

GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser, JAMS

GCR 
GLOBAL COMPETITION REVIEW

The Guide to Energy Market Manipulation

Editor

Gordon Kaiser

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2018
For further information please contact Kieran.Hansen@lbresearch.com

GCR |
GLOBAL COMPETITION REVIEW

Published in the United Kingdom
by Global Competition Review

Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK
© 2018 Law Business Research Ltd
www.globalcompetitionreview.com

First edition

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information in this is accurate as of February 2018, be advised this is a developing area. Appendix 1 is a reproduction of a US federal document in the public domain to which Law Business Research does not purport to assert copyright.

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-78915-092-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following contributors' for their learned assistance throughout the preparation of this book:

AKIN GUMP STRAUSS HAUER & FELD LLP

ALBERTA UTILITIES COMMISSION

ALLEN & OVERY LLP

AUSTRALIAN ENERGY REGULATOR

BIRD & BIRD LLP

BLAKE, CASSELS & GRAYDON LLP

BORDEN LADNER GERVAIS LLP

CHARLES RIVER ASSOCIATES

COMPETITION AND MARKETS AUTHORITY

JAMS

MCCARTHY TÉTRAULT LLP

MORRISON & FOERSTER LLP

NEXTERA ENERGY, INC

OFGEM

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

QUEEN'S UNIVERSITY

ST. LAWRENCE BARRISTERS LLP

STIKEMAN ELLIOTT LLP

Contents

Energy Market Manipulation: A New Regulatory Regime 1
Gordon E Kaiser

Foreword.....11
Joseph T Kelliher

Part I: Legislation & Jurisprudence

1 Perspectives on FERC’s Enforcement Programme as it Relates to Energy
Market Manipulation..... 15
Robert S Fleishman and Paul C Varnado

2 Commodity Futures Trading Commission Enforcement..... 26
Anthony M Mansfield

3 Compliance and Enforcement in the Ontario Electricity Sector..... 34
Glenn Zacher

4 Investigating Energy Market Activity in Ontario 49
George Vegh

5 Energy Market Manipulation in Alberta..... 58
Randall W Block QC, John D Blair QC and Laura M Poppel

6 REMIT Energy Market Manipulation..... 72
Peter Willis

Contents

7	Testing Energy Market Manipulation in Great Britain.....	80
	<i>James Jamieson and Nenad Njegovan</i>	

8	Australia	87
	<i>Peter Adams, Kate Murphy and Jeremy Llewellyn</i>	

Part II: Enforcement Practices

9	FERC Practice and Procedure.....	99
	<i>David A Applebaum, Todd L Brecher and J Porter Wiseman</i>	

10	Energy Market Manipulation in the EU: Practice and Procedure	113
	<i>Mark J Mills</i>	

11	Fines, Sanctions and Settlements	122
	<i>JP Mousseau</i>	

12	Private Actions in the United States, Canada and Europe	131
	<i>Randall Hofley, Justine Johnston and Joseph J Bial</i>	

Part III: The Regulatory Process

13	Administrative Law Principles.....	147
	<i>David J Mullan</i>	

14	The Use of Expert Evidence	161
	<i>M Philip Tunley</i>	

15	Economic Evidence of Market Power and Market Manipulation in Energy Markets	178
	<i>Robin Cohen, David Hunger, Brian Rivard and Christopher Russo</i>	

	Staff White Paper on Anti-Market Manipulation Enforcement Efforts: Ten Years After EPAAct 2005, November 2016	193
--	--	-----

	Table of cases	225
--	----------------------	-----

	Reports and guidelines	227
--	------------------------------	-----

	About the Authors	229
--	-------------------------	-----

	Contributing Law Firms' Contact Details.....	241
--	--	-----

Part I

Legislation & Jurisprudence

5

Energy Market Manipulation in Alberta

Randall W Block QC, John D Blair QC and Laura M Poppel¹

Introduction

The purpose of this chapter is to describe the range of market misconduct that may be investigated and prosecuted by the Alberta Market Surveillance Administrator (MSA) and to outline the legislation and case law that governs investigations and prosecutions of market misconduct in Alberta. In doing so, this chapter will refer extensively to the seminal case in Alberta regarding market manipulation where the Alberta Utilities Commission (the Commission) interpreted and applied the legislative framework governing the Alberta electricity market.

The Alberta electricity market

In 1996, Alberta commenced the process of deregulating the electricity market for the generation of electric energy in the province of Alberta. The deregulation of electricity generation was intended to benefit Alberta consumers through lower electricity costs achieved through fair and open competition.

A critical component of the process of deregulation was addressing the market power of the three largest utility electric energy generators, which at the time controlled approximately 90 per cent of the province's generating units.² Part of the means chosen by the province of Alberta to address market power was through the development and approval of power purchase arrangements (PPAs).

1 Randall W Block, QC and John D Blair, QC are partners and Laura M Poppel is an associate at Borden Ladner Gervais LLP.

2 Alberta Utilities Commission Decision 3110-D01-2015, Phase 1 (27 July 2015) at Paragraph 43, online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2015/3110-D01-2015.pdf (AUC Decision 3110-D01-2015).

The PPAs were intended to increase the number of participants offering energy into the Power Pool, thus creating competition in the market. Instead of forcing the three largest utilities (the PPA owners) to sell their generating units, the government required them to sell the output from those units to other parties (the PPA buyers) through the PPAs. PPA buyers purchased the right to the majority of the output from the generating units and had the exclusive right to offer electricity into the Power Pool. In exchange, the PPA buyers were required to pay the PPA owners their fixed and variable generation costs and a return on investment.³ The PPAs were auctioned in 2000 and came into force on 1 January 2001.

Shortly thereafter in 2003 the statute governing the electricity market in force at the time was repealed and replaced in its entirety with the Electric Utilities Act⁴ (EUA). The EUA is not a provincial equivalent to the Canadian federal Competition Act.⁵ It governs a specific market, electricity, has its own specific words and a unique legislative history. Notably, the EUA was enacted during a time when the ENRON scandal was well known to the Alberta legislature.

The EUA imposes on all market participants⁶ the positive obligation to support the fair, efficient and openly competitive operation of the Alberta electricity market.⁷ This obligation is a unique and important feature of the Alberta market, but perfectly understandable when considered against the objective legislative intent in the enactment of the EUA: to implement an efficient deregulated electricity market based on fair and open competition and to ameliorate anticompetitive behaviour.⁸

Through the Fair, Efficient and Open Competition Regulation, Alta Reg 159/2009 (the FEOC Regulation), the legislature has provided guidance to Market Participants with respect to what is required of them under Section 6 of the EUA. Section 2 of the FEOC Regulation sets out an expansive but non-exhaustive list of specific types of conduct that breach Section 6. This conduct includes, among other behaviour, restricting or preventing competition or a competitive response (Section 2(h)) and manipulating market prices away from a competitive market outcome (Section 2(j)). Importantly, Section 6 imposes a positive and overarching standard on all market participants and conduct that fails to support a fair, efficient and openly competitive market is not limited to the enumerated conduct in Section 2 the FEOC Regulation. Accordingly, there can be a breach of Section 6 of the EUA without also finding a breach of Section 2 of the FEOC Regulation.

3 AUC Decision 3110-D01-2015, at Paragraph 43.

4 Electric Utilities Act, SA 2003, Chapter E-5.1 (EUA).

5 Competition Act, RSC, 1985, Chapter C-34.

6 Section 1(ee) of the EUA defines 'market participant' as 'any person that supplies, generates, transmits, distributes, trades, exchanges, purchases or sells electricity, electric energy, electricity services or ancillary services, or any broker, brokerage or forward exchange that trades or facilitates the trading of electricity, electric energy, electricity services or ancillary services.'

7 EUA, Section 6.

8 Decision 3110-D01-2015, at Paragraph 251; See also Alberta Utilities Commission Decision 2012-182, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corp. (3 July 2012) at Paragraph 18, online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2012/2012-182.pdf; Alberta Utilities Commission Decision 2010-548, Preferential Sharing of Records between TransAlta Corporation and Capital Power Generation Services Inc. (25 November 2010) at Paragraph 10, online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2010/2010-548.pdf.

Thus, the statutory scheme imposes a principle-based approach to regulation, as opposed to a rules-based approach. Overarching principles are established by the legislation and each and every market participant has the obligation to understand the obligations imposed and apply those overarching principles in their day-to-day conduct when participating in the Alberta electric energy industry.

There are three regulatory bodies that have distinct legislative roles and responsibilities with respect to operating, monitoring and regulating Alberta's electricity market to ensure that the fundamental goal of establishing a fair, efficient and openly competitive electricity market is achieved.

The Commission interprets and applies the law and acts as the adjudicator on all matters brought before it. In conducting hearings the Commission is bound by the rules of procedural fairness, but it is not bound by the rules of law concerning evidence applicable to judicial proceedings.⁹ Instead, the Commission governs its own process and has established its own rules of practice and procedure.¹⁰

The MSA polices the industry and is statutorily mandated to conduct surveillance of the Alberta electricity market, investigate contraventions of the legislation governing the electricity market and bring matters forward to the Commission for adjudication.¹¹

The Alberta Electric System Operator (AESO), among other duties, operates the Alberta Power Pool, which is Alberta's real-time electricity spot market. AESO rules require that generators must offer all available capacity to the Power Pool¹² and the EUA mandates that all electric energy entering or leaving the Alberta interconnected electric system (AIES) must flow through the Power Pool.¹³ Currently, the Alberta electricity market is 'energy only' in that generators only receive payments for electricity that is produced and supplied. In a capacity market, generators receive payments for generation that they have available to supply, even if the generation is not actually supplied. In operating the Power Pool, the AESO is statutorily required to promote the fair, efficient and openly competitive market for electricity.¹⁴

Aside from a price floor (C\$0/MWh) and a price cap (C\$999.99/MWh), the pool price the generators receive for dispatched electricity is solely determined by competitive market forces. The price of electricity in Alberta is set hourly. In real time, in each hour all offers to sell power are ranked from lowest to highest in offer price to form a 'merit order'. The lowest offer in the merit order is dispatched first and when demand rises, the offers higher up in the merit order are dispatched on an as-needed basis. On a minute-by-minute basis, a 'system marginal price' is set at the price of the last (highest) offer that is dispatched to serve the demand. The generators dispatched in each hour all receive the same pool price, which is the average of the 60 one-minute system marginal prices in each hour.

9 Alberta Utilities Commission Act, SA 2007, Chapter A-37.2 (AUCA), Section 20.

10 Alberta Utilities Commission Rule 001, Rules of Practice (March 24, 2017), online: www.auc.ab.ca/regulatory_documents/Consultations/Rule001.pdf (AUC Rule 001).

11 AUCA, Section 39.

12 Alberta Electric System Operator, ISO Rules, 9 January 2017, Rule 203, online: www.aeso.ca/rules-standards-and-tariff/iso-rules.

13 EUA, Section 18. This requirement is subject to certain exceptions as set forth in the regulations made under Sections 41, 99 and 142 of the EUA.

14 EUA, Sections 16, 17 and 18.

Given this structure, if generators offer too high, they may not be dispatched. Conversely, if all offers dispatched in a given hour are low, the generators forego profits they would have achieved if they had made offers higher, but still low enough to be dispatched.

Investigations by the MSA

As noted, the MSA's mandate includes investigating conduct that does not support the fair, efficient and openly competitive operation of the electricity market.¹⁵ The MSA may initiate investigations on its own initiative or on receiving a complaint or referral from any person, including the AESO or the Commission.¹⁶

In conducting its initial investigation, the MSA has considerable investigatory powers under the Alberta Utilities Commission Act (AUCA).¹⁷ For the purposes of carrying out investigations, Section 46 of the AUCA authorises the MSA to enter the premises of a market participant, make enquiries of employees and former employees of a market participant and require information to be provided under oath, request potentially relevant records and request access to a market participant's computer system.¹⁸

The MSA's investigatory powers are not unfettered and are subject to certain legislative checks. First, the AUCA requires that the MSA act honestly, fairly, responsibly, in good faith and in the public interest.¹⁹ Second, the MSA is obligated to publicise the procedures it uses in its interactions with market participants during investigations and if the MSA decides to materially change those procedures, the MSA must consult with market participants on the proposed changes.²⁰ Last, pursuant to Section 58 of the AUCA, any person may make a complaint to the Commission regarding the conduct of the MSA and the Commission has the power to dismiss all or part of the complaint, or direct the MSA to change or refrain from the conduct complained of.²¹ Accordingly, the Commission has oversight power respecting the MSA's conduct during its investigations.

Proceedings and hearings before the Commission

After conducting an investigation, if the MSA is satisfied that a person has contravened any of the enactments, rules or standards governing the Alberta electricity market or that a person has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, the MSA may give written notice to the Commission requesting a hearing or other proceeding.²²

The MSA may request various remedies that the Commission is authorised by the AUCA to grant, including administrative penalties.²³ Section 63 of the AUCA specifies

15 AUCA, Section 39(1)(b)(ii).

16 AUCA, Section 41; see also Alberta Utilities Commission Decision 2014-135, Complaints about the conduct of the Market Surveillance Administrator (15 May 2014) at Paragraph 54, online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2014/2014-135.pdf (AUC Decision 2014-135).

17 AUCA; AUC Decision 2014-135, at Paragraph 57.

18 AUCA, Section 46.

19 AUCA, Sections 40 and 34(7).

20 Market Surveillance Regulation, Alta Reg 266/2007, Section 7 (MSR Regulation).

21 AUCA, Section 58.

22 AUCA, Section 51(1).

23 AUCA, Section 56(4)(a).

that the Commission may impose an administrative penalty that requires the contravener to pay either or both of:

- a* an amount not exceeding C\$1 million for each day or part of a day on which the contravention occurs or continues; or
- b* a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention.²⁴

Accordingly, administrative penalty proceedings have the potential to result in the imposition of severe financial consequences. The AUCA prescribes that if a contravener is ordered to pay an administrative penalty, it must be paid to the General Revenue Fund of the province of Alberta.²⁵

On receiving a notice to initiate a proceeding from the MSA, the Commission must hold a hearing or other proceeding into the matters set out in the MSA's notice.²⁶ The Commission has stated that since administrative penalty proceedings may result in significant financial consequences on an alleged contravener, its preference is to hear an administrative penalty proceeding through an oral hearing, presided over by a panel of three Commission members.²⁷

As opposed to bringing the matter before the Commission for a formal hearing, the MSA is also authorised by the AUCA to negotiate and agree to a settlement with a person under investigation. However, the settlement agreement must be publicly filed and must be approved by the Commission.²⁸

The seminal case in Alberta

In 2015, at the end of an extensive enforcement proceeding brought before the Commission by the MSA, the Commission issued a landmark decision for the electricity market in Alberta. The case merits a thorough discussion since it establishes benchmark principles pertaining to the regulation, investigation and enforcement of electricity market manipulation in Alberta.

Background facts

The facts of the case primarily concerned actions taken by TransAlta Corporation, TransAlta Energy Marketing Corp and TransAlta Generation Partnership (collectively, 'TransAlta') in respect of coal-fired generating units that TransAlta owned and that were each subject to a PPA. Accordingly, critical to understanding the facts of the case is an understanding of the PPAs.

²⁴ AUCA, Section 63(2).

²⁵ AUCA, Section 63(5).

²⁶ AUCA, Section 53.

²⁷ Alberta Utilities Commission Bulletin 2010-017, Consultation on Market Surveillance Administrator (MSA) Proceedings Before the Alberta Utilities Commission (AUC or Commission) (23 April 2010), at Paragraphs 75–77 (AUC Bulletin 2010-017).

²⁸ AUCA, Section 44.

As briefly touched on above, PPAs allow PPA buyers the exclusive rights to offer output of a generating unit up to a certain capacity (known as the ‘committed capacity’) into the Power Pool.²⁹ This is commonly known as ‘offer control’. However, the PPAs give PPA owners the right to take their generating units offline (and deprive the PPA buyers of some or all of their committed capacity) if the shutdown is necessary to safeguard life, property or the environment, or to the extent reasonably necessary to conduct preventative maintenance to safeguard life, property or the environment.³⁰ Depending on the severity of the issue, PPA owners are sometimes in a position to exercise discretion over the necessity and timing of the outage. When the owner has discretion regarding the outage, the outage is known as a ‘discretionary outage’.³¹ Normally (as per good operating practice) discretionary outages are scheduled during periods of low demand, during non-peak hours or at weekends.³²

On 25 February 2011, the MSA received a complaint regarding the conduct of TransAlta. The complaint related to the timing of outages at TransAlta’s coal-fired generating units, each of which were subject to a PPA.³³ Thereafter, the MSA conducted an investigation into TransAlta’s conduct.³⁴

At the conclusion of its investigation, the MSA was satisfied (and the Commission ultimately found) that between November 2010 and February 2011, TransAlta implemented a corporate strategy³⁵ that was designed to time discretionary outages of its coal-fired generating units during hours of high demand in order to maximise profits for TransAlta.³⁶ Ultimately, TransAlta timed six discretionary outages during peak hours,³⁷ which had the effect of removing significant amounts of the PPA buyer’s committed capacity from the market.³⁸ As a consequence, offers in the merit order at higher prices were dispatched in order to meet the high demand, and the pool price rose.³⁹ At the same time, TransAlta had implemented a strategy with respect to its merchant units (those units that were not subject to the PPAs over which TransAlta had offer control), which was structured so that TransAlta would benefit from high pool prices.⁴⁰ The MSA was satisfied (and the Commission ultimately found) that TransAlta’s conduct breached Section 6 of the EUA and Sections 2(h) and (j) of the FEOC Regulation as it prevented or restricted a competitive response from the PPA buyers⁴¹ and had the effect of manipulating the pool price to TransAlta’s benefit.⁴²

29 AUC Decision 3110-D01-2015, at Paragraph 43.

30 AUC Decision 3110-D01-2015, at Paragraph 7(a). Article 5.2 of the PPA is set out in full at Paragraph 282 of AUC Decision 3110-D01-2015.

31 AUC Decision 3110-D01-2015, at Paragraph 336.

32 AUC Decision 3110-D01-2015, at Paragraph 370.

33 AUC Decision 3110-D01-2015, at Paragraph 38.

34 AUC Decision 3110-D01-2015, at Paragraph 38.

35 AUC Decision 3110-D01-2015, at Paragraphs 304–309.

36 AUC Decision 3110-D01-2015, at Paragraphs 7(a) and 7(b).

37 AUC Decision 3110-D01-2015, at Paragraph 7(b).

38 AUC Decision 3110-D01-2015, at Paragraphs 526–528.

39 AUC Decision 3110-D01-2015, at Paragraph 7(c).

40 AUC Decision 3110-D01-2015, at Paragraphs 476–479.

41 AUC Decision 3110-D01-2015, at Paragraph 7(e).

42 AUC Decision 3110-D01-2015, at Paragraph 7(f).

In the course of the MSA's investigation, the MSA also became satisfied that two of TransAlta's energy traders had directly or indirectly used non-public outage records to trade, contrary to Section 4 of the FEOC Regulation.⁴³ In December 2010, certain of TransAlta's employees exchanged emails regarding the potential for an upcoming extended outage at one of TransAlta's generating units.⁴⁴ Prior to the date that TransAlta made this outage public, a number of trades were executed.⁴⁵ The MSA was satisfied that the trades were executed while the traders were in possession of non-public information about the extended outage.⁴⁶

On 25 February 2014 the MSA filed a notice of request to initiate a proceeding against TransAlta and two of TransAlta's traders.⁴⁷ The MSA advised the Commission that if it determined that the MSA had proven its case, the MSA would seek an administrative penalty against TransAlta and the traders pursuant to both Section 63(2)(a) of the AUCA (C\$1 million per day) and 63(2)(b) of the AUCA (disgorgement of economic benefit), in addition to other remedies.⁴⁸

The events leading up to the oral hearing

Complaint regarding the MSA's investigation

Prior to the commencement of the oral hearing, the Commission was required to address certain complaints made by TransAlta and the traders regarding the conduct of the MSA during its investigation.

In the days prior to the MSA filing its notice, TransAlta and the two traders each filed complaints pursuant to Section 58 of the AUCA. The complaints alleged, among other things, that the MSA breached its own investigation procedures, statutory duties and the requirements of procedural fairness in the course of its investigations of TransAlta and the traders. In addition to other relief, TransAlta and the traders requested that the Commission direct the MSA to cease its investigations.

Pursuant to Section 58(2)(a) of the AUCA, the Commission is required to dismiss a 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.⁴⁹ TransAlta and the traders argued that their complaints should not be dismissed on this basis because the complaints preceded the MSA's notice to initiate a proceeding. Therefore, they could not

43 Market Surveillance Administrator, Application of the Market Surveillance Administrator, File No. 0630 (21 March 2014) at Paragraphs 43–44 (MSA Application); The Commission found in AUC Decision 3110-D01-2015 that the MSA had failed to meet its burden to establish that one of the traders used non-public outage information to trade. See Paragraphs 790–791 of AUC Decision 3110-D01-2015.

44 The Commission summarised the relevant evidence in respect of the trading allegations in Paragraphs 659–709 of AUC Decision 3110-D01-2015.

45 AUC Decision 3110-D01-2015, at Paragraphs 785–787.

46 MSA Application, at Paragraph 7. The Commission found in AUC Decision 3110-D01-2015 that only one of the traders used non-public outage information to trade. See Paragraphs 787 and 790–791 of AUC Decision 3110-D01-2015.

47 AUC Decision 3110-D01-2015, at Paragraph 11.

48 AUC Decision 3110-D01-2015, at Paragraph 869.

49 AUCA, Section 58(2)(a).

be related to a matter that is before the Commission. They also argued that their complaints were not related to the MSA's enforcement matter.

On 14 May 2014 the Commission issued its decision⁵⁰ finding that there was a logical and rational connection between the three complaints and the substance of the MSA's notice and thus the complaints were required to be dismissed. It did not matter that the complaints had been filed before the MSA's notice was actually filed with the Commission. The Commission held that the words 'is before' in Section 58(2)(a) meant the time that the Section 58(2) matter would be heard, not the time the complaints were filed.⁵¹ Even though the complaints were dismissed, the Commission noted that TransAlta and the traders were entitled to pursue the issues raised in their complaints in the context of the proceeding initiated by the MSA's notice to the extent that those issues amounted to defences or mitigating factors.⁵²

The Commission's decision affirmed that market participants under investigation cannot use Section 58 of the AUCA as a defensive mechanism to derail or delay a hearing with respect to an MSA investigation.

The MSA pre-filed its case

In accordance with Section 53 of the AUCA, after the MSA's notice was filed and the Section 58 complaints dealt with, the Commission held a proceeding (proceeding 3110) to adjudicate the MSA's allegations. The proceeding was divided into two phases. Phase I (merits) was to decide whether the MSA had proved its case on a balance of probabilities. Phase two (sanctions) would only proceed if the MSA established the alleged contraventions, and would determine what penalties, if any, ought to be imposed.

Less than a month after the MSA filed its notice the MSA filed a 125-page application,⁵³ which together with its appendices and attachments constituted the MSA's entire case. The application outlined the facts the MSA was relying upon and appended:

- a expert reports from the MSA's three expert witnesses;
- b witness statements from two of the MSA's key witnesses;
- c a report from the MSA's chief economist; and
- d all documents that the MSA intended to rely upon.

Accordingly, TransAlta and the traders had full notice of the MSA's case months in advance of the oral hearing. Interestingly, the Commission determined that TransAlta and the traders were not required to file or present their factual evidence until after the MSA's case was closed⁵⁴ and before commencing their defence. Thus, TransAlta and the traders were afforded the right to remain silent until well into the oral hearing. This differed from typical Commission procedure where evidence is exchanged in advance of the hearing and was

50 AUC Decision 2014-135.

51 AUC Decision 2014-135, at Paragraphs 94-96; AUC Decision 3110-D01-2015, at Paragraph 13.

52 AUC Decision 2014-135, at Paragraph 116.

53 MSA Application.

54 Alberta Utilities Commission Decision 2014-204, Preliminary matters (11 July 2014), at Paragraph 52, online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2014/2014-204.pdf (AUC Decision 2014-204).

reflective of the prosecutorial nature of the case and the fact that, for the first time, the MSA was seeking sanctions against individuals.

The Commission did require TransAlta and the traders to pre-file any expert evidence they intended to rely upon in advance of the oral hearing.⁵⁵ The MSA was entitled to file expert evidence in reply.

Pre-hearing decision regarding standard of disclosure

Prior to the commencement of the oral hearing, the Commission also made a significant decision⁵⁶ regarding a number of procedural issues, including the standard of disclosure the MSA was required to provide to the respondents prior to the hearing.

Normally, the duty of procedural fairness in the administrative context only requires disclosure on a 'reliance' standard; that is, the prosecution must only disclose the information it intends to rely upon at the hearing.⁵⁷

However, in proceeding 3110, the Commission determined that the higher relevance standard delineated in *Stinchcombe*⁵⁸ was appropriate, having regard to the potential for significant monetary penalties against TransAlta and personal and professional consequences to the individual traders.⁵⁹ Thus, prior to the oral hearing the Commission ordered the MSA to produce all documents, whether inculpatory or exculpatory, relevant to the issues raised in the MSA's notice and application to all respondents.⁶⁰

Pre-hearing decision regarding the MSA's investigatory records and disclosure of the confidential informant

A significant administrative law issue also arose with respect to investigation records, including some relating to a confidential informant. In most enforcement venues, investigation records are not producible, but the Alberta electricity regime provides for exceptions. Namely, Section 6(12) of the Market Surveillance Regulation⁶¹ (the MSR Regulation) provides that the Commission must not require the MSA to disclose any non-public record created by the MSA for its internal use in carrying out its mandate unless (1) the specific conduct of the MSA is relevant and material to its consideration of the matters at issue before the Commission; and (2) the disclosure of the record is necessary for the Commission to determine whether or not, by that specific conduct, the MSA did not comply with a provision of the AUCA or the MSR Regulation.⁶²

Since TransAlta and the traders had each raised concerns about the conduct of the MSA during its investigation, the MSA identified and provided the Commission with records which might fit the criteria for disclosure under Section 6(12) of the MSR Regulation. The Commission decided that some of the records were relevant and material to the

55 AUC Decision 2014-204, at Paragraph 52.

56 AUC Decision 2014-204.

57 AUC Bulletin 2010-017, at Paragraph 90.

58 *R v Stinchcombe*, [1991] 3 SCR 326.

59 AUC Decision 2014-204, at Paragraph 22.

60 AUC Decision 2014-204, at Paragraph 22.

61 MSR Regulation.

62 MSR Regulation, Section 6(12).

defences the traders intended to assert respecting the MSA's conduct and were producible. Three records, however, contained communications between the MSA and individuals that came forward (based on assurances from the MSA that their identities would not be revealed) to express concerns about possible impropriety that ultimately prompted the MSA's investigation.

The Commission agreed that Section 6(12) of the MSR Regulation did not abrogate common-law privileges, including privilege pertaining to confidential sources. The Commission held that the three records were protected from disclosure.

Notwithstanding, the Commission still directed the MSA, without revealing the identity of the individuals, to provide summaries or redacted versions of the three records to the respondents. This further reflected the high degree of disclosure and procedural fairness that the Commission required of the MSA during proceeding 3110.

The oral hearing

The oral hearing commenced in December 2014 and was presided over by a panel of three Commission members. By the time the oral hearing commenced, it had been nine months since the MSA had pre-filed its case, three months since the respondents had filed their expert evidence, and two months since the MSA had filed its reply expert evidence.

Notably, the Commissions' Rules of Practice permit evidence to be given at an oral hearing by two or more witnesses sitting as a panel.⁶³ The Rules further provide that questions to a witness panel may be directed at specific members of the panel, and indicate that unless the Commission otherwise directs, members of a witness panel may confer among themselves prior to answering a question.⁶⁴ In proceeding 3110 one of the traders requested that the MSA present its witnesses separately; however, the Commission held that the MSA was entitled to present its case in the manner it proposed, through a single witness panel.

The MSA sat its witness panel during the first week of the oral hearing. During direct examination, the MSA adopted all of its pre-filed submissions, including its application, as evidence in the proceeding. After the MSA's direct examination concluded, the MSA's witness panel was subjected to cross-examination by all other parties.

It was not until a few short days before TransAlta and the traders were subjected to cross-examination that they were finally required to file their written factual evidence. Accordingly, TransAlta and the traders had the benefit of knowing the entirety of the MSA's evidence before deciding whether, and what, to file in response. TransAlta and the individual traders were subjected to cross-examination after questioning of the MSA's panel was complete.

The hearing also had a written component. Approximately one month after the oral hearing concluded, the MSA filed a written argument and TransAlta and the traders had three weeks to file their written arguments in response. As the applicant, the MSA had the last word and was entitled to respond to TransAlta's and the respondents' written arguments by way of reply.

63 AUC Rule 001, Rule 41.1.

64 AUC Rule 001, Rules 41.2, 41.3, 41.4.

The decision regarding the alleged misconduct

In July 2015, the Commission issued its decision in proceeding 3110⁶⁵ with respect to Phase I of the bifurcated proceeding. The decision serves as a template regarding market manipulation in Alberta, establishing principles that will have application in future cases. It addressed not only the aspect of conduct which results in immediate, and profound, changes to spot market electricity prices, but also the trading of electricity contracts and therefore the long-term market as well.

The decision against TransAlta

As noted above, the offences alleged to have been committed by TransAlta were specified in Section 6 of the EUA and Sections 2(h), 2(j) and 4(1) of the FEOC Regulation. The Commission held that the MSA had the burden of demonstrating on a balance of probabilities based on clear, convincing and cogent evidence that the alleged contraventions occurred.⁶⁶

The Commission affirmed that Sections 2(h) and (j) of the FEOC Regulation are regulatory in nature and therefore classified both Sections 2(h) and 2(j) as strict liability offences.⁶⁷ This meant that the MSA was only required to establish that TransAlta engaged in the impugned conduct, and then TransAlta had available the defence of due diligence.⁶⁸ The MSA was not required to establish subjective intent on behalf of TransAlta.⁶⁹

The Commission further found that Section 2(h) of the FEOC Regulation creates a per se offence rather than a rule-of-reason offence, in the sense that Section 2(h) does not require assessment of the economic effects resulting from the impugned conduct.⁷⁰

Within this framework, the Commission set out the elements that the MSA must prove to establish a contravention of Sections 2(h) and (j) of the FEOC Regulation.

With respect to Section 2(h) of the FEOC Regulation, the Commission determined that a breach of Section 2(h) will occur when a market participant restricts or prevents competition, a competitive response, or market entry, and the person engaged in the conduct with an anticompetitive purpose.⁷¹ The Commission agreed with both TransAlta and the MSA that conduct that restricts or prevents competition of a competitive response is conduct that creates, maintains, enhances or extends market power. The Commission determined that the requisite anticompetitive purpose can be established objectively on the basis that a respondent intends the reasonably foreseeable consequences of its acts.⁷² Proving an anticompetitive purpose therefore involves an objective analysis on the act itself to discern its purpose, rather than on the actor to determine the actor's subjective intent.⁷³

65 AUC Decision 3110-D01-2015, at Paragraph 29. The Commission determined that the record for the first phase of Proceeding 3110 closed on 11 May 2015.

66 AUC Decision 3110-D01-2015, at Paragraph 68.

67 AUC Decision 3110-D01-2015, at Paragraph 249.

68 AUC Decision 3110-D01-2015, at Paragraph 268.

69 AUC Decision 3110-D01-2015, at Paragraph 249.

70 AUC Decision 3110-D01-2015, at Paragraph 228.

71 AUC Decision 3110-D01-2015, at Paragraph 220.

72 AUC Decision 3110-D01-2015, at Paragraph 227.

73 However, the Commission did state in Paragraph 227 of AUC Decision 3110-D01-2015 that the requisite anticompetitive purpose could also be established directly through evidence of subjective intent, although it

The Commission found that TransAlta deliberately timed outages at its coal-fired generating units subject to PPAs on the basis of market conditions, rather than by the need to safeguard life, property or the environment, in order to maximise its profits (i.e., for an anti-competitive purpose).⁷⁴ The Commission found that by removing megawatts from market supply, TransAlta's ability to move the price was enhanced.⁷⁵ Further, TransAlta's conduct restricted or prevented a competitive response from TransAlta's competitors, namely, the PPA buyers who no longer had access to committed capacity to offer into the Power Pool.⁷⁶ For these reasons, the Commission found that TransAlta had breached Section 2(h) of the FEOC Regulation and Section 6 of the EUA.⁷⁷

Regarding Section 2(j) of the FEOC Regulation, the Commission determined that in order to establish a breach, the MSA must demonstrate:

- a* that TransAlta engaged in manipulative conduct designed to move market prices by impairing, obstructing, circumventing or defeating the operation of competitive market forces;
- b* that, as a result of the manipulative conduct, market prices were moved away from a competitive market outcome (which the Commission defined as the outcome that would have resulted but for the manipulative conduct);⁷⁸ and
- c* what the competitive market outcome would have been but for the manipulative conduct.⁷⁹

The Commission found that TransAlta's conduct was 'unquestionably deliberate' and was designed to move, and did move, market prices away from a competitive market outcome.⁸⁰ Accordingly, the Commission found that TransAlta breached Section 2(j) of the FEOC Regulation and Section 6 of the EUA.⁸¹ TransAlta raised defences of due diligence and officially induced error but the Commission rejected both defences.⁸²

cited cases that noted that subjective intention is almost impossible to prove in many cases unless one stumbles on a 'smoking gun' (see Paragraph 223 of AUC Decision 3110-D01-2015).

74 AUC Decision 3110-D01-2015, at Paragraph 370.

75 AUC Decision 3110-D01-2015, at Paragraph 529.

76 AUC Decision 3110-D01-2015, at Paragraphs 7(e) and 526–528.

77 AUC Decision 3110-D01-2015, at Paragraph 7(e).

78 AUC Decision 3110-D01-2015, at Paragraph 550.

79 AUC Decision 3110-D01-2015, at Paragraph 240.

80 AUC Decision 3110-D01-2015, at Paragraphs 542 and 550–552.

81 AUC Decision 3110-D01-2015, at Paragraph 7(f).

82 AUC Decision 3110-D01-2015, at Paragraphs 628–629.

The trading case against the traders and TransAlta

The Commission found that the MSA had demonstrated that one of the traders used non-public outage records to trade.⁸³ However, the trader established a due diligence defence because he made an enquiry and obtained trading permission from a superior.⁸⁴ Nonetheless, the Commission found that TransAlta breached Section 4 of the FEOC Regulation by allowing its employee to trade while in possession of a non-public outage record⁸⁵ and that TransAlta had not established a defence of due diligence or any other defence in response to the Section 4 allegations.⁸⁶

The traders also raised their concerns regarding the MSA's conduct during its investigation as a defence to the allegations, arguing that as a result of the unfair conduct, the proceedings should be nullified against the traders or, at least, the MSA's findings should not be given any deference.⁸⁷ However, the Commission determined that the MSA carried out its mandate in a fair and responsible manner throughout the investigation and hearing, and therefore rejected those arguments.⁸⁸

Phase II: penalties

Having found in Phase I that the contraventions alleged against TransAlta had occurred, the Commission proceeded to Phase II of the proceeding to determine what sanctions, if any, to impose on TransAlta. As noted above, the AUCA has the potential for extremely significant administrative penalties due to Section 63(2)(a), which prescribes that a penalty may be imposed in the amount of C\$1 million for each day, or part of a day, on which the contravention occurs or continues.⁸⁹

However, prior to commencement of the Phase II hearing, the MSA made an application to the Commission pursuant to Section 54 of the AUCA requesting that the Commission issue a consent order in respect of Phase II. The Commission ultimately approved the consent order,⁹⁰ having found that it was in the public interest and fell within a range of acceptable outcomes taking into account the Commission's own rules regarding the factors to be considered when imposing an administrative penalty.⁹¹ Thus, it remains to be seen how the Commission will calculate an administrative penalty for 'each day or part of a day on which the contravention occurs or continues'.

83 AUC Decision 3110-D01-2015, at Paragraph 7(j).

84 AUC Decision 3110-D01-2015, at Paragraph 7(k). At Paragraph 7(l) of AUC Decision 3110-D01-2015, the Commission found that the evidence tendered by the MSA failed to demonstrate that the other trader had or used non-public outage records to trade or otherwise breached Section 6 of the EUA.

85 AUC Decision 3110-D01-2015, at Paragraph 7(m).

86 AUC Decision 3110-D01-2015, at Paragraph 7(n).

87 AUC Decision 3110-D01-2015, at Paragraph 836.

88 AUC Decision 3110-D01-2015, at Paragraphs 7(o), 838-839 and 855.

89 AUCA, Section 63(2)(a).

90 Alberta Utilities Commission Decision 3110-D03-3015, MSA allegations against TransAlta Corporation et al., Phase II – request for consent order (29 October 2015) online: www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2015/3110-D03-2015.pdf.

91 Alberta Utilities Commission Rule 013, Criteria Relating to the Imposition of Administrative Penalties (1 February 2013) online: www.auc.ab.ca/acts-regulations-and-auc-rules/rules/Documents/Rule013.pdf.

Pursuant to the consent order, TransAlta agreed to pay in excess of C\$56 million.⁹² The administrative penalty portion of the settlement amount had two components. The first was disgorgement of economic benefit pursuant to Section 53(2)(b) of the AUCA in the amount of C\$26.9 million that was required to be paid within 30 days of the consent order. The second was a monetary penalty pursuant to Section 63(2)(a) of the AUCA in the amount of C\$25 million that was required to be paid within 395 calendar days of the consent order. This latter payment was secured by way of an irrevocable letter of credit. The Commission confirmed on 7 January 2016 that all amounts set out in the consent order had been paid and the case was therefore concluded.

The amount the Commission required TransAlta to ultimately pay was significant, and provides a forceful deterrent against manipulative or anticompetitive conduct in the Alberta market.

Market in flux

As noted above, the Alberta electricity market is currently energy only. However, Alberta is currently transitioning from an energy-only market to a hybrid market that will have both an energy and a capacity market. It is expected that a capacity market will be in place by 2021.⁹³ Accordingly, Alberta will likely see fundamental changes to the regulatory scheme governing the Alberta electricity market once the new market structure is in place. It is yet to be seen how the concept of ‘fair, efficient and open competition’ will operate within the new market structure.

For now, though, the Commission’s decision in proceeding 3110 serves as a guidebook on the governing principles to be applied in enforcement proceedings for electricity market manipulation in Alberta. As a result of the proceeding 3110, market participants have direction respecting what constitutes an offence under Section 6 of the EUA and Sections 2(h), 2(j) and 4(1) of the FEOC Regulation and important guidance on how MSA investigations and hearings brought before the Commission will be conducted.

92 This amount included a payment in the amount of approximately C\$4.3 million directly to the MSA to fully compensate the MSA for all its legal costs, expert fees and other disbursements incurred by the MSA in Proceeding 3110.

93 Alberta Electric System Operator, Capacity market transition, online: www.aeso.ca/market/capacity-market-transition.

Appendix 4

About the Authors

Randall W Block, QC

Borden Ladner Gervais LLP

Randall Block is a partner in BLG's litigation and arbitration group in Calgary. Randall specialises in all forms of dispute resolution in the energy, and oil and gas industries, including commercial litigation and arbitration and regulatory proceedings. He is recognised as one of the world's leading lawyers in these fields by the foremost legal ranking directories.

Randall has appeared before the Alberta Court of Queen's Bench, Alberta Court of Appeal, the Supreme Court of Canada, the Alberta Utilities Commission, the Energy Resources Conservation Board, the National Energy Board and various arbitral panels. He has also sat as an arbitrator. Randall has written and lectured on various issues in oil and gas law and realisation on oil and gas-related security. He was appointed Queen's Counsel in 2005 and Fellow of the American College of Trial Lawyers in 2010.

John D Blair, QC

Borden Ladner Gervais LLP

John Blair is BLG's national group head for commercial litigation. John's practice focuses on securities class actions, shareholder disputes, takeover bid defences, securities regulatory hearings, corporate investigations, plans of arrangement and cross-border civil and regulatory matters. He successfully represents clients in investigations and enforcement actions before the Alberta Securities Commission, Investment Industry Regulatory Organization of Canada, Mutual Fund Dealers Association and listed stock exchanges regarding insider trading, market manipulation, securities distributions, financial disclosure, investment suitability and director conduct. John has conducted many Queen's Bench trials and appears regularly before the Alberta and Federal Courts of Appeal.

Laura M Poppel

Borden Ladner Gervais LLP

Laura Poppel is an associate in BLG's commercial litigation and arbitration group in Calgary. Laura has a general commercial practice with a focus on corporate commercial disputes, civil fraud, and energy-related litigation. She acts and advises clients in these areas and has experience in regulatory proceedings before the Alberta Utilities Commission as well as proceedings at the Alberta Provincial Court, Court of Queen's Bench and Court of Appeal.

Borden Ladner Gervais LLP

520 3rd Avenue SW

Suite 1900

Calgary T2P 0R3

Canada

Tel: +1 403 232 9500

Fax: +1 403 266 1395

rblock@blg.com

jblair@blg.com

lpoppel@blg.com

www.blg.com

The Guide to Energy Market Manipulation is a survey of the law on market manipulation in the energy sector across nations that reflects the collective wisdom and real-life experiences of 30 distinguished practitioners from 18 different organisations.

Part I looks at legislation and jurisprudence where laws have been applied, most notably North America, but also Europe, the UK and Australia. Part II shines a light on enforcement practices, including negotiating with regulators and private actions. Part III looks at the regulatory process itself: administrative law, evidence and the use of expert evidence.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-78915-092-6