May 21, 2014

Round One of the Electricity Competition Playoffs Goes to the Market Surveillance Administrator: MSA 1; TAU 0. TAU Cannot Hijack the MSA's Own Proceeding

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Decision commented on: AUC Decision 2014-135, TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly; Complaints about the conduct of the Market Surveillance Administrator, May 15, 2014

Is it possible to ensure a competitive electricity market in Alberta? This is I think the broad issue that underlies the current proceedings before the Alberta Utilities Commission (AUC) involving the Market Surveillance Administrator (MSA) and TransAlta (TAU). Several months ago the MSA filed with the AUC notice of a request to initiate a proceeding against TAU and two of its current or former employees, Kaiser and Connelly (K & C). In brief the MSA is charging these parties with unlawfully manipulating the price of electricity as set by Alberta's power pool to the advantage of TAU in breach of the *Electric Utilities Act*, SA 2003, c E-5.1 and the *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009. The MSA seeks to prosecute those charges before the AUC as contemplated by the *Alberta Utilities Commission Act*, SA 2007, c A-37.2 (*AUCA*). Days before the MSA took this action TAU, K and C seized the moment and filed their own complaints with the AUC under s.58 of the *AUCA* alleging that the MSA was abusing its position. To be clear, TAU and K and C knew what was in store for them. The MSA had informed TAU three years ago (March 2011) that it was commencing an investigation and it has spent the time in between diligently collecting information from TAU and building its case. The MSA provided TAU with the draft case against it in November 2013. It is fairly evident therefore that the preemptive filing by TAU, K and C was a strategic effort to seize the initiative, put the MSA on the defensive, and perhaps seek to have the complaints against the MSA heard before the MSA's own case.

And that was the specific issue that was at stake in this set of preliminary proceedings: could TAU, K & C hijack the MSA's application? The AUC, in my view correctly, has concluded that it cannot.

The legal issue

The legal issue at stake in this preliminary proceeding turns on the proper interpretation of s.58 of the *AUCA*. That section provides as follows:

> 58(1) Any person may make a written complaint to the Commission about the conduct of the Market Surveillance Administrator.
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> (2) The Commission
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> > (a) shall dismiss the complaint if the Commission is satisfied that it relates to a matter the substance of which is before or has been dealt with by the Commission or any other body, or

(b) may dismiss the complaint if the Commission is satisfied that the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation or a hearing.

(3) The Commission may, in considering a complaint, do one or more of the following:

(a) dismiss all or part of the complaint;

(b) direct the Market Surveillance Administrator to change its conduct in relation to a matter that is the subject of the complaint;

(c) direct the Market Surveillance Administrator to refrain from the conduct that is the subject of the complaint.

(4) A decision of the Commission under subsection (2) or (3) is final and may not be appealed under section 29.

The focus here was on the mandatorily framed s 58(2)(a). That provision and the facts of these proceedings gave rise to two principal points of statutory interpretation: (1) Is the relevant time for applying this paragraph the time that the written complaints were filed (at which time there was no MSA proceeding) or when the matter came to be determined by the AUC? (2) Were the complaints and the MSA's own application "related"?

In answering these two questions the AUC was careful to examine the ordinary and grammatical meaning of the relevant provisions and to consider them within their entire statutory context and legislative intent noting as well that it should avoid adopting an interpretation which led to an absurdity of inconsistency. The AUC's concluding observations on statutory context and legislative intent are worth quoting at length:

> [66] When read as a whole, the Commission finds that the statutory scheme makes clear the fundamental importance of establishing and maintaining an electricity market that is fair, efficient and openly competitive. The scheme establishes the MSA as the market watchdog with one of its primary goals being the protection of the fair, efficient and openly competitive operation of the electricity market. The MSA is given broad powers to carry out this role. The Commission considers that those broad powers reflect the fundamental importance of preserving or maintaining a fair, efficient and openly competitive market.
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> [67] The Commission notes that the MSA's exercise of its authority over market participants is not unlimited and is subject to a number of checks. First, it has a statutory duty to act fairly, responsibly and in the public interest. Second, it is required to consult with market participants with respect to its investigation procedures and any guidelines it makes under Section 39(4) of the *Alberta Utilities Commission Act*. It cannot change existing procedures or guidelines without consultation. Third, the MSA concerns about the conduct of market participants are subject to the Commission's oversight. Fourth, a person who has a concern about the conduct of the MSA may make a complaint about that conduct.
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> [68] The statutory scheme places the Commission in a supervisory role over the activities and conduct of the MSA. The Commission not only rules on matters brought before it by the MSA but also rules on complaints relating to the conduct of the MSA. Importantly, neither the MSA nor a complainant is entitled to appeal a decision of the Commission on a complaint.

As to the purpose of s 58(2)(a), the AUC emphasized that the paragraph is not concerned with the merits of the complaints (that is the office of the discretionary paragraph (b)), instead, the purpose of paragraph (a)

> [86]… is to address the conflicts that could arise in circumstances where a complaint and a matter brought forward by the MSA are premised on common issues. Specifically, the Commission finds that subsection 58(2)(a) embodies a number of common law doctrines designed to ensure the integrity, fairness and finality of the decision making process. Those doctrines include: abuse of process, collateral attack, issue estoppel, *res judicata* and *lis pendens*.

This did not mean however that the statutory provision imported all of the technical rules associated with these common law doctrines. The AUC expressed the relevant test as follows (at para 96): "the Commission finds that subsection 58(2)(a) requires it to dismiss a complaint about the conduct of the MSA if it is satisfied that there is a logical or reasonable connection between the complaint and a matter the essence or essential quality of which is, or has been before the Commission." As to the question of whether or not the provision was operable even in the situation where the complainants filed first the Commission ruled as follows:

> [94] Because the purpose of subsection 58(2)(a) is to safeguard the electricity market while promoting a timely, fair, efficient, and final decision-making process, the Commission finds that an overly technical or literal reading of that subsection that precludes its operation when a complaint is made before the MSA initiates proceedings against the complainant would be contrary to Section 10 of the *Interpretation Act* and produce an absurd result. This is especially so given the MSA's practice of providing its facts and findings to a market participant prior to filing its notice commencing a proceeding against that market participant.
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> [95] Accordingly, the Commission finds that to achieve the purposes described above it may dismiss a complaint under subsection 58(2)(a), even if the complaint is filed before the MSA files a notice under Section 51 of the *Alberta Utilities Commission Act*.

This did not deprive the complainants of their day in court but it did (at para 91) mean that "the complainant's 'day in court' occurs within the context of the MSA initiated proceeding." Furthermore (at para 93) "in the event that a matter raised in a complaint dismissed under subsection 58(2)(e) is ultimately not considered in the context of the associated MSA proceeding, a complainant may not be precluded from re-filing the complaint as it relates to the unaddressed matter."

Applying the "logical or reasonable connection" test to the substance of the MSA charges and the three complaints the Commission had little difficulty in concluding that they covered common ground (at paras 107 – 116).

The decision is not appealable (see s 58(4)) and it is therefore time now to get on with the merits of the MSA's charges - supported as they are by what appear to be a number of "smoking gun" and self-congratulatory internal email exchanges within TAU (for details see the MSA's Application to the AUC filed on March 21, 2014 available on the AUC's website under File 0630). Any further delays will only serve to question the efficacy the MSA's supervision of Alberta's electricity market.