MARKET MANIPULATION IN ALBERTA: TRANSALTA PAYS $56 MILLION

*Gordon E. Kaiser**

On July 27, 2015 the Alberta Utilities Commission released the first contested Canadian decision involving energy market manipulation. The 217 page decision[1] followed a three year investigation and a three-week hearing. This is not the first decision on this topic. TransAlta settled an earlier market manipulation case[2] and the Ontario Market Surveillance Panel recently released a extensive Report on gaming of the Market Rules in connection with constrained off payments.[3] But by any measure the Alberta decision is a major step forward in this branch of energy regulation.

The Commission used a two phase proceeding. Phase One dealt with the substantive allegations. Phase Two dealt with the appropriate administrative penalty.

The Allegations

The Alberta Market Surveillance Administrator (MSA) claimed that in November and December 2010 and February 2011 TransAlta intentionally took certain coal-fired generating units off-line for repairs during periods of high demand. The MSA argued that TransAlta could have made those repairs during periods of lower demand but instead the company elected to drive up electricity prices by reducing supply during peak hours.

The MSA also claimed that two TransAlta traders used non public information to trade in the Alberta electricity market.

In addition the MSA claimed that TransAlta did not have an effective compliance policy to prevent anticompetitive conduct.The MSA argued that TransAlta's lack of policy and training regarding the use of non public information breached its obligation to support the fair efficient and openly competitive operation of the market as required by section 6 of the *Electric Utilities Act*.[4]

The Outage Allegations

The Alberta Commission found that TransAlta had in fact timed the outage of its coal-fired generating plants on the basis of market conditions rather than the need to safeguard life, property or the environment as provided for in article 5.2 of the Power Purchase Arrangements. The findings related to four dates- November 19, 2010 for the Sundance 5 plant, November 23, 2010 for the Sundance 2 plant, December 13-16, 2010 at Sundance 2 plant, the Keephills 1 plant and Sundance 6

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1 *Market Surveillance Administrator v TransAlta Corporation* (Decision) (July 2015), 3110-D0I-2015 (Alberta Utilities Commission).

2 Re *Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corporation,* (Decision) (3 July 2012), 2012-182 (Alberta Utilities Commission).

3 Ontario Enerergy Board, Market Surveillance Panel, *Report on the Investigation into Possible Gaming related to Congestion Management Credit Payments by Abitibi Consolidated and Bowater Canada Forest Products,* Investigation No 2010-2 (February 2015).

4 *Electric Utilities Act,* SA 2003 c E-5.1, s 6.

plant and February 16, 2011 at the Keephills 2 plant.

The Commission concluded that TransAlta could have done the work during off-peak hours but instead chose to use peak or super peak hours to maximize the price and benefit its own portfolio.

The most important finding in the decision dealt with the interpretation of section 2 of the *Fair, Efficient and Open Competition Regulation*[5]. There were two important issues. First, in demonstrating anticompetitive conduct, is it necessary that the MSA prove that TransAlta intended to limit competition? Second, did the MSA have to prove the extent to which competition had actually been lessened?

The Alberta Utilities Commission relied on the Federal Court of Appeal's decision in *Canada Pipe*[6] and the Alberta court's decision in *Royal LePage*[7] to conclude that direct evidence of subjective intent was not required and that in establishing anticompetitive intent the Commission could rely on the fact that corporate actors intended the consequences of their actions. The Commission also found that section 2 created a per se offense rather than a rule of reason offense in that section 2 does not require assessment of the economic effects resulting from the conduct. In short, the prescribed conduct is anticompetitive in and of itself without assessing the economic effects of that conduct. Once the Commission found that the charging section was a per se offence, the MSA 's chance of success in the case improved substantially.

The Trading Allegations

Contrary to the assertion of the traders, the Commission found that the traders were market participants at all material times and that one of them used non public records to trade contrary to section 4 of the *Fair Efficient and Open Competition Regulation*.

However the Commission also found that the trader took all reasonable steps to avoid breaches of that section by seeking and obtaining direction from senior TransAlta management and concluded that the trader had established a defense of due diligence. With respect to the second trader, the Commission concluded the MSA had failed to demonstrate that the trader had used non public records during the relevant period.

The Compliance Allegations

With respect to the compliance allegations, the Commission concluded the MSA had not proven on a balance of probabilities that TransAlta had breached section 6 of the *Electric Utilities Act* on the basis that the compliance policies and oversight were inefficient, inadequate or deficient.

While the Commission found that the evidence in the case fell short of establishing a contravention of section 6 of the Electric Utilities Act, it noted that robust compliance regimes were important and strongly suggested that TransAlta retain an outside independent expert in the compliance field to review its policies practices and make recommendations for improvement.

The Consent Order

On September 30, 2015 counsel for the MSA filed an application with the Commission seeking approval of a Consent Order under section 54 of the Alberta Act.[8] Counsel argued that the Consent Order would bring Proceeding 3110 to a final and binding conclusion and, if granted, would provide clarity to all market participants.

Counsel further stated that the would provide a in-depth interpretation of the integrated legislative framework governing Alberta's competitive electricity market and that the decision would form the bedrock for future decisions and play a critical role in ensuring that Albertans continue to benefit from a fair, efficient and openly competitive market.

Counsel also noted that the Consent Order would bring the proceeding to a final resolution without further appeals and allow the decision to stand unchallenged to provide immediate and lasting procedural value in administrative decisions.

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5 *Fair, Efficient and Open Competition Regulation*, Alta Reg 159/2009.
6 *Canada (Commissioner of Competition) v Canada Pipe Co,* 2006 FCA 233, [2007] 2 FCR 3.
7 *R v Royal LePage Real Estate Services Ltd,* [1993] ABQB 7148.
8 *Alberta Utilities Commission Act,* SA 2007, c A-37.2, s 54.

Under the Consent Order TransAlta agreed to pay in excess of $56 million. Consisting of an administrative penalty of $ 51.9 million and,$4.3 million in MSA costs.[9] The administrative penalty of $51.9 million consisted of two components. The first was disgorgement of $26.9 million pursuant to section 63(2) of the *Alberta Utilities Commission Act* and Section 7 of Commission Rule 13 .[10] The Second was an administrative monetary penalty of $ 25 million.

The disgorgement under the Alberta Rule 7 Is intended to nullify the value of gains acquired through misconduct. The Commission accepted the MSA expert evidence that 26.9 million was in light of the jurisprudence reasonable and in the public interest.

The Sentencing Factors

The administrative monetary penalty levied by the Commission was at the top of the range under Commission Rules having regard to the various factors in Rule 13 the Commission found the contraventions very serious:

- the contraventions resulted in significant widespread harm to customers and the market by negatively impacting pool prices, the forward market and customer confidence;
- the contraventions involved significant amounts of money and resulted in substantial gains for TransAlta;
- the outage contraventions were premised on manipulation and were part of a broad scheme that was systematic and persistent;
- the bidding strategy was approved by TransAlta senior management;
- this was not TransAlta`s first offence. The company had breached the Fair and Openly Competitive Regulation in November 2010 by impeding Import transactions.[11]

The Procedural Issues

In some respects the main liability issues (a) did TransAlta time the outages for the purpose of maximizing prices and (b) how much was the gain were the easy issues.

From beginning to end the Commission faced a variety of challenges on virtually every possible point of law. All were considered in careful detail. They included the extent of disclosure), the use of circumstantial evidence, the admissibility of expert evidence,[12] the burden of proof), due diligence, the issue of officially induced error, and abuse of process.

Conclusion

The decision is a textbook on the principles involved in regulating energy market manipulation. While there has been extensive jurisprudence in US investigations under FERC jurisdiction, this is the first Canadian decision to rule on the wide ranging legal issues that will guide regulators throughout the country.

Of interest was the fact that the Consent Order contained an acknowledgment by TransAlta that the MSA had carried of its mandate in a fair and reasonable manner. The record was littered with allegations of abuse of process. Another interesting point about the Consent Order proceeding was that the consumer groups were not granted standing - the Commission having ruled that it did not have legislative authority to award restitution.[13]

Like the decision on liability, the decision on the Consent Order explains in detail the jurisdiction of the Commission to accept the Consent Order. Taking guidance from the principles developed by the courts throughout Canada,[14] the Commission ruled that the Commission's obligations to decide whether or not the

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9 *Market Surveillance Administrator Allegations against TransAlta Corporation et al* (Request for Consent Order) (29 October 2015), Decision 3110 – DO3- 2015, (Alberta Utilities Commission).

10 Alberta Utilities Commission Rule 013, *Criteria Relating to the Imposition of Administrative Penalties.*

11 Re *Market Surveillance Administrator, Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corporation,* Decision 2012-182 (Alberta Utilities Commission).

12 Following the main hearing the Commission asked for submissions on decision of the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton,* 2015 SCC 23 [*White Burgess*].

13 Limited standing had been granted in the first TransAlta decision, *supra* note 2.

14 *R v Bullock*, 2013 ABCA 44 at para 18; *Rault v Law Society of Saskatchewan*, 2009 SKCA 8; *R v DeSousa,* 2012 ONCA 154, 109 OR (3d) 792.

proposed settlement is reasonable is that it must fall within a range of acceptable outcomes given the facts and the applicable law, not whether it is the result that the Commission might have chosen.

This was a hotly contested case with expert counsel on both sides and a range of expert witnesses. For those that follow these cases, what stands out to any observer is the detail that the Commission exercised in carefully examining each aspect of the evidence and each legal argument. It's a rare example of detailed reasons that we rarely see in regulatory decisions today. It provides an important handbook for regulators and lawyers practicing this field.

This is a growing part of energy regulation. In the United States regulatory lawyers like to say that in the old days their main work was the regulation of rates, but today they focus on regulating competition. Between 2007 and 2014, FERC assessed civil penalties of $ 602 million and ordered disgorgement of $300 million under market manipulation cases. The levels increased in 2015.

In recent years Ontario has also moved aggressively to enforce breaches of the Market Rules. A number of settlements have been reached although few are public. As dynamic energy markets move toward more competitive solutions, we will see more of these cases. The Alberta decision is a welcome example of timely and first class legal decision-making to be appreciated regardless of which side is viewing it. ■