

**M. Neil McCrank, O.C., P. Eng**  
Chairman

September 19, 2006

Mr. Bryan Duguid  
Blake, Cassels & Graydon LLP  
Suite 3500, 855 – 2<sup>nd</sup> Street S.W.  
Calgary, Alberta  
T2P 4J8

Mr. Martin Merritt  
Market Surveillance Administrator  
Suite 500, 400 – 5<sup>th</sup> Avenue S.W.  
Calgary, Alberta  
T2P 0L6

Dear Messrs. Duguid and Merritt:

**Re: Complaint Pursuant to Section 73 of the Electric Utilities Act**

Attached, please find my decision, as Chair of the Alberta Energy and Utilities Board, with respect to the complaint filed by TransAlta Corporation on November 30, 2005.

Yours sincerely,



Neil McCrank

September 19, 2006

Blake, Cassels & Graydon LLP  
Attention: Mr. Bryan Duguid

Market Surveillance Administrator  
Attention: Martin Merritt

Dear Sirs:

**Re: Decision of the Chair of the Alberta Energy and Utilities Board  
In respect of a Complaint by TransAlta Corporation Pursuant to Section 73 of the  
Electric Utilities Act**

**1. Introduction**

Section 73<sup>1</sup> of the *Electric Utilities Act*, S.A. 2003 c. E-5.1 (the Act), allows any person to file a complaint with the Chair of the Alberta Energy and Utilities Board (Chair) with respect to the conduct of the Market Surveillance Administrator (MSA). The Chair may refuse a complaint in certain circumstances or proceed to consider a complaint.

On November 30, 2005 TransAlta Corporation (TransAlta) submitted to the Chair a Complaint (the Complaint) pursuant to Section 73 of the Act.

The MSA responded to the complaint by letter dated December 14, 2005 (the MSA Submission).

By letter dated January 5, 2006 counsel on behalf of TransAlta requested the opportunity to make a reply submission responding to the MSA Submission.

In my letter dated February 1, 2006 granting TransAlta the opportunity to respond to the MSA Submission, I noted that the Act does not specify a particular process with respect to the adjudication of a complaint and therefore the Chair has the ability to determine a process which will be fair and transparent for both a complainant and the MSA.

TransAlta responded to the MSA Submission on February 17, 2006 (the TransAlta Reply).

I believe that I have the material information required to make a decision with respect to the Complaint and am satisfied that both TransAlta and the MSA have had the opportunity to fully present their respective positions.

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<sup>1</sup> Section 73 of the Act is attached as Appendix 1 to this Decision

## **2. The Complaint**

### **2.1 The First Complaint**

TransAlta asserts that by publishing the “TransAlta Complaint: Preliminary Assessment Pertaining to the December 1, 2004 Notice of Outage Disclosure” (the Preliminary Assessment Report), and by disclosing TransAlta’s confidential information in the Preliminary Assessment Report, that the MSA exceeded its statutory authority, and violated its enabling statute, related regulations and its own guidelines, (the First Complaint).

With respect to the First Complaint TransAlta seeks the following relief from the Chair:

1. Declarations that the MSA exceeded its statutory authority and breached the Act and related regulations by:
  - a. publishing the Preliminary Assessment Report and by disclosing TransAlta’s confidential information in the Preliminary Assessment Report; and
  - b. issuing those portions of the Investigation Guidelines that permit the issuance of reports or to publish information outside of reports specifically contemplated in the Act.
2. Directions to the MSA, requiring it to:
  - a. refrain from publishing any preliminary assessment reports or any other reports other than reports specifically contemplated in the Act;
  - b. refrain from publishing reports that disclose confidential information; and
  - c. comply with the requirement in Section 50 of the Act to carry out its mandate in a fair and responsible manner.

### **2.2 The Second Complaint**

TransAlta asserts that the Preliminary Assessment Report is inconsistent and contrary to:

- a. The “fair, efficient and openly competitive operation of” the electricity market in Alberta;
- b. The Act and the mandate of the MSA pursuant to the Act; and
- c. The trading practices guidelines (the TPG) issued by the MSA on February 18, 2004.

In particular, the Preliminary Assessment Report expressly purports to authorize the power purchase arrangement (PPA) buyers (PPA Buyers) to withhold outage information from PPA owners (PPA Owners) and the balance of the market for a reasonable amount of time (30 minutes more or less) for the express purpose of allowing, the PPA Buyers:

- a. to process the outage information;
  - b. to consider the impact of the outage on their business operations;
- and

- c. to make and formulate business decisions and strategies concerning the impact of the information on their trading and risk management activities,  
(the Second Complaint).

With respect to the Second Complaint TransAlta requests a declaration from the Chair that PPA Buyers must, notwithstanding the Preliminary Assessment Report, disclose outage information to the ISO “as soon as possible” after it is received from the PPA Owner.

### **3. Background to the Complaint**

On February 18, 2004 the MSA issued the TPG. This was followed by the issuance of an interim outage information disclosure procedure on March 2, 2004 which was replaced on June 28, 2004 by the outage information disclosure procedure (the IDP).

TransAlta alerted the MSA on several occasions to concerns it had with the TPG and the IDP insofar as they required the PPA Owners to rely on PPA Buyers for notification regarding the communication of outage information to the ISO which would be considered to be disclosure to the public. In TransAlta’s view this created the potential to “freeze TransAlta out of the market by delaying notification to TransAlta until well after outage information had been received, and the ISO had been notified.”<sup>2</sup>

On December 1, 2004 the MSA issued a Notice to Market Participants with respect to disclosure requirements of PPA Buyers. The Notice sanctioned a practice of PPA Buyers providing PPA Owners with outage disclosure at the same time that it is communicated to the Independent System Operator (ISO).

On December 9, 2004 TransAlta advised the MSA that the processes outlined in the December 1, 2004 Notice were insufficient to address TransAlta’s concerns with respect to the timely disclosure of outage information by PPA Buyers.

On May 9, 2005 TransAlta again asserted its complaints and confirmed that unless these matters were addressed that there could be significant financial harm to PPA owners. (the TransAlta - MSA Complaint).

On May 11, 2005, the MSA responded to the TransAlta – MSA Complaint and indicated that it would conduct a preliminary assessment into the matter.

On October 17, 2005 the MSA provided TransAlta with a copy of the Preliminary Assessment Report into the TransAlta – MSA Complaint and indicated that it was preparing to publish the report on October 20, 2005. The MSA also indicated that it was prepared to meet with TransAlta to discuss any questions or concerns that TransAlta might have with the report.

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<sup>2</sup> Complaint pages 4 and 5

TransAlta responded by letter of October 20, 2005 asking the MSA to reconsider issuing the Preliminary Assessment Report and indicating that:

The original complaint was made almost half a year ago and this is the first information we have received regarding the complaint since that time. We [have] just begun to analyze the report but already find a number of the conclusions and the publishing of this report troublesome. TransAlta does not consent to the Preliminary Assessment being published or communicated to other parties.

The Preliminary Assessment Report was published on the MSA's website on October 21, 2005.

#### **4. Initial Determination**

Pursuant to Section 73, the Chair has authority to "refuse the complaint or to consider the complaint". The Chair may dismiss the complaint if he is "satisfied that the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation".

As an initial consideration the Chair must determine if either the First Complaint or the Second Complaint appears on its face to be frivolous, vexatious or trivial. The MSA has not argued and I do not find either complaint to be frivolous, vexatious or trivial and accordingly, the Chair concludes that both the First Complaint and the Second Complaint merit further examination.

In the event the Chair does not dismiss a complaint on the basis that it is frivolous, vexatious or trivial, the options available to the Chair include, but are not limited to, referring parties to a dispute resolution process. Should the Chair not consider dispute resolution to be appropriate, Chair has authority to consider and decide the complaint.

The parties appear to have been engaged on the disclosure requirements related to outages for some time. It was the inability of the parties to agree on this issue that resulted in TransAlta filing the TransAlta – MSA Complaint with the MSA. In the circumstances, it is evident that neither the First Complaint nor the Second Complaint is likely to be resolved through a dispute resolution process. Accordingly, I will proceed to consider the complaints.

#### **5. The First Complaint**

##### ***5.1 The TransAlta Position***

TransAlta suggests that the MSA has acted outside of its jurisdiction by publicly releasing reports like the Preliminary Assessment Report. TransAlta points to section 49(1) of the Act which specifies that the mandate of the MSA is to carry out surveillance and investigation in respect of electricity. Section 52(1)(b) of the Act requires the MSA to investigate complaints unless the complaint is frivolous, vexatious or trivial or otherwise does not merit investigation. Section 52(2) requires the MSA to notify the complainant of the results of any investigation. TransAlta argues that these provisions do

not provide the MSA with the authority to publicly publish the results of its investigation into a complaint.

TransAlta argues that the end result of the investigative function of the MSA should either be a dismissal of the complaint or a request to the Chair to appoint a tribunal to make a determination in respect of the matter investigated. Accordingly, the MSA does not have the ability to report publicly on the matter being investigated or to release confidential information.

TransAlta further argues that the MSA acted in direct contradiction to statutory requirements when it disclosed confidential information supplied by TransAlta. Section 5 of the *Market Surveillance Regulation* Article 24 166/2003 requires the MSA to keep confidential any record obtained by the MSA in the course of its mandate.

Finally, TransAlta argues that the MSA violated its own Investigative Process and Assessment Guidelines dated January 26, 2004 (the Investigation Guidelines) which provides in Part 2.2 for the preparation of a preliminary assessment for review by MSA management which would be used by management in determining if an investigation of a complaint is warranted.

With respect to the process followed by the MSA in circulating and then publishing, the Preliminary Assessment Report, TransAlta acknowledged that the MSA transmittal received on October 17, 2005 did indicate that the MSA was prepared to meet to discuss the report, however the time frame was insufficient for TransAlta to “complete its analysis of the report which would be prudent before meeting with the MSA”.<sup>3</sup> In these circumstances TransAlta advised the MSA in writing on October 20, 2005 that it had several initial concerns with the report, asked the MSA to reconsider issuing the report and advised the MSA that it did not consent to the release of the report. The TransAlta letter closed by stating: “If you have any questions or comments please contact me...”. The Preliminary Assessment Report was published the next day. TransAlta remarked upon the MSA’s actions in the following words:

...after developing the Preliminary Assessment Report for more than five months, the MSA provided TransAlta with two business days to respond to the draft report of 22 pages in length. When TransAlta did manage to conduct an initial review of the report and then respond within that extremely tight timeframe by requesting the MSA to reconsider publishing the report, the MSA did so immediately nonetheless...Much of the damage resulting from the publication of the Preliminary Assessment Report occurred as soon as the MSA published it, and cannot be remedied after the fact. Had the MSA acted in a fair, responsible, and procedurally appropriate manner, TransAlta would have had the opportunity to develop and voice its concerns in more detail. ...These circumstances exemplify

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<sup>3</sup> TransAlta Reply page 5.

the manner in which the MSA generally has been purporting to carry out its mandate under the Act ...<sup>4</sup>

TransAlta commented further on this issue in the TransAlta Reply:

In this respect, having regard to the fact that Section 73 applies to complaints about the “conduct” of the MSA which includes “omissions”, the lack of response from the MSA to TransAlta’s October 20, 2005 letter evidences further support for the authority of the Chair to consider and determine the Complaint.”<sup>5</sup>

## 5.2 *The MSA Position*

The MSA responded to the First Complaint by suggesting that the Chair lacked the authority under Section 73 of the Act to decide matters of MSA jurisdiction. The First Complaint alleged that the MSA had exceeded its authority in publishing the Preliminary Assessment Report and in publishing TransAlta confidential information. At page 1 of the MSA Submission the MSA states:

...the s. 73 complaint mechanism is not the means through which issues of *authority or jurisdiction* are to be resolved. With all due respect, such matters are properly left to the courts, to the legislature, and possibly to the tribunal established under Part 3 of the Act.

The MSA argued that Section 73 is designed for disputes regarding the conduct of the MSA, and does not empower the Chair to make a determination with respect to whether the MSA acted within or outside of its jurisdiction with respect to any particular matter.

The term conduct is define in s. 1(1)(f) of the Act to include acts and omissions. In relation to s. 73, we respectively submit that *conduct* means the manner in which the MSA carries out its mandate. The standard of conduct is set in s. 50 of the Act, which requires the MSA to carry out its mandate in a fair and responsible manner.<sup>6</sup>

With respect to the MSA’s conduct, the MSA submitted that it exercised its authority and jurisdiction in a fair and reasonable manner as is required by Section 50 of the Act. The MSA indicated that during the five month period between the filing of the TransAlta – MSA Complaint with the MSA on May 9, 2005 and the issuance of the Preliminary Assessment Report on October 21, 2005:

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<sup>4</sup> The Complaint page 15.

<sup>5</sup> TransAlta Reply page 6.

<sup>6</sup> MSA Submission page 3.

...there were several communications to TransAlta initiated by the MSA, and certainly also ample opportunity for TransAlta to make additional inquiries of the MSA.<sup>7</sup>

With respect to the process of providing the Preliminary Assessment Report to TransAlta a few days before it was published the MSA stated:

TransAlta's letter dwells on the fact that it was given only a few days to digest the *Preliminary Assessment Report* before its publication. At its discretion, the MSA will share advance copies of its reporting with affected parties, both as a courtesy and for the purpose of catching any factual errors. The MSA has found that a few days is sufficient for those purposes, and has never previously had a party complain that such timing was inadequate. The practice of the MSA is to take reasonable steps to catch and correct any factual errors prior to publication, and thus the MSA will delay publication if necessary.<sup>8</sup>

The MSA further submitted that it took steps to ensure that the confidential information received from TransAlta and others was treated appropriately and that the Preliminary Assessment Report was released in the normal course following an extensive review of the TransAlta complaint.

As is its normal practice, the MSA gave due consideration to the impacts of the release of the Report, and worked to ensure that the benefits of the reporting would not be undermined by any harmful impact. It is important to note that while the analysis described in the Report was based upon information obtained in part from TransAlta and in part from other parties, the Report contained only summaries of aggregated information. Thus, confidentiality of specific information was maintained.<sup>9</sup>

While the MSA acknowledged that it was required to be careful in its handling of confidential information it also argued that it had the ability to use such information without the consent of the provider for the purposes of carrying out its mandate if necessary.

In addition to its argument that the Chair could not determine issues related to the statutory authority of the MSA and that the Chair's review must be limited to questions of "conduct", the MSA asserted, that even if the Chair did have such jurisdiction, that the MSA had acted within its statutory powers in publishing the Preliminary Assessment Report.

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<sup>7</sup> MSA Submission page 4.

<sup>8</sup> MSA Submission page 5.

<sup>9</sup> MSA Submission page 6.



The MSA has a need to publish information in relation to its mandate, and is given the authority to do so by the Act and related regulations. ...TransAlta is therefore in error when arguing that the MSA exceeded its statutory jurisdiction by publishing the materials at issue.<sup>10</sup>

The MSA further noted that the relationship between PPA Owners and PPA Buyers and their conduct is clearly within its mandate under Section 49(2)(e) and (f) of the Act. Accordingly, the MSA argued, that it has the authority to publish materials related to that relationship and to the conduct of PPA Owners and PPA Buyers.

The MSA also notes that the Preliminary Assessment Report is in part a follow-up to earlier public communications by the MSA including the December 1, 2004 letter issued by the MSA which dealt specifically with the need for the PPA Buyer to communicate outage information to the PPA Owner concurrently with its notification to the ISO. The December 1, 2004 letter indicated that the MSA would conduct a preliminary assessment upon receipt of a complaint from a PPA Owner with respect to the timeliness of outage communications by PPA Buyers. The Preliminary Assessment Report was a combination of a response to the particular complaint by TransAlta and further guidance with respect to the December 1, 2004 letter. Accordingly, the Preliminary Assessment Report went beyond what was contemplated by the Investigation Guidelines, namely a recommendation on whether or not to proceed to an informal or formal investigation of the TransAlta – MSA Complaint.

However, as noted at Page 2 of the Report, the scope of the *Preliminary Assessment Report* dated 21 October 2005 went beyond merely answering whether there is a basis for proceeding to a full investigation; the Report also addresses three other related questions related to TransAlta's complaint. This is an important point. The MSA considered it appropriate to take the opportunity in its Report to provide additional guidance to market participants around the *Trading Practices Guideline/Information Disclosure Procedure (TPG/IDP)* finalized and published in 2004 with the assistance of various stakeholders, including TransAlta. The MSA is authorized, and arguably required, to provide such guidance.<sup>11</sup>

The MSA noted that page 3 of the Investigation Guidelines indicates that the MSA has the discretion to make revisions to the investigative procedures in order to accommodate unique circumstances. The MSA considered the additional guidance contained within the Preliminary Assessment Report is in keeping with the unique nature of the circumstances of the outage notification issue and within the discretion permitted by the Investigation Guidelines. Further, the additional guidance contained within the Preliminary Assessment Report falls squarely within the authority granted to the MSA under Section 49(4) of the Act to establish public guidelines to further the fair, efficient and openly competitive operation of the market

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<sup>10</sup> MSA Submission page 2.

<sup>11</sup> MSA Submission pages 3 and 4.

### 5.3 *Views of the Chair*

The First Complaint is refused in part. The Chair agrees with the position of the MSA that the Chair lacks the authority under Section 73 of the Act to deal with matters relating to the jurisdiction of the MSA. I find that Section 73 does not empower the Chair to make determinations with respect to the scope of the MSA's jurisdiction or authority. The Chair does not have the statutory authority to adjudicate complaints that allege the MSA has exceeded its jurisdiction in taking certain actions or in setting certain policies or guidelines. Accordingly, the Chair is not able to adjudicate the First Complaint to the extent that it alleges that the MSA undertook certain actions, like the publishing the Preliminary Assessment Report or the disclosure of confidential information, and by doing so exceeded its statutory jurisdiction and breached the Act.

Section 73 of the Act authorizes the Chair to consider complaints with respect to the "conduct" of the MSA. Conduct is defined by Section 1(1)(f) of the Act to include acts and omissions. I find that the authority of the Chair in considering a complaint under Section 73 is limited to a consideration of:

- the fairness of the processes and procedures employed by the MSA relating to complaints;
- the application of those processes and procedures to a particular complaint in order to assess the degree to which the complainant was accorded fair treatment from the MSA in the circumstances of the matter complained of; and
- whether or not the interactions of the MSA with the complainant were consistent with the obligation of the MSA under Section 50 of the Act to carry out its mandate in a fair and responsible manner.

Among the items of relief requested in the First Complaint, TransAlta requests a direction to the MSA to comply with the requirement in Section 50 to carry out its mandate in a fair and responsible manner. Although I have determined that the Chair does not have the authority to determine if the MSA acted outside of its statutory authority in publishing the Preliminary Assessment Report and in disclosing TransAlta confidential information, I find that the Chair does have the authority under Section 73 to consider this request insofar as it relates to the conduct of the MSA

As noted above, in order to determine if the conduct of the MSA was appropriate, I must evaluate if TransAlta was treated fairly in the circumstances. With respect to a complaint filed by any market participant with the MSA, indicia of fair treatment by the MSA would include:

- public notice of the MSA rules and procedures for the filing and processing of a complaint;
- the application of the MSA rules and procedures to the complaint in a manner consistent with those rules and procedures allowing for modifications required by any unique circumstances of the complaint; and
- the extension of appropriate due process in the handling of the complaint; including an opportunity for the complainant to communicate its position to the MSA, an opportunity to respond to questions or contrary evidence before the MSA related to the complaint, consideration of the complaint in a reasonably timely manner, and notification of a decision with respect to the complaint and the reasons therefore.

There has been no assertion by TransAlta that the rules applicable to a filing of a complaint were not known. The Investigation Guidelines which apply to the processing of complaints had also been made public. TransAlta points out however, that the Investigation Guidelines contemplate the preliminary assessment as an internal tool whose purpose is to assist MSA management in making the decision as to whether or not to pursue an investigation of a complaint. I agree with this characterization. It does not appear that the Investigation Guidelines contemplate the publication of preliminary assessments. They also do not stipulate the publication of policy direction or guidelines for market participants as an objective. The publication of the Preliminary Assessment Report containing the additional guidance to market participants with respect to the communication of outage information, therefore, goes beyond what would ordinarily be anticipated. I do not find persuasive the explanation provided by the MSA with respect to the reasons why the Preliminary Assessment Report was expanded from a document dealing with the TransAlta – MSA Complaint to include policy and guidelines for market participants on the disclosure of outage information in general.

Fairness dictates that complainants know the manner in which their complaint will be dealt with. They also have the legitimate expectation that their complaint will be handled in a manner consistent with the established process, modified where necessary to fit the circumstances.

Although the MSA's actions in issuing the Preliminary Assessment Report were undoubtedly taken in good faith in performance of its mandate under the Act, fairness suggests that the Investigation Guidelines be amended to better inform market participants of the possible outcomes of the complaint process. Accordingly, the MSA is directed to take steps to clarify the use of preliminary assessments in the Investigation Guidelines and to separate the documentation notifying a complainant of the results of an investigation into a specific complaint from documents that provide broader based views, guidelines or policy matters. The Investigation Guidelines should also be clarified with respect to the MSA's position with respect to the potential publication of information related to a filed complaint and information received from a complainant or other market participant during the course of a complaint. If the investigation of a complaint leads to broader policy issues, the MSA is free to deal with these broader issues through a

separate guideline development process. However, if the MSA intends to continue to use the Investigative Guidelines processes to develop broader policies and guidelines, this should be made clear.

Additionally, I find the MSA's conduct, though undertaken in good faith, inappropriate with respect to the process followed by the MSA in circulating and then publishing the Preliminary Assessment Report. Having extended TransAlta the opportunity to meet with the MSA and to provide comments on the Preliminary Assessment Report prior to it being published, and having been advised that TransAlta had significant concerns with the document, it was incumbent on the MSA to allow sufficient time for TransAlta to adequately prepare for and meet with the MSA prior to its publication. I do not find the MSA's explanation of its sharing practices "with affected parties, both as a courtesy and for the purpose of catching any factual errors" to be sufficient. Nor was it made clear to TransAlta in the MSA's correspondence that the Preliminary Assessment Report was being provided to TransAlta simply for the "purpose of catching any factual errors".

Although I would encourage the MSA to meet with TransAlta to explore the concerns that TransAlta has with the Preliminary Assessment Report, which can not help but to advance the understanding of both parties, there seems little point in directing a new process in respect of the Complaint at this time. I note TransAlta's comment at page 15 of the Complaint that: "Much of the damage resulting from the publication of the Preliminary Assessment Report occurred as soon as the MSA published it, and cannot be remedied after the fact." Little would likely be gained in directing the MSA to retract the Preliminary Assessment Report, meet with TransAlta with respect to its concerns with the report, consider these concerns, separate out the Complaint matters from the policy and guidelines and handle each aspect accordingly.

I believe the implementation of improvements with respect to future complaints to be a more constructive approach. Therefore, the MSA is directed to clarify the Investigation Guidelines with respect to the involvement or lack of involvement of the complainant in the finalization of a preliminary assessment report and other documentation relating to the investigation of a complaint.

As discussed above, the Investigation Guidelines should also be clarified with respect to the use of the of preliminary assessments, the handling of confidential information and the degree to which parties other than the complainant will have access to such documentation. Once clarified, the MSA should not deviate from such procedures without due consideration for the process and fairness issues that may arise.

## **6. The Second Complaint**

### ***6.1 The TransAlta Position***

TransAlta argues that the MSA's position with respect to the disclosure of outage information allows PPA Buyers to "freeze out" the PPA Owner from the market place during the period of time it knows the information but has not yet informed the ISO (the

Holding Time). TransAlta argues that this is unfair, discriminatory and could lead to abuse as only one player in the market has the outage information which is contrary to the MSA's mandate to ensure a fair, efficient, and openly competitive market and could lead to financial disadvantage for PPA Owners.

## ***6.2 The MSA Position***

The MSA argued that Section 73 is designed for disputes regarding the conduct of the MSA, and does not empower the Chair to make a determination with respect to the appropriateness of the views or decisions of the MSA acting within its mandate.

The MSA contrasted the role and authority of the Chair under Section 73 of the Act with respect to complaints regarding the conduct of the MSA with the powers of the Alberta Energy and Utilities Board (Board) under Sections 25 and 26 with respect to complaints regarding the ISO. Under Section 25 any person may complain about an ISO rule, fee or order and the Board has the ability to confirm, change or revoke any such rule, fee or order. Section 26 allows the Board to investigate any complaint about the conduct of the ISO. The MSA makes the point that a comparison of sections 25 and 26 underscores the distinction made between powers relating to overturning decisions or views taken by the ISO and complaints about the conduct of the ISO. The Chair has not been given Section 25 type powers to change or revoke the views or decisions of the MSA.

## ***6.3 Views of the Chair***

In Section 5 above, I concluded that the Chair does not have the jurisdiction under Section 73 to determine if the MSA has acted outside of its statutory authority. I concluded that the Chair's powers are limited to a consideration of the conduct of the MSA. The Second Complaint requests the Chair to make a declaration that PPA Buyers must, notwithstanding the Preliminary Assessment Report, disclose outage information to the ISO "as soon as possible" after it is received from the PPA Owner. Such a declaration would require the Chair to overturn or modify the stated position and guidance of the MSA. Just as the Chair does not have the jurisdiction to determine if the MSA has acted outside of its statutory authority, I find that the Chair is not empowered under Section 73, to make determinations with respect to the substantive aspects of any guideline, decision, policy or view expressed by the MSA.

I note and agree with the comparison drawn by the MSA of the scope of powers provided to the Chair under Section 73 with respect to complaints concerning the MSA as contrasted to the scope of powers provided to the Board with respect to complaints concerning the ISO. Section 26 of the Act provides the Board with similar powers in dealing with complaints relating to the conduct of the ISO as are given to the Chair with respect to complaints concerning the conduct of the MSA under Section 73. Section 25 however, provides the Board with extensive, express powers to confirm, change or revoke any rule, fee or order of the ISO in adjudicating a complaint in respect of a rule,

fee or order. These powers have not been provided to the Chair in respect of directions, decisions, views or guidelines of the MSA.

The Chair agrees with the MSA that the Chair lacks the jurisdiction to amend, modify, revoke or overturn policy directions, guidelines, views or decisions of the MSA. Having determined that the Chair lacks jurisdiction to amend, modify, revoke or overturn policy directions, guidelines, views or decisions of the MSA, I must refuse the Second Complaint without making a finding in respect of the matters raised therein.

**7. Posting and Implementation of Decision**

The MSA is directed to post this decision on its website with 20 days of the date hereof. The MSA is further directed to amend the Investigation Guidelines in the manner provided for herein and to publish the amendments on its website within 60 days of the date hereof.



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Neil McCrank  
Chairman, Alberta Energy and Utilities Board

## Appendix 1

### **Complaints about MSA**

**73(1)** Any person may make a written complaint to the chair of the Board about the conduct of the Market Surveillance Administrator.

**(2)** The chair of the Board

- (a) must refuse the complaint if the chair is satisfied that it deals with a matter the substance of which is before or has been dealt with by a tribunal, or
- (b) may refuse the complaint if the chair is satisfied that the complaint is frivolous, vexatious or trivial or otherwise does not warrant an investigation.

**(3)** A decision by the chair of the Board to refuse the complaint or to consider the complaint is final and shall not be questioned, reviewed or restrained by any proceeding in the nature of an application for judicial review or otherwise in any court.

**(4)** The person making the complaint and the Market Surveillance Administrator must, if the chair of the Board so requires, participate in a dispute resolution process selected by the chair of the Board, which may include arbitration under the *Arbitration Act*.