation and documents which will make the identity of the market participant in question obvious.

(c) The market participant’s previous public announcement has already drawn attention and could result in speculation even if the market participant is not named by the MSA.

4.4 Practical alternatives: Subsection 4(a)(iv)

18. The MSA considered whether releasing the Public Document without including the name of the market participant would be possible. It concluded that, with the detail necessary to provide meaning to the Public Document, the identity of the market participant would likely be revealed. Consequently, either the name of the market participant would have to be released or releasing the Public Document at all would have to be abandoned. In the MSA’s view, the benefits of issuing the Public Document favoured its release.

4.5 Other factors: Subsection 4(a)(v)

19. In addition to its assertion that naming it in the proposed Public Document could harm it financially or competitively, the market participant raised other objections:

(a) Subsection 6(1) of the MSR states that the MSA is to conduct its planned activities confidentially.

(b) Public disclosure is premature, as the matter has just commenced and the MSA has not drawn conclusions.

(c) The market participant does not understand the case against it and has not been given the opportunity to respond to the MSA’s proposed notice. Speculation is likely given the general references in the proposed public notice.

(d) A notice such as that intended by the MSA will tarnish the reputations of those associated with the market participant, and issuance of the proposed public notice does not support the fair, efficient and openly competitive nature of the market.

20. The MSA rejected the market participant’s argument that the MSA’s investigative activities are to be conducted in private and referred to the specific provisions in Section 4 of the MSR that specifically permit this disclosure. It further rejected the market participant’s arguments concerning the timing and potential speculation that could ensue with the release of
the Public Document, responding that the investigation procedures followed by the MSA are well-known to all parties and the release of the Public Document will not diminish the procedural protections available to the market participant. Lastly, it rejected any claims of a tarnished reputation arising from the release of the Public Document as speculative, and reiterated that a fair, efficient and openly competitive market is supported by the MSA’s public fulfillment of its mandate.

4.6 Balance of considerations: Subsection 6(4)(b)

21. Having considered and responded to each of the objections raised by the market participant, the MSA concluded that none of the above concerns weighs against the benefits of releasing the name of the market participant and the Public Document.

5 Commission findings

5.1 Standard of review is reasonableness

22. The statute has specifically enabled the Commission to act in the role of a reviewing body concerning the determination of the MSA and requires the Commission to assess the MSA’s determination on the basis of whether it was reasonable.

23. The Supreme Court of Canada has set out what is required by a reviewing body when conducting a reasonableness review. The court stated in Vavilov:2

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

...

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place.

24. The MSA has been recognized by the Court of Queen’s Bench of Alberta as a body that possesses considerable expertise in carrying out its mandate.3 As such, it is entitled to deference.

25. Consequently, the Commission is not determining whether on balance, it would have concluded that the benefits that may arise from disclosure of the name of the market participant in the Public Document reasonably outweigh the potential harm to the objecting market

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2 Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 652019 SCC 65, paragraph 13.
participant that may arise from disclosure. Rather, the Commission is considering whether the MSA’s determination is transparent, intelligible and justified, and as such, falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.4

5.2 Review for reasonableness

26. The court in *Vavilov* provided further direction regarding the analysis that must be conducted by a reviewing body:

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[99] A reviewing court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a “line-by-line treasure hunt for error”: However, the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived” Reasons that “simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion” will rarely assist a reviewing court in understanding the rationale underlying a decision and “are no substitute for statements of fact, analysis, inference and judgment. [references and footnotes omitted]

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision …

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4 *Vavilov*, paragraph 86.
27. The principal issue before the Commission is whether it was reasonable for the MSA to determine that the factors it assessed under Subsection 6(4) of the MSR favour the release of the name of the market participant in the Public Document it seeks to publish.

28. The Commission’s review of the MSA’s determination leads it to conclude that the determination made by the MSA was reasonable.

29. The MSA determined that the benefits of releasing the Public Document would include demonstration to the public that it was fulfilling its mandate, as well as control the messaging and public interest regarding the subject of its investigation of this particular market participant. The history of the subject matter was provided in further detail in the application. This additional information supports the MSA’s determination that the subject matter of this investigation would be of interest to the public and that by controlling the messaging, it was reasonable to believe that the MSA could more effectively conduct its investigation as required by its mandate.

30. In addition, the Commission finds that the MSA’s rejection of the market participant’s claim that publishing the market participant’s name in this circumstance could result in financial loss or competitive harm to the market participant was supported by the factors set out in the MSA’s determination. Pursuant to Subsection 4(a)(ii), the MSA is required to determine whether undue financial loss or significant harm to the market participant’s competitive position could be reasonably expected to occur. The MSA’s determination was supported by past facts, upon which the Commission concludes can reasonably be relied, to support the MSA’s conclusion that publishing the name of the market participant would not reasonably result in this type of loss or harm.

31. The Commission also finds that the MSA’s reasoning that the MSR provides for a statutory scheme permitting the MSA to make public its activities in the fulfillment of its mandate, including the commencement and progress of its investigations, is supported by its analysis of the provisions set out in subsections 6(2), 6(3) and 6(4) of the MSR. The requirement to keep records that the MSA obtains from a party confidential under Subsection 6(1) is treated separately from the documents that the MSA generates. The Public Document falls within this category of information and does not include “any reference to, or reproduction of, in whole or in part, [...] any record provided to the MSA by a market participant as part of an investigation.”

Further, the MSA is interpreting a statute closely connected to its function with which it would have a “particular familiarity;” a home statute. As such, a presumption of deference applies to the MSA’s interpretation. The MSA’s determination on the application of the provisions of the MSR to these documents is reasonable.

32. Lastly, the Commission finds the MSA’s consideration of the other factors raised by the market participant to be reasonable. It accepts the MSA’s determination that its investigative process is public and well-known to market participants and that as such, the release of the name of the market participant in the Public Document will not diminish the procedural protections available to the market participant, nor necessarily result in a tarnished reputation. The Commission also accepts the MSA’s reasoning that because the matters referenced in the Public Document are well known to market participants, the identity of the market participant would inevitably be known.

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5 Market Surveillance Regulation, Subsection 6(2)(a).
6 FortisAlberta Inc v Alberta (Utilities Commission), 2015 ABCA 295 at paragraph 88.
33. In summary, the Commission finds that the MSA has addressed each of the factors outlined in Section 6 of the MSR in its application and that the MSA’s determination, that on balance these factors favour the release of the name of the market participant, is both rational and logical.

6 Order

34. It is hereby ordered that:

   (1) Pursuant to Subsection 6(10) of the Market Surveillance Regulation, the Market Surveillance Administrator may make public the record identifying the market participant by name.

Dated on September 2, 2020.

Alberta Utilities Commission

(original signed by)

Anne Michaud
Vice-Chair

(original signed by)

Neil Jamieson
Commission Member