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MSA Announces Investigation into the Bidding Practices of the Balancing Pool

By: Nigel Bankes

Proceedings and Announcements Commented On: (1) [MSA News Release](#), “MSA has issued a formal notice of investigation to the Balancing Pool related to offer strategies undertaken at PPA units”, September 2, 2020; and (2) [AUC Decision 25809-D01-2020](#), Market Surveillance Administrator, Application to Make Public a Record that Identifies a Market Participant by Name, September 2, 2020

On September 2, 2020, the Market Surveillance Administrator (MSA) announced that it was initiating an investigation into the bidding practices of the Balancing Pool (BP) in relation to the remaining power purchase agreements (PPAs) for which it still has offer control. This follows an earlier MSA investigation into the BP’s bidding practices that resulted in a settlement agreement between the BP and the MSA that was ultimately approved (on the second go-around) by the Alberta Utilities Commission (AUC). For the two AUC decisions see: [AUC Decision 23828-D01-2019](#), Market Surveillance Administrator, Application for Approval of a Settlement Agreement Between the Market Surveillance Administrator and the Balancing Pool, August 1, 2019; and [AUC Decision 23828-D02-2020](#), Market Surveillance Administrator, Application for Approval of a Revised Settlement Agreement Between the Market Surveillance Administrator and the Balancing Pool January 14, 2020. The settlement agreement itself, from October 1, 2019, is posted [here](#) (you will need a free AUC account to access).

The current investigation appears to have been triggered by the changes in Alberta’s electricity market associated with COVID-19 and oil price declines. The BP announced its response to these developments on [June 18, 2020](#), stating that:

Following the extraordinary economic contraction and corresponding decline in power prices earlier this year, some power companies have elected to shut down their generating units, and some have not. The Balancing Pool also evaluated potential strategies that involve shutting down certain PPA generating units, with the goal being to reduce operating costs. These evaluations have included cost-benefit, legal, and regulatory analyses. The key conclusions from these analyses have been as follows:

- Shutting down PPA generating units would result in minimal savings, and is expected to result in a loss to the Balancing Pool after accounting for the expenses and risks associated with such a strategy.
- The PPAs do not readily facilitate the shutting down of PPA units. The PPAs limit the number of shutdowns permitted, establish minimum generation levels, include take-or-pay minimums and other obligations that would negate potential cost reductions,

and impose additional risks on the Balancing Pool when shutting down generating units.

- Coal-fired generating units are not easily turned on and off. There are operational risks associated with shutting down these units that limit the feasibility of shutdowns and may impose further costs.
- Important legal and regulatory hurdles restrict the Balancing Pool's ability to properly coordinate a shutdown with the PPA units' owners/operators.

Taken together, the Balancing Pool has concluded that any potential benefits do not outweigh the risks and costs associated with shutting down the PPA units. The Balancing Pool is continuing to monitor the situation, and has taken other steps to enhance PPA earnings in this low price environment.

Before the MSA could make its announcement publicly naming the BP as the subject of an investigation, it had to fulfill its obligations under the *Market Surveillance Regulation*, [Alta Reg 266/2007](#) (MSR). Specifically, this required the MSA to assess the pros and cons of naming the market participant (MP) as the subject of the investigation and then, if the balance favours public naming, notifying that party of its intention to do so. That MP has the opportunity to object, at which point the AUC must conduct a private proceeding to assess the reasonableness of the MSA's determination (MSR, s 6(10)). In this case the BP did object and as a result, triggered the AUC proceeding reported as AUC Decision 25809-D01-2020 that is the subject of this post. At no point does that decision identify the BP as the market participant concerned, but it is clear enough from the decision and its timing that the subject of the application must be the BP.

In its decision, the AUC confirmed that the standard of review on such an application was reasonableness (as specified in MSR, s 16(10)) and that its task, following *Vavilov (Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)), was to consider (at para 25) “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.” It was not the role of the AUC to determine (at para 25) “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 participant that may arise from disclosure.”

In its decision, the AUC carefully reviewed the reasons provided by the MSA for its determination. Following the requirements of the regulation, the relevant factors include possible impact on the financial or competitive position of the MP, as well as the benefits of disclosure. In this case the benefits of disclosure as listed by the MSA and quoted by the AUC (at para 14) seem to have been especially compelling:

- (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.

Now we must await the outcome of the MSA's investigation under the authority of s 42(1)(b) of the *Alberta Utilities Commission Act*, [RSA 2000 c A-37.2](#). The MSA will have to assess the conduct of the Balancing Pool in relation to potential breaches of the *Electric Utilities Act*, [SA 2003, E-5.1](#) (*EUA*), including sections 6 and 85, the *Fair, Efficient and Open Competition Regulation*, [Alta Reg 159/2009](#) (FEOC Regulation), and the Settlement Agreement between the MSA and Balancing Pool referenced above. Section 6 of the *EUA* enjoins all MPs (including the BP) to conduct themselves in a manner "that *supports* the fair, efficient and openly competitive operation of the electricity market" (emphasis added), whereas section 85 specifically requires the BP to manage its generation assets in a commercial manner. The FEOC regulation generally seeks to identify and further define conduct by an MP "that does not support the fair, efficient and openly competitive operation of the electricity market". The leading authority on the interpretation of the FEOC provisions of both the *EUA* and the FEOC Regulation is the AUC's decision examining TransAlta portfolio bidding practices with respect to facilities encumbered by PPAs: see [AUC Decision 3110-D01-2015](#), Market Surveillance Administrator, Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly, Phase 1, July 27, 2015.

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