March 11, 2016

Court Confirms that the AUC Can Take the Lead in Examining the Scope of the ISO's Reporting Obligations

By: Nigel Bankes

Case Commented On: *Independent Power Producers' Society of Alberta v Independent System Operator (Alberta Electric System Operator)*, 2016 ABQB 133

Alberta has a competitive electricity market which functions through the power pool coordinated by the Independent System Operator (ISO) known in Alberta as the Alberta Electric System Operator (AESO) (see the *Electric Utilities Act*, SA 2003, c E-5.1 ss 17 - 18 (*EUA*)). In simple terms power producers bid blocks of power (price/quantity pairs) into the pool at the price at which they are prepared to be dispatched (e.g. GenCo bids 10 MW at $40/MWh) on an hourly basis for the following seven days. Generators may change their offer prices closer to real time as the market unfolds: see MSA, *Alberta Wholesale Electricity Market*, 2010. The ISO ranks all bids in merit order (i.e. starting with the lowest bids) and moves up the ladder of bids until supply meets the load (demand). The last unit dispatched sets the system marginal price which is received by all generators which are dispatched. Thus, if the price settles at $80/MWh that is the price that GenCo will receive. If the price settles at $30/MWh GenCo will not be dispatched. See AESO, "Determining the Wholesale Market Price for Electricity".

The ISO has rule making functions for the market under the *EUA* as well as reporting functions under the *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009 (*FEOC Regulation*). In particular, s 6 of that regulation provides that:

> **6(1)** The ISO shall make available to the public the price, quantity and asset identification associated with each offer made to the power pool that is available for dispatch.
>
> **(2)** The ISO shall
>
> > (a) develop information technology systems that are capable of identifying and tracking the market participant that holds the offer control associated with each price and quantity offer made to the power pool, and
> >
> > (b) include that information in the reporting made available to the public under subsection (1), when the ISO's information technology systems are capable of identifying and tracking that information.
>
> **(3)** The ISO shall delay making available to the public the asset identification referred to in subsection (1) and the identification of the market participant that holds the offer control referred to in subsection (2) by 60 days after they are made to the power pool.

The Alberta Utilities Commission (AUC) has some supervisory jurisdiction over the ISO. For example, market participants may complain to the AUC (*EUA*, s 25(1)) about ISO rules on the grounds that such a rule is technically deficient or that it fails to support FEOC values (i.e. the rule does not support the fair, efficient and openly competitive operation of the market), or that it is not in the public interest. In addition, the province's Market Surveillance Administrator (MSA) has a mandate to monitor the electricity and natural gas markets and to promote behavior that supports FEOC. The MSA is continued by s 32 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*AUCA*). The MSA also has specific responsibilities under the *EUA*. It too can complain to the AUC about ISO rules (*EUA* s 25(1.1)) on most of the grounds listed above but also on the grounds that an ISO rule "may have an adverse effect on the structure and performance of the market." In addition, the MSA may refer to the AUC any matter related to the mandate of the MSA and have the AUC hold a hearing to investigate the matter and make any relevant orders (*AUCA*, ss 51(1)(b) and 56).

In this case, the MSA had become concerned about the implications of the way in which the ISO was fulfilling its reporting obligation under s 6 of the *FEOC Regulation*. The ISO has been doing this by publishing something called the Historic Trading Report (HTR). Justice Kim Nixon's judgment describes the HTR as follows (at para 8):

> The HTR provides information to the public about all offers made by generators to the Alberta power pool during the preceding hour to dispatch power at specified quantities and prices. It is published hourly, within 5-10 minutes after the end of each hour, and lists the prices and quantities of all offers made to the Alberta power pool.

The MSA had apparently reached the tentative conclusion that under certain market conditions the information provided resulted in spikes in market prices and undermined FEOC values. It also considered that the ISO could discharge its obligations in an alternative way by providing Merit Order Snapshot Reports which provide data on a less contemporaneous basis (60 days after the event).

The ISO responded to the MSA's concerns and proposed, by way of a notice to market participants issued on January 8, 2015, to change its reporting practices as follows (at para 10):

> [Henceforward] the HTR would be published 12 hours after the hour for which the offers corresponded but it would continue to publish, on an hourly basis, offer volumes and prices up to $250/MWh. The price-quantity pairs priced higher than $250/MWh would be aggregated in four offer ranges rather than each individual offer being listed.

The Independent Power Producers' Society of Alberta (IPPSA) took exception to this proposal and filed an application for judicial review of the ISO's decision to change the format and publication timing of the HTR Reports. In response, the ISO advised that it would suspend implementation of the change. For reasons not disclosed in Justice Nixon's judgement, IPPSA's application (which was originally scheduled to be heard in November) was adjourned *sine die* in

September (with the agreement of both parties) with the result that the status quo on reporting would continue. Given that, the MSA decided to refer the matter of the publication of HTR reports to the AUC under s 51(1)(b) of the *AUCA* (referenced above). The filings for this application are available on the AUC's website here. This in turn triggered IPPSA to re-schedule its adjourned JR application which leads to this decision by Justice Nixon.

Justice Nixon made two decisions. First, she decided (at para 21) that the MSA should be granted standing "in part because it plays a key role in the electricity market in Alberta" and also because "the MSA is directly affected by the subject matter of the judicial review." Second, she concluded (at paras 22 – 25) that IPPSA's JR application should be dismissed on the basis that JR is a discretionary remedy and that this would not be an appropriate matter for JR because there is an adequate alternative remedy.

The result here clearly makes sense. Contrary to IPPSA's remarkable submission to the effect that "it is a simple and straightforward matter to interpret the *FEOC Regulation* and that no policy considerations, no expert knowledge of the electricity market, and no factual background is necessary to do so", this is an exceptionally complex statutory scheme in which different regulatory actors (the MSA, the ISO and the AUC) have different and carefully calibrated roles and significant expertise. It makes all the sense in the world to have these issues examined in the first instance by these expert bodies. IPPSA will be free to participate in the AUC public consideration of the MSA's application and if it doesn't like the result it will then be free to make an application to the Court of Appeal for leave under s 29 of the *AUCA* on a point of law or jurisdiction. It would be completely inappropriate for the Court of Queen's Bench to deal with the interpretation issue without the benefit of the considered reflection and opinion of the AUC provided in the context of the MSA's application and background documents as well as any further evidence and opinion adduced at the AUC's public hearing: see in particular *Coldwater Indian Band v. Canada (Indian Affairs and Northern Development)*, 2014 FCA 277.

Whether it was appropriate to dismiss on the basis of an adequate alternative remedy *for this applicant* I am less sure since in this case the alternative remedy is being sought by the MSA rather than by IPPSA. But it certainly would not be unreasonable to adjourn the JR application pending the outcome of the process initiated by the MSA. IPPSA could hardly claim that it was seriously prejudiced by such an adjournment since it had already adjourned its own application *sine die*. There may be issues still to be resolved at the end of the MSA/AUC process and any subsequent appeal thereof, but likely there will not – at which point any remaining JR application would simply be an impermissible collateral attack on the outcome of the proceeding initiated by the MSA.