

“www.JustAnswer.com... or How the Alberta Courts Respected the Market Surveillance Administrator’s Just Exercise of Jurisdiction”

By Alice Woolley

Cases Considered:

[Alberta \(Market Surveillance Administrator\) v. Enmax Energy Corporation 2008 ABQB 54](#)

Regulation of the functioning of the market for electricity poses difficulties. The price for electricity in Alberta is determined through the mechanism of the Power Pool on an hourly basis. Generators bid the electricity they will have available for dispatch into the Power Pool during a given hour, and the Power Pool selects electricity in merit order (from the lowest price bid to the highest price bid) as required to meet demand in that hour. The price of electricity in each hour is the level of the highest bid of the last unit of electricity required to meet demand in that hour. Every in merit generator in that hour is then paid at that price, regardless of the level of the bid initially made by that generator.

In Alberta (as in many other jurisdictions) there are times and seasons in which the amount of electricity bid in to the Power Pool in an hour is just sufficient to meet demand in that hour – where electricity will be dispatched at the maximum Pool Price of \$1000/MWh. These times arise at points of peak demand but also, and usually, where points of high demand coincide with limits in supply arising from events such as scheduled and unscheduled outages in generation facilities. Further, at points the tension between supply and demand of electricity in Alberta is sufficiently tight that a single unscheduled outage by a significant electricity generator can push electricity prices to the \$1000/MWh peak.

These issues in electricity markets mean that those markets have been traditionally susceptible to market abuse. Moreover, that market abuse can arise from behaviour that, in other circumstances would not be abusive. In California, for example, participants used unscheduled facility outages – outages that could have been for completely legitimate reasons – as a way of creating supply shortages that allowed the price of electricity to spike in hours of peak demand. What this means is that the electricity market is not only susceptible to abuse, but also that it can be very difficult to ascertain whether such abuse has occurred.

In Alberta, the task of regulating the electricity generation market is given to the Market Surveillance Administrator, formerly an independent regulatory agency that has now been placed under the purview of the Alberta Utilities Commission. In the years since deregulation of

electricity generation, Alberta's Market Surveillance Administrator – the regulatory agency charged with ensuring the competitiveness of the electricity market – has in its Annual Reports consistently noted the possibility for participants to abuse market power. It has not, however, reported any instances of market abuse that have taken place.

In the case at hand, Justice Alan D. Macleod of the Alberta Court of Queen's Bench was asked to compel Enmax to answer certain questions posed by the Market Surveillance Administrator in the course of its investigation into Enmax's importation of electricity in September, 2005. Justice Macleod directed that Enmax answer all of the questions in dispute. He noted the absence of any expectation of privacy of those participating in the electricity market, the expertise of the Market Surveillance Administrator and that, as a consequence, he "would be slow to second guess its views on what is important or relevant to its mandate... this is, after all, an investigation." Justice Macleod concluded that the questions were relevant and likely to generate information helpful to the investigation.

This decision is to be commended. Given the difficulties in regulating the market for electricity generation, and ensuring it is competitive rather than simply providing participants with the opportunity to abuse market power, it is crucial that the investigatory powers of the Market Surveillance Administrator be vigorous and not unnecessarily curtailed. Participants in the generation market need to be willing to be transparent in their dealings, and to account to the Market Surveillance Administrator for decisions that raise concerns, if there is any hope for the generation market to function both fairly and effectively.

Justice Macleod is also to be commended for requiring that his reasons for decision be made public. He is correct that matters related to the functioning of the electricity market, and the regulatory authority and investigative powers of the Market Surveillance Administrator, are matters of public interest and importance. As stated by Justice Macleod, "the public is entitled to scrutinize the debates between the MSA and Enmax as to whether or not the extent of this investigation is in the public interest and as to whether the respondents have had the benefit of due process."