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Alberta Utilities Commission

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Market Surveillance Administrator

Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly

Phase 1

July 27, 2015

Alberta Utilities Commission
Decision 3110-D01-2015
Market Surveillance Administrator
Market Surveillance Administrator allegations against TransAlta Corporation et al.,
Mr. Nathan Kaiser and Mr. Scott Connelly
Proceeding 3110
Phase 1

July 27, 2015

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1 Introduction

1. In this decision, the Alberta Utilities Commission (AUC or the Commission) must decide whether TransAlta Corporation, TransAlta Energy Marketing Corp. and TransAlta Generation Partnership (collectively, TransAlta), Mr. Nathan Kaiser (Kaiser) and Mr. Scott Connelly (Connelly) engaged in conduct that does not support the fair, efficient and openly competitive operation of Alberta's electricity market.

2. Alberta's Market Surveillance Administrator (MSA) alleges that in November and December 2010 and February 2011,TransAlta intentionally took certain coal-fired generating units that it owned, that were subject to power purchase arrangements (PPAs), offline for repairs during periods of high demand when it was open to TransAlta to delay those repairs to a period of lower demand. The MSA submitted that TransAlta engaged in this conduct to drive up electricity prices to benefit TransAlta's portfolio. The MSA asserted that this conduct restricted or prevented competition and restricted or prevented a competitive response and manipulated market prices away from a competitive market outcome.

3. The MSA also alleged that Kaiser, Connelly and TransAlta had non-public information regarding the capability of certain TransAlta generating units to produce electricity in 2011and improperly used that non-public information to trade in Alberta's electricity market.

4. The MSA submitted that TransAlta did not have effective internal compliance policies and practices that prevented anticompetitive conduct from occurring and in particular, criticized TransAlta for lack of a policy and training regarding the use of non-public outage information. It argued that TransAlta's practices were substandard and in breach of its obligation to conduct itself in a manner that supports the fair, efficient and openly competitive operation of the market set out in Section 6 of the *Electric Utilities Act.*

5. TransAlta denied the MSA's allegations regarding the improper timing of the outages at its coal-fired generating units. TransAlta submitted, amongst other things, that timing forced outages at coal generation plants subject to PPAs to benefit its portfolio position was consistent with the governing law and with the direction it received from the MSA. TransAlta also asserted that it had a robust compliance program for its traders.

6. Kaiser, Connelly and TransAlta also denied the MSA's allegations with respect to improper trading. They submitted that they did not have or use non-public outage information. Kaiser and Connelly contended that the MSA's investigation of them was procedurally unfair. Further, they argued that the provisions regarding trading do not apply to them since they were

not market participants as that term is defined in the *Electric Utilities Act,*[1] and because they were acting on behalf of TransAlta.

7. After considering the evidence and arguments presented in this proceeding, and for the reasons given in this decision, the Commission finds as follows:

The outage allegations

a) TransAlta 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 as described in Article 5.2 of the PPA on four occasions (November 19, 2010 at Sundance 5, November 23, 2010 at Sundance 2, December 13-16, 2010 at Sundance 2, Keephills 1 and Sundance 6, and February 16, 2011 at Keephills 2).

b) TransAlta could have deferred each of the outage events to off peak hours[2] but chose instead to take them during peak or super-peak hours to maximize the benefit to its own portfolio.

c) TransAlta's timing of outages increased average pool prices from what they would otherwise have been had the outages been scheduled to commence on off peak hours.

d) TransAlta's implementation of the Portfolio Bidding Strategy did affect the forward markets; however, the Commission makes no finding regarding the magnitude of the effects associated with the discretionary outages in question.

e) For each of the four outage events, TransAlta restricted or prevented a competitive response from the respective PPA buyers, contrary to Section 2(h) of the *Fair, Efficient and Open Competition Regulation* and, therefore, Section 6 of the *Electric Utilities Act.*

f) For each of the four outage events, TransAlta manipulated market prices away from a competitive market outcome, contrary to Section 2(j) of the *Fair, Efficient and Open Competition Regulation* and, therefore, Section 6 of the *Electric Utilities Act.*

g) TransAlta has not established the defences of due diligence or officially induced error, with respect to any of the four outage events.

h) TransAlta has not demonstrated that the MSA's investigation into the outage events or the actions it took to seek enforcement against TransAlta for those events, was an abuse of process.

The trading allegations

i) TransAlta, Kaiser and Connelly were "market participants" at all material times.

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1 *Electric Utilities Act,* SA 2003, c. E-5.1.

2 The PPAs define peak hours as 7:00 a.m. to 9:00 p.m. on Alberta business days, with all other hours being off peak. Exhibit 14.02, MSA Application, March 21, 2014, page 42, paragraph 158 defines super peak as the period from 5:00 p.m. to 9:00 p.m.

j) On January 6 and 7, 2011, Kaiser used non-public outage records to trade contrary to Section 4(1) of the *Fair, Efficient and Open Competition Regulation*.

k) Kaiser took all reasonable steps to avoid a breach of Section 4(1) by seeking and getting direction from senior TransAlta management on his continued eligibility to trade on two separate occasions after he received non-public outage records. Kaiser has established the defence of due diligence. Given the finding, the Commission cannot conclude that Kaiser otherwise breached Section 6 of the *Electric Utilities Act*.

l) The evidence tendered by the MSA failed to demonstrate that Connelly had or used non-public outage records to trade during the period between January 6 and 21, 2011 or that Connelly otherwise breached Section 6 of the *Electric Utilities Act*.

m) TransAlta breached Section 4(1) of the *Fair, Efficient and Open Competition Regulation*, and, therefore, Section 6 of the *Electric Utilities Act*, by allowing Kaiser to trade while in possession of a non-public outage record.

n) TransAlta has not established the defence of due diligence with respect to the trading allegations.

o) The MSA carried out its mandate in a fair and reasonable manner, pursuant to Section 40 of the *Alberta Utilities Commission Act*, throughout the investigation and hearing of this matter.

The compliance allegations

p) The MSA has not proved, on the balance of probabilities, that TransAlta breached Section 6 of the *Electric Utilities Act* on the basis that its compliance policies, practices and oversight thereof, were inadequate and deficient.

8. This decision is structured as follows: First, the Commission describes the background to this proceeding. Second, the Commission reviews the legislative framework, including a brief overview of the history of the deregulation of Alberta's electricity industry, and a description of the relevant statutory provisions. Third, the Commission outlines how it considered the evidence in the proceeding. Fourth, it addresses the outage allegations against TransAlta. Fifth, the Commission addresses the trading allegations involving Kaiser, Connelly and TransAlta. Sixth, the Commission addresses the allegations with respect to TransAlta's compliance policies and procedures.

1.1 Background

1.1.1 Proceeding 3109 – the complaint proceeding

9. Prior to the MSA commencing proceedings against TransAlta, Kaiser and Connelly, each filed a complaint against the MSA under Section 58(1) of the *Alberta Utilities Commission Act*.[3] TransAlta and Kaiser filed their respective complaints on February 21, 2014, and Connelly filed a similar complaint on February 24, 2014. The complaints concerned the conduct of the MSA in

[3] *Alberta Utilities Commission Act,* SA 2007, C. A-37.2.

relation to its investigation into the complainants' alleged anticompetitive activities in the Alberta wholesale electricity market in 2010 and 2011.

10. Section 58(1) provides that any person may make a written complaint to the Commission against the MSA and Section 58(3) provides that in considering the complaint, the Commission may dismiss all or part of it, or direct the MSA to change or refrain from the impugned conduct. In their respective complaints, the complainants essentially asked that the Commission direct the MSA to halt its investigation into their alleged conduct. They submitted that the MSA had breached its own investigation procedures, statutory duties and the requirements of procedural fairness in its actions against them. TransAlta also asserted that the MSA had breached its statutory duty to consult with market participants prior to developing new guidelines or materially changing existing guidelines.

11. On February 25, 2014, the day after Connelly filed his complaint, the MSA filed a notice with the Commission under Section 51 of the *Alberta Utilities Commission Act* requesting that a hearing be initiated against TransAlta for breaches of Section 6 of the *Electric Utilities Act* and sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* in 2010 and 2011 in the Alberta electricity wholesale market. The MSA also requested a hearing in connection with Kaiser, Connelly and TransAlta for breaches of Section 4(1) of the *Fair, Efficient and Open Competition Regulation* and Section 6 of the *Electric Utilities Act*. On March 21, 2014, pursuant to the notice filed earlier, the MSA filed its application with supporting evidence.

12. In a letter to the parties dated March 12, 2014, the Commission decided that the first step in connection with the proceedings brought by the complainants and the MSA, was to consider Section 58(2)(a) of the *Alberta Utilities Commission Act*. This provision required the Commission to dismiss a complaint "... if the Commission is satisfied that it relates to a matter the substance of which is before it or has been dealt with by the Commission or any other body."

13. After receiving written argument from the complainants and the MSA, the Commission on May 15, 2014, in Decision 2014-135, dismissed the complaints against the MSA without determining their merits, concluding that there was a logical and rational connection between the complaints filed by TransAlta, Kaiser and Connelly and the substance of the MSA's application.[4] It concluded that both proceedings ultimately concerned the same circumstances: discretionary outages and forward trading. The Commission also held that the words "before it" meant the time that the Section 58(2)(a) matter was heard, not the time that the complaints were filed. Further, the Commission ruled that the complainants could raise the issues set out in their complaints with respect to the MSA's conduct, to the extent that those issues amounted to defences or mitigating factors.

1.1.2 Proceeding 3110 – the procedural decisions

14. As indicated earlier, the MSA initiated a proceeding against TransAlta, Kaiser and Connelly in connection with certain activities conducted by the parties in the wholesale electricity market in late 2010 and early 2011.

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[4] Decision 2014-135: *TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly, Complaints about the conduct of the Market Surveillance Administrator*, Application Nos. 1610340, 1610342, 1610343, Proceeding No. 3109, May 15, 2014, page 22, paragraph 117.

15. Prior to the start date of the public hearing into MSA's allegations, the Commission issued a number of procedural decisions. The main decisions dealt primarily with the issue of disclosure. The first decision was issued on July 11, 2014.[5] It set out a process schedule and provided direction on three issues: the scope of the proceeding, the standard of disclosure and the need for a written interrogatory process.

16. The Commission ruled that the effect of Section 53 of the *Alberta Utilities Commission Act* meant that the scope of the hearing consisted of the matters outlined in the MSA's notice and application, as well as any defences or mitigating factors raised by the respondents.

17. The Commission also ruled that in the circumstances of the proceeding and, in particular, the potential personal and professional consequences to Kaiser and Connelly, the appropriate standard of disclosure from the MSA to the respondents was relevance, not reliance. The Commission directed the MSA to disclose all inculpatory and exculpatory documents (approximately 250,000), identify those documents it objected to disclosing and file, in a sealed envelope, any documents subject to disclosure under sections 6(12)(a)(i) and (ii) of the *Market Surveillance Regulation* so that the Commission could determine whether to order disclosure of these work-product-type documents.

18. Although the MSA had agreed directly with TransAlta to provide responses to a series of draft information requests, the Commission ruled that a written interrogatory process was not required in the case because the parties would have a reasonable opportunity to learn the facts relevant to the MSA's application from the disclosure previously ordered, as well as from the filed evidence in the MSA's application. The Commission did, however, direct the MSA to provide further particulars to Connelly sufficient to enable him to identify the transactions that were the focus of the case against him.

19. As a result of the directions in Decision 2014-204 outlined in paragraph 18 above, the MSA provided responses to requests for particulars, a list of 589 privileged documents it would not disclose and 45 documents (plus four documents not then provided) that might fit the criteria for disclosure under sections 6(12)(a)(i) and (ii) of the *Market Surveillance Regulation*.

20. The respondents were concerned about the adequacy of the disclosure and, after considering submissions from all parties, the Commission issued another ruling dated August 22, 2014.[6] The Commission found that there was some confusion as to whether the 589 documents on the privileged list were non-disclosable under Section 6(12)(a) of the *Market Surveillance Regulation* or for some other ground of privilege. It directed the MSA to provide more information about the documents. The Commission advised the parties that it would consider further argument once the information had been filed and then decide which documents on the privileged list and which of the 45 sealed records (plus the four yet to be provided) should be disclosed.

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5 Decision 2014-204: *Market Surveillance Administrator, Preliminary matters in Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly*, July 11, 2014.

6 Decision 2014-246: *Market Surveillance Administrator, Preliminary matters in Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly*, August 22, 2014.

21. Further to the August 22, 2014 ruling and the additional information filed by the MSA, which clearly identified the documents that it would and would not disclose under Section 6(12) of the *Market Surveillance Regulation,* the respondents collectively challenged 12 of the non-disclosable documents on the privileged list.

22. The Commission determined that 10 of the 12 documents were protected from disclosure under Section 6(12)(b) of the *Market Surveillance Regulation* and the remaining two documents were immune from disclosure under Section 6(12)(a).[7]

23. The Commission also ruled on the 49 sealed documents that the MSA had characterized as documents that may be subject to disclosure under sections 6(12)(a)(i) and (ii) of the regulation. The Commission held that 33 of the 49 sealed records were relevant and material to specific conduct of the MSA identified by Kaiser and Connelly in the defences they had raised and ordered that 30 of the documents be disclosed immediately. The Commission was concerned about whether or not the remaining three records were prohibited from disclosure under a common law privilege, notwithstanding sections 6(12)(a)(i) and (ii) of the *Market Surveillance Regulation*, and directed further submissions from the parties.

24. After considering submissions from the parties, the Commission ruled that in the absence of clear language to the contrary, Section 6(12) of the *Market Surveillance Regulation* did not abrogate relevant common law privileges against disclosure and that based on the Wigmore criteria, the three records and the identities of the individuals who provided the information were protected from disclosure.[8]

25. Notwithstanding the general tenor of the ruling, the Commission directed the MSA to review certain paragraphs in the sealed records and determine whether the passages could be redacted or summarized without revealing the identities of the individuals. In a letter dated November 3, 2014, the MSA advised the Commission that it had provided a redacted version of the three documents to the respondents.

1.2 Process and schedule

26. The Commission determined that the proceeding would commence with the MSA putting in its case. The respondents would then decide whether to call any factual evidence, with the MSA having the right of reply. However, the respondents would have to pre-file any expert evidence upon which they intended to rely. The parties were also given an opportunity to make written submissions about the qualification of each party's expert witnesses prior to the commencement of the hearing on December 1, 2014. The Commission ruled that if the MSA proved its case on a balance of probabilities, phase two of this proceeding would be conducted to consider the remedy for the misconduct established in the first proceeding.

27. On November 27, 2014, TransAlta notified the Commission and parties to the proceeding that it intended to raise jurisdictional issues in this proceeding.[9]

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7 Exhibit 68.01, AUC Ruling on disclosure under Section 6(12), September 17, 2014.
8 Exhibit 86.01, AUC Ruling on disclosure records B2, B3 and B4 by the MSA, October 28, 2014.
9 Exhibit 105.01, TransAlta letter re Notice of Jurisdictional Issues, November 27, 2014, page 1.

28. The Commission commenced an oral hearing on December 1, 2014 at its hearing room in Calgary before Commission Member Tudor Beattie, QC (Panel Chair), Commission Member Dr. Henry van Egteren and Acting Commission Member Dr. Moin A. Yahya. The oral hearing concluded on December 16, 2014. Written argument was filed by the MSA on January 20, 2015, and by the respondents on February 10, 2015. Reply argument was filed by the MSA on February 19, 2015. TransAlta and the MSA filed submissions on the applicability of *White Burgess Langille Inman v Abbott and Haliburton Co.* (*White Burgess)* regarding the admissibility of expert evidence on May 11, 2015.

29. The Commission considers the record for the first phase of Proceeding 3110 closed on May 11, 2015.

30. In reaching the determinations contained within this decision, the Commission has considered all relevant materials comprising the record of this proceeding. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Commission's reasoning relating to a particular matter and should not be taken as an indication that the Commission did not consider all relevant portions of the record with respect to that matter.

31. Throughout this decision, many officers and employees of TransAlta, the MSA, Kaiser, Connelly and witnesses that testified before the Commission are mentioned. For the convenience of the reader, Appendix 2 contains a list of the persons referred to in this decision.

1.3 A brief summary of the events in question

32. The following section is provided as a brief summary of events for the benefit of the reader. The full list of relevant facts, allegations and defences are included later throughout this decision.

33. On February 8, 2010, the MSA issued a notice to market participants and stakeholders that it would be hosting a roundtable discussion on market participant offer behaviour on February 18, 2010,[10] which initiated the consultation process for the development of guidelines regarding market participant offer behaviour (which became known as the offer behaviour enforcement guidelines or OBEG) in the Alberta wholesale electricity market. Between February and November 2010, as part of the OBEG consultation, the MSA issued several discussion papers, met with multiple stakeholders (including TransAlta on October 8, 2010, to discuss a series of example fact patterns[11]) and published at least two sets of illustrative examples.

34. In or around May and June 2010, TransAlta began developing its Portfolio Bidding Strategy,[12] and in August, 2010, the TransAlta asset optimizers, Kaiser and Mr. James O'Connor (O'Connor), were moved to the trading floor.[13] At TransAlta, asset optimizers were responsible for managing TransAlta's asset positions in Alberta, taking into account long positions from physical assets and commercial contracts as well as short positions from financial contracts;

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10 Exhibit 108.02, MSA Notice Re: Roundtable Discussion, February 8, 2010, page 1.
11 Exhibit 14.02, MSA Application, March 21, 2014, page 30, paragraph 122.
12 Exhibit 14.14, MSA Application, Tab 49, transcript of interview with Dean Luciuk, PDF page 120; Exhibit 14.15, MSA Application, Tab 50, transcript of interview with Rob Schaefer, PDF page 2.
13 Exhibit 14.15, MSA Application, Tab 51, transcript of interview with James O'Connor, PDF pages 4-5.

assessing market fundamentals; instructing term traders to buy or sell financial contracts; determining price-quantity pairs or offers for TransAlta's merchant generation; and making recommendations with respect to the timing of short-term outages.[14] Traders, such as Connelly, would transact in the forward financial energy market, which involved buying and selling financial contracts. Delivery in the financial market involves the flow of cash rather than the physical exchange of electricity, with the value of the financial contracts derived from the price of electricity in the physical market.[15]

35. The Portfolio Bidding Strategy identified the opportunity to use two key strategies to capture higher revenues: economic withholding and discretionary outages.[16] On or around October 21, 2010, the document *Alberta Portfolio Bidding Business Case – Executive Summary* was circulated within TransAlta,[17] which eventually received executive approval by November 18, 2010.[18]

36. On November 19, November 23, December 13 and 14, 2010, and February 16, 2011, TransAlta timed discretionary outages at various generating units subject to PPAs to benefit its overall portfolio position in accordance with its Portfolio Bidding Strategy. A detailed timeline of the events surrounding these outages is found in Appendix 5.

37. The MSA released the draft OBEG on November 26, 2010. Its cover letter asked participants to provide input regarding discretionary outages at units subject to a PPA.[19] The final OBEG was released on January 14, 2011; it stated that additional considerations may apply to certain fact patterns if the unit is subject to a PPA. The final OBEG also stated that the MSA "at this time offers no guidance on outage timing at PPA units. Once the MSA is in a position to provide such guidance this section of the guideline will be revised."[20] [emphasis in original]

38. The MSA received a complaint on February 25, 2011, regarding the conduct of TransAlta as a PPA owner pertaining to the timing of outages at coal-fired generating units.[21] On March 8, 2011, the MSA issued a Notice of Investigation to TransAlta relating to the timing of outages at TransAlta's PPA power plants, and instructing TransAlta to retain all relevant records related to the matters under investigation.[22]

39. In its application filed with the Commission on March 21, 2014, the MSA alleged that the conduct of TransAlta in relation to the events on November 19, November 23 and December 13 and 14, 2010, and February 16, 2011, contravened sections 2(h) and 2(j) of the *Fair, Efficient*

14 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, pages 2-4.
15 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 3.
16 TransAlta used the term discretionary outage to refer to outages at generating units to address operational issues in which it had some discretion as to the timing of the outage.
17 Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF page 2.
18 Exhibit 14.15, MSA Application, Tab 55, email from Dean Luciuk *Portfolio Bidding – Approval for Alberta Asset Optimizers – Acknowledgement Requested*, November 18, 2010, PDF page 16.
19 Exhibit 14.14, MSA Application, Tab 42, MSA notice re market participant offer behaviour draft guidelines, November 26, 2010, PDF page 20.
20 Exhibit 14.14, MSA Application, Tab 46, *MSA Offer Behaviour Enforcement Guidelines*, January 14, 2011, PDF page 105.
21 Exhibit 14.02, MSA Application, March 21, 2014, PDF page 15, paragraph 43.
22 Exhibit 14.10, MSA Application, Tab 6, MSA Notice of Investigation, March 8, 2011, PDF page 22.

and Open Competition Regulation and Section 6 of the *Electric Utilities Act*. In addition, the MSA alleged that the conduct of TransAlta, Kaiser and Connelly in relation to trading activities around the time of these events contravened Section 4 of the *Fair, Efficient and Open Competition Regulation* and Section 6 of the *Electric Utilities Act*.

2 Relevant statutory and regulatory provisions

40. In this section, the Commission provides background on the evolution of Alberta's competitive generation market, including the development and auction of the PPAs, explains the general statutory scheme for the operation of a fair, efficient and openly competitive (FEOC) wholesale electricity market and sets out the specific provisions of the general statutory scheme that are relevant in this proceeding.

2.1 Deregulation and the development of the Power Purchase Arrangements

41. Before 1996, most of Alberta's electricity needs were met by three utilities: TransAlta Utilities Corporation (formerly Calgary Power Company Ltd.), ATCO Ltd. (formerly Alberta Power Ltd.) and EPCOR Utilities Inc. (formerly Edmonton Power Corporation). Those utilities were vertically-integrated, which means that each utility owned and operated the necessary infrastructure to generate, transmit and distribute electricity within a defined service territory. Customer rates for the electricity generated and delivered by these utilities were based on generation and transmission costs that were averaged on a province-wide basis and approved by the Commission's predecessor utility regulator.

42. In 1996, the government of Alberta began to restructure Alberta's electricity market. The Alberta Legislature passed the *Electric Utilities Act*[23] and the legislature made a number of other changes to the regulatory regime. One of the fundamental changes introduced by the new act was to establish separate regulatory treatment for the three components of the electricity industry: generation, transmission and distribution. An important change was that, under the new legislation, the commodity price of electricity, the price that generators would receive for their production, would be set by competitive market forces, while the delivery costs for electricity, which included the costs of transmission and distribution, would continue to be fully regulated.

43. The legislature made further refinements to the electricity industry in 1998 when it amended the *Electric Utilities Act* and introduced the PPAs. The purpose of the PPAs was to address the concentration of market power held by TransAlta Utilities, ATCO and EPCOR, which controlled approximately 90 per cent of the province's generating units. Instead of forcing those utilities to sell their generating units, the government required them to sell a specified amount of generation from those units to other parties through the PPAs. In exchange, the PPA buyers were required to pay the utilities their fixed and variable generation costs and a return on investment. PPAs allow the buyer the exclusive dispatch rights to the output of the PPA unit up to a certain capacity of the generating unit. This is known as the committed capacity. Each PPA sets out a target availability for each generating unit. The target availability is expressed as a percentage of the committed capacity and the value changes from year to year. The PPAs contain incentives to encourage the owners to achieve the committed capacity set out in the PPA. These

[23] *Electric Utilities Act*, SA 1995, c E-5.5.

incentives are referred to as availability incentive payments (AIP).[24] In a given settlement period, if the PPA owner can make available generating capacity above the target availability, the PPA owner is paid the AIP. If the PPA owner does not achieve the target, it is required to pay the PPA buyer the AIP.

44. The Chief Justice of Alberta described the PPAs in *ATCO Electric Limited v Alberta (Energy and Utilities Board)*, 2004 ABCA 215, as follows:

> [17] PPAs are long-term contracts, for a maximum of 20 years, entitling the party holding the contract rights to the electrical output of a power generating unit. The plan was to sell the PPAs by auction: s.45.93 of the *1998 Act*. All PPAs required Board approval and the Board could, in certain circumstances, vary the terms of the PPAs: s.45.91 of the *1998 Act*. The auction rules under which the PPAs were to be sold were codified in the *Power Purchase Arrangement Auction Regulation*, Alta. Reg. 85/2000. These *Auction Rules* set limits respecting the maximum generating capacity a party could ultimately control through winning bids. The purpose of this limitation – to minimize the risk that one or more buyers might control a disproportionate market share and thereby defeat the objective of increased competition.
>
> [18] The theory was that by compelling this generation capacity of the Alberta power producers to be disposed of under PPAs, it would increase the number of parties selling electricity which would, in turn, increase competition and result in lower prices for electricity. As a consequence of this new legislative regime, PPAs cover the electrical output of most regulated plants (those in existence prior to the *1995 Act*) from January 1, 2001 until December 31, 2020. PPA buyers have the right to sell that output directly to consumers or through the Power Pool of Alberta. Viewed in this light, PPAs represent an example of the government's attempts, on restructuring, to increase competition and promote a more balanced relationship, in terms of bargaining power, between utilities and their customers.

45. Further changes to the *Electric Utilities Act* were made in 2003, and in June 2009, the government enacted the *Fair, Efficient and Open Competition Regulation*.[25]

2.2 The statutory scheme for the wholesale electricity market

46. The *Electric Utilities Act* sets out the regulatory framework for the operation of Alberta's wholesale electricity market. Section 5 of the act sets out its purposes, which include:

> (b) to provide for a competitive power pool so that an efficient market for electricity based on fair and open competition can develop, where all persons wishing to exchange electric energy through the power pool may do so on non-discriminatory terms and may make financial arrangements to manage financial risk associated with the pool price;

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[24] The AIP is calculated on the basis of a rolling average pool price (RAPP) calculated over a 30 day period. AIP is the difference between target availability and actual availability, multiplied by the rolling average pool price less an energy payment scheduled in the PPA. The AIP is not dependent on the dispatch level of the unit, but rather the availability that is declared by the PPA owner – as per exhibit 152.01, Witness Statement of Kelvin Koay, December 5, 2014, page 5, paragraph 23.

[25] This included merging the Transmission Administrator with the Power Pool of Alberta to form the Alberta Electric System Operator (AESO), which performs the duties of the independent system operator (ISO) in Alberta.

(c) to provide for rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant;

(d) to continue a flexible framework so that decisions of the electric industry about the need for and investment in generation of electricity are guided by competitive market forces;

...

(g) to continue the framework established for power purchase arrangements;

(h) to provide for a framework so that the Alberta electric industry can, where necessary, be effectively regulated in a manner that minimizes the cost of regulation and provides incentives for efficiency.

47. Section 6 of the *Electric Utilities Act* is also relevant and states:

6 Market participants are to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market.

48. The *Fair, Efficient and Open Competition Regulation* addresses, amongst other things, conduct that does not support the fair, efficient and openly competitive generation market. Section 2 is a list of market participant conduct that does not support the fair, efficient and openly competitive operation of the market. Relevant to this proceeding are sections 2(h) and 2(j):

2 Conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market includes the following:

...

(h) restricting or preventing competition, a competitive response or market entry by another person, including

(i) a market participant directly or indirectly colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition, and

(ii) a market participant engaging in predatory pricing or any other form of predatory conduct;

...

(j) manipulating market prices, including any price index, away from a competitive market outcome;

49. Section 4 of the regulation is also relevant in this proceeding and describes restrictions on the use of non-public outage records for trading subject to certain exceptions set out in the provision.

2.2.1 The MSA's role

50. Part 5 of the *Alberta Utilities Commission Act* addresses the continuation of the MSA as an independent agency and sets out its mandate and duties.

51. Section 33 of the *Alberta Utilities Commission Act* requires the person appointed as Market Surveillance Administrator to act honestly, in good faith, and in the public interest and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

52. Section 39 sets out the MSA's mandate. The MSA's statutory duties include surveillance, investigation and enforcement of matters and activities related to the fair, efficient and openly competitive electricity market of Alberta. The MSA has been described by the Alberta Court of Appeal as the independent "watchdog" of Alberta's electricity market.[26]

53. Section 40 of the *Alberta Utilities Commission Act* defines the MSA's duty and states: "[t]he Market Surveillance Administrator shall carry out its mandate in a fair and responsible manner."

54. The MSA has considerable investigatory powers under the *Alberta Utilities Commission Act*. Pursuant to Section 46 of that act, the MSA can enter the premises of a market participant, make inquiries of a market participant's current and former employees, including contract employees, request the production of documents, and request access to a market participant's computer system.

55. If the MSA is satisfied that a person has contravened an act or another regulatory instrument or has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, it can provide notice to the Commission of the need for a hearing into the matter under Section 51 of the *Alberta Utilities Commission Act*. When the Commission receives such a notice, it must set the matter down for a hearing pursuant to Section 53 of the *Alberta Utilities Commission Act*.

56. Section 61 of the *Alberta Utilities Commission Act* provides that the MSA is immune from liability for "market surveillance acts" that include acts and omissions carried out in the exercise of the MSA's mandate, unless the acts were not carried out in good faith.

57. The *Market Surveillance Regulation* is a regulation made under the *Alberta Utilities Commission Act*. This regulation sets out in greater detail a market participant's obligation to provide records requested by the MSA. It also makes it clear that the MSA is entitled to use such records for the purposes of its mandate.

58. Sections 7 and 8 of the *Market Surveillance Regulation* are also relevant in terms of understanding the statutory scheme. Section 7 requires the MSA to make public the procedures it will use when interacting with market participants during investigations. Under this section, the MSA is required to consult with market participants before making any material changes to its investigation procedures. Section 8 of the regulation sets out the process that the MSA must follow when making guidelines in support of the fair, efficient and openly competitive operation

[26] *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 (CanLII), paragraph 1.

of the electricity market. This section provides that the MSA must consult with market participants when developing new guidelines or when changing existing guidelines.

2.2.2 The Commission's role

59. The *Alberta Utilities Commission Act* sets out the AUC's role and duties with respect to the MSA and its activities. The act places the Commission in a supervisory and decision-making role with respect to the activities of the MSA.

60. When the MSA brings a matter to the Commission by way of a notice under Section 51, the Commission must hold a hearing in accordance with Section 53. Section 56 sets out the Commission's authority when making a decision on a matter brought to it by the MSA. Section 56(2) provides that the Commission may take into account any guidelines made by the MSA. Section 56(3) states that, if the Commission finds that a person has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market, it may:

- impose an administrative penalty on the person
- impose any terms or conditions on the person relating to the person's future conduct in the electricity market, and
- prohibit the person from engaging in conduct or direct the person to take action.

61. It is within this statutory context that the Commission will consider the MSA application.

3 Assessment of evidence

62. A considerable amount of evidence was filed and given in this proceeding. The evidence took many forms and included:

- Documentary evidence generated by the parties before, during and after the contraventions alleged by the MSA;
- Expert reports prepared by the experts retained by the MSA and TransAlta;
- Witness statements filed by the witnesses for the MSA, TransAlta, Kaiser and Connelly; and
- Oral evidence from the parties and their respective expert witness.

63. Several evidentiary issues were addressed over the course of the hearing and in argument. Those issues include the appropriate standard and burden of proof for the proceeding, the treatment of circumstantial evidence and the drawing of inferences, the admissibility and weight of the expert evidence tendered at the proceeding, and the treatment of evidence from corporate witnesses and the MSA. In this section, the Commission sets out its general approach to each of these evidentiary issues.

64. The Commission's starting point for assessing the evidence in this proceeding is Section 20 of the *Alberta Utilities Commission Act,* which states: "[t]he Commission is not bound in the

conduct of its hearings by the rules of law concerning evidence that are applicable to judicial proceedings."

65. In Decision 2011-436,[27] the Commission stated: "While this [Section 20] allows the Commission some flexibility to determine what evidence to admit and what weight to give the evidence it admits, it cannot ignore the principles of procedural fairness that underlie the formal rules of evidence."[28] The Commission's approach to the assessment of evidence has not materially changed since it issued Decision 2011-436.

3.1 Standard and burden of proof

66. The Commission has consistently held that the standard of proof in proceedings before it, including proceedings initiated by the MSA, is proof on a balance of probabilities.[29] As stated by the Supreme Court of Canada in *F.H. v McDougall*:[30]

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.[31]

67. The court then commented on the scrutiny of evidence and the application of the civil standard of proof:

> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.[32]

68. The Commission considers the above to be guiding principles in the assessment of evidence in this proceeding. Accordingly, the MSA has the burden of demonstrating on a balance of probabilities, that the alleged contraventions occurred. Then, for those contraventions to which the defence of due diligence applies, the respondents will have an opportunity to demonstrate, on a balance of probabilities, that they took all reasonable care to prevent the alleged contraventions. The evidence relied upon by all of the parties must be clear, convincing and cogent to satisfy the burden imposed. The Commission's job is then to scrutinize with care all of the evidence filed when making its decision.

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27 Decision 2011-436, *AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Heartland Transmission Project*, November 1, 2011.

28 *Ibid.*, paragraph 82.

29 Decision 2009-144, *Market Surveillance Administrator, Confirmation of a Specified Penalty Issued to Syncrude Canada Ltd.*, September 22, 2009, pages 5-6, paragraph 18. See also Decisions 2008-126 and 2008-114.

30 *F.H. v McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII).

31 *Ibid.*, paragraph 40.

32 *Ibid.*, paragraphs 45 and 46.

3.2 Circumstantial evidence

69. Some of the evidence relied upon by the MSA is circumstantial evidence. The Supreme Court has described circumstantial evidence as "evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue can be reasonably inferred."[33]

70. The Alberta Court of Appeal recently commented on the drawing of inferences from circumstantial evidence in *Walton v Alberta (Securities Commission)*(Walton).[34] The Walton case involved allegations against Walton and others on illegal trading under the *Securities Act*.[35] The court acknowledged that such charges can be proven by inferences drawn from circumstantial evidence. However, the court emphasized the distinction between a proper inference and speculation or conjecture. It described speculation as "the drawing of an inference in the absence of any evidence to support that inference, or in situations where there is no 'air of reality' to the inference."[36] The court stressed the need for clear and cogent evidence before any particular inference is drawn. The court went on to describe some limitations on the drawing of inferences:

> The process of drawing inferences from facts established by the evidence is not without limits. As was said in *R. v Cavanagh*, 2013 ONSC 5757 (CanLII) at para. 74: ". . . there comes a time when the underlying facts may be so remote that there are just too many steps or leaps in the chain of reasoning to say that a particular inference can be reasonably drawn."[37]

71. Having regard to the foregoing, it is apparent to the Commission that it may draw inferences if they are reasonably and logically drawn from facts established by evidence that is clear, convincing and cogent.

3.3 Expert evidence

72. Expert evidence is opinion evidence on a scientific, technical or otherwise specialized matter provided by a person with specialized knowledge, experience or training. The Supreme Court of Canada succinctly explained the role of an expert witness in *R. v Howard*: "[e]xperts assist the trier of fact in reaching a conclusion by applying a particular scientific skill not shared by the judge or the jury to a set of facts and then by expressing an opinion as to what conclusions may be drawn as a result."[38]

73. The Supreme Court of Canada set out the law governing admissibility of expert evidence in *R. v Mohan*.[39] It held that expert evidence will be admissible if it is: a) relevant, b) necessary to

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33 *R. v Cinous*, [2002] 2 SCR 3, 2002 SCC 29 (CanLII), at paragraph 89.
34 *Walton v Alberta (Securities Commission)*, 2014 ABCA 273 (CanLII).
35 *Securities Act* (Alberta), RSO 2000, c S-4.
36 *Walton,* paragraph 26.
37 *Ibid.*, paragraph 28.
38 *R. v Howard*, [1989] 1 SCR 1337.
39 *R. v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC).

assist the trier of fact, c) there is no other rule excluding the evidence, and d) the expert has the necessary qualifications.[40]

74. Another important factor when considering expert evidence is the expert's independence and objectivity. On April 30, 2015, the Supreme Court of Canada issued a judgement that directly addressed expert evidence and the relationship between independence, admissibility and weight; *White Burgess Langille Inman v Abbott and Haliburton* (*White Burgess*).[41] TransAlta filed a copy of that decision on the day it was issued on the basis that it may have been relevant to the Commission's deliberations. The Commission subsequently set out a process for parties to file submissions on the decision and its implications for this proceeding.

75. *White Burgess* is a professional negligence case relating to accounting work. In 1995, the appellants hired the respondent accountants to perform an audit function. In 2005, the appellants hired a different accounting firm to perform their audits. The new accounting firm alleged irregularities in the old firm's audits and claimed that the appellants suffered financially as a result of the irregularities. A suit was launched to recover the shortfall. In response to a motion for summary dismissal, the appellants hired an expert in forensic accounting who also worked for the new firm, but at a different location. The respondents sought to have the expert's report expunged from the record on the grounds of bias or lack of independence.

76. The chambers judge found that the expert's reliability did not meet the threshold for admissibility because of her firm's relationship with the plaintiffs on the main issue raised in the suit and struck her report from the record. The majority of the Court of Appeal overturned the trial judge's ruling, determined the expert's evidence to be admissible and ruled that "[t]he mere appearance or even existence of a conflict due to personal, professional or institutional relationship does not disqualify."[42]

77. The Supreme Court found that expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. The court found that there was a threshold admissibility requirement for expert evidence in relation to this duty. The court reviewed the law in Canada and other jurisdictions and determined that "...an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted."[43]

78. The court described the threshold inquiry as "whether the expert is able and willing to carry out his or her primary duty to the court."[44] The court explained that "... it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible." However, the court set out the following caution about the exclusion of expert evidence:

> I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with

40 *Ibid.*
41 *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23.
42 *Abbott and Haliburton Company v WBLI Chartered Accountants*, 2013 NSCA 66 (CanLII), paragraph 125.
43 *White Burgess*, paragraph 45.
44 *Ibid.*, paragraph 49.

> fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.[45]

79. The court made it clear that the concept of apparent bias is not relevant to the question of whether an expert will be unable or unwilling to fulfill its duty to the court. It stated that decision makers should not ask if the reasonable observer would think that the expert is not independent. Rather, the court explained that the question is "whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance."[46]

80. The court applied this analysis to the expert evidence in question and found that the evidence was admissible, notwithstanding that the expert worked for the same firm that initially raised concerns about the original accountant's work. It concluded that the expert recognized that she was aware of the standards and requirements that experts be independent, the precise guidelines in the accounting industry concerning accountants acting as expert witnesses and that she owed an ultimate duty to the court in testifying as an expert witness.

3.3.1 The expert evidence tendered in Proceeding 3110

81. The MSA and TransAlta each tendered expert economic and technical evidence in support of their respective positions.

82. The MSA's expert witnesses were:

- Dr. Matt Ayres (Ayres) as an expert in economics. Ayres prepared a report on price impacts associated with the outages in question.
- Dr. Jeffrey Church (Church) as an expert in economics. Church provided a report that addressed competition matters including market power.
- Mr. Doug Heath (Heath) as an expert in the industry practice for discretionary outages in Alberta at units subject to PPAs. Heath prepared a report on the four outages taken by TransAlta that are the subject of this proceeding.
- Mr. Stephen Eisenhart (Eisenhart) as an expert in industry practice for discretionary outages in North America. Eisenhart prepared a report on discretionary outages.

83. TransAlta's expert witnesses were:

- Dr. Ramsay Shehadeh (Shehadeh) and Dr. Jonathan Falk (Falk), both of NERA Economic Consulting (NERA), as experts in economics. Shehadeh and Falk filed a critique of Church's report (the NERA report).
- Ms. Julia Frayer (Frayer), of London Economics International LLC (LEI), an expert in economics. Frayer filed a critique of Ayres' report (the LEI report).

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45 *Ibid.*, paragraph 49.
46 *Ibid.*, paragraph 50.

- Dr. Marshall Clark (Clark), and Mr. Steve Paterson (Paterson), experts in metallurgical and materials engineering and Mr. Tom Burnett (Burnett), an expert in mechanical engineering. Clark, Patterson and Burnett filed a critique of the reports prepared by Heath and Eisenhart.

84. TransAlta also filed a witness statement prepared by Mr. Robert Emmott (Emmott) who was TransAlta's Chief Engineer at the material times. TransAlta stated that because parts of Emmott's witness statement could be considered to be opinion evidence, it also wanted to have him qualified as an expert regarding engineering standards and practice in Alberta.

3.3.2 Views of TransAlta

85. The Commission set out a process for the pre-qualification of witnesses based on written submissions. TransAlta did not ask the Commission to exclude any of the MSA's expert evidence but stated that it had concerns regarding the independence of Church and Ayres that it would address through cross-examination and argument.

86. In argument, TransAlta submitted that Ayres was a key figure who played a leading role for the MSA during the OBEG consultation process, the investigation of the outage and trading allegations and in the proceedings before the Commission. TransAlta observed that Ayres was the lead investigator for the matter, he drafted the MSA's notice, he instructed experts retained on behalf of the MSA and he authored expert evidence on the price impact associated with the outage allegations.

87. TransAlta alleged that Ayres' expert opinion on price impact was influenced by what he learned in his investigation. It further submitted that Ayres' role as lead investigator diminished his impartiality as an expert. It stated that Ayres' conclusion on the investigation was reflected in, and informed his expert opinion. TransAlta submitted that Ayres' expert report suffered from confirmation bias and alleged that Ayres selected a methodology for calculating price impact that would maximize the alleged scope of harm resulting from TransAlta's actions.

88. TransAlta summarized its concerns about Ayres' evidence as follows:

> Dr. Ayres was the lead investigator into the impugned conduct. He has a vested interest in the outcome of this proceeding. Dr. Ayres is not independent and, as a result, his evidence is unreliable. The AUC should reject Dr. Ayres' evidence or grant it little weight.[47]

89. In its final argument, TransAlta submitted that Canadian courts and tribunals have concluded, on several occasions, that investigators are not independent witnesses when later called on to testify to their investigations.[48]

90. TransAlta submitted that Church's evidence also suffered from a lack of independence for two reasons. First, it asserted that Church had an economic relationship with the complainant that triggered the investigation into the outage matters. TransAlta alleged that Church did not reveal this relationship until questioned at the hearing. TransAlta also contended that Church's

[47] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 109, paragraph 337.
[48] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 106, paragraph 326.

responses were evasive and reflective of a conflict of interest. TransAlta submitted that an economic relationship with an interested party creates an obvious conflict of interest. It submitted that Church failed to grasp his duties to the AUC as an expert witness.

91. Second, TransAlta questioned Church's independence based on a working relationship that Church had with one of the MSA investigators into the outage allegations, Mr. Richard Kendall-Smith (Kendall-Smith). TransAlta submitted that Kendall-Smith was a graduate student of Church and that the two co-authored a paper on market power in the Alberta electricity market. TransAlta observed that Church met with the MSA, including Kendall-Smith, and discussed his general approach to preparing his report. TransAlta argued that "it was inconsistent with the role of an expert witness to be writing an expert report on a topic similar to a paper that the expert was working on with an individual playing a central role in the investigation into the impugned conduct."[49]

92. In its supplemental submissions, TransAlta argued that the Supreme Court reaffirmed the following principles in the *White Burgess* decision:

- Expert witnesses have a special duty to the court to provide fair, objective and non-partisan evidence.
- An expert's lack of independence and impartiality can result in egregious miscarriages of justice.
- The potential dangers of expert evidence are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it.
- When deciding if an expert can carry out its duty to the court, an important consideration is the nature and extent of the expert's interest or connection with the litigation or a party.[50]

93. TransAlta submitted that, given the multiple roles played by Ayres in relation to the proceeding and the events that led up to the proceeding, his participation was inconsistent with the special duty that an expert has to the decision maker because he was an advocate for the MSA's position.

94. TransAlta explained that its concerns about Church's evidence arise not because he previously worked for one of the complainants, but because of his failure to identify that relationship prior to cross-examination and his attempts to avoid answering questions about his relationship with the complainant during cross-examination. TransAlta also repeated its concern about Church's academic relationship with Kendall-Smith.

95. TransAlta concluded that having regard to the direction provided by the Supreme Court, the Commission should give the evidence of Church and Ayres little or no weight.

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[49] *Ibid.*, page 133, paragraph 415.
[50] Exhibit 3110-X0183, Letter to AUC re Applicability of Supreme Court Decision, May 11, 2015, page 3.

3.3.3 Views of the MSA

96. In its submissions on the pre-qualification of witnesses, the MSA did not seek to exclude any of TransAlta's witnesses but reserved the right to cross-examine them on all matters going to the weight of their evidence.

97. In argument, the MSA submitted that Ayres is independent of any market participant. It stated that Ayres' role was to serve the MSA's legislated mandate.[51] The MSA submitted that Ayres constructed his counter factual price impact analysis in good faith based on his expertise and knowledge of the behaviour of market participants and the Alberta market. The MSA submitted that, as an expert body, it should not be prevented from utilizing that expertise in performing its statutory mandate.

98. Regarding TransAlta's concerns about Church's independence, the MSA submitted that Church had no discussions with Kendall-Smith and was not then working for any party in the proceeding. It observed that Church's resumé reflects that he has worked for a number of other market participants, including TransAlta.

99. The MSA also filed submissions addressing the Supreme Court's decision in *White Burgess*. The MSA observed that *White Burgess* addresses the role and duty of expert witnesses and submitted that the Supreme Court's conclusions are consistent with the MSA's previous submissions. The MSA submitted that both Church and Ayres were credible experts who provided "clear, sensible and solidly grounded testimony in accordance with their duty to assist the trier of fact."[52]

100. The MSA submitted that admissibility of its expert evidence is not an issue in this proceeding because no objection was taken by any party to the qualifications of its witnesses during the pre-qualification process set out by the Commission.

101. The MSA stated that the spectre of bias in the *White Burgess* case was much higher than that alleged by TransAlta as against Church and Ayres. It submitted that TransAlta's concerns about Ayres' bias ignore the fact that Ayres played a number of roles in the investigation and proceeding because that was his job as an employee of the MSA. It further noted that Ayres had a statutory duty to carry out the MSA's mandate in a fair and responsible manner.

102. The MSA submitted that the concerns expressed by TransAlta regarding Church's independence were unfounded. It argued that TransAlta did not demonstrate that Church was incapable of providing fair, objective and non-partisan evidence.

103. The MSA submitted that having regard to the principles expressed in *White Burgess*, TransAlta's expert evidence should be given little or no weight. It submitted that the evidence provided by its engineering experts was flawed and partisan. The MSA also argued that TransAlta's economic evidence was irrelevant because it was not based on sound technical evidence.

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51 Exhibit 3110-X0174, Reply Argument of the Market Surveillance Administrator, February 19, 2015, page 33, paragraph 132.

52 Exhibit 3110-X0184, MSA letter to AUC re White Burgess SCC Case, May 11, 2015, page 2.

3.3.4 Commission findings

104. Neither the MSA nor TransAlta submitted that each other's expert evidence should be excluded but both argued that each other's evidence should be given little or no weight.

105. The Commission observes that all of the cases filed by TransAlta regarding the role of an investigator in subsequent proceedings were decided before *White Burgess*. In the Commission's view, *White Burgess* provides relevant and timely direction regarding independence and its role in the qualification of expert witnesses. The Commission will follow the principles outlined in *White Burgess* when assessing the expert evidence filed in the proceeding.

106. Because *White Burgess* was issued following the oral portion of the public hearing, none of the expert witnesses were specifically asked if he or she could fulfill the duty to provide fair, objective and non-partisan evidence. Notwithstanding that the question was not asked, the Commission is satisfied that each of the experts who appeared in the proceeding was able and willing to carry out his or her respective duty to provide the Commission with fair, objective and non-partisan evidence. All of the expert witnesses gave their evidence under oath or affirmation. The Commission is satisfied, based on the demeanor of the experts when testifying, that each understood their respective roles and duties to the Commission as expert witnesses. Accordingly, the Commission finds that all of the expert evidence filed met the threshold for admissibility from the perspective of independence.

107. The expert evidence filed in the proceeding can be grouped generally into three categories: a) expert economic evidence regarding the restriction or prevention of competition (Church, Shehadeh and Falk); b) expert economic evidence regarding price impacts associated with the timing of outages (Ayres and Freyer); and c) expert evidence regarding the discretionary nature of the outages (Heath, Eisenhart, Clark, Patterson and Burnett).

108. While the Commission's assessment of the weight to be accorded to the above evidence is generally found in the sections in which the evidence is discussed in detail, the Commission will now also address the issues raised by the parties with respect to all of the economic evidence filed in the proceeding and, in particular, with respect to TransAlta's concerns about the independence of Church and Ayres.

109. At the outset of this discussion, the Commission considers it important to note that the Commission itself is an expert tribunal whose expertise includes the very issues identified and addressed in the expert economic evidence filed in this proceeding; i.e., questions of economic policy in competition issues and to the quantification of price impacts through counterfactual analysis.

110. In noting its own expertise, the Commission is not stating that it was unnecessary for the expert economic evidence in question to be filed; some of the issues addressed in the economic evidence were being raised before the Commission for the first time. Rather, the Commission raises its own expertise simply to highlight that one of the common concerns regarding expert evidence, that the trier of fact may inappropriately defer to an expert's opinion, is not a significant factor as it relates to the Commission's assessment of expert economic evidence in this proceeding. The concern was described as follows by Justice Sopinka in *R. v Mohan*.

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.[53]

111. In this instance, the Commission is very knowledgeable about the issues raised in the expert economic evidence and with the methods and language used by the economics experts in providing their various opinions. While this expertise does not eliminate concerns specific to expert independence, it does allow the Commission to make an informed judgement about the economic evidence filed in the proceeding. In the Commission's view, its familiarity with the subject matter ameliorates one of the potential dangers associated with expert evidence that can arise due to a lack of independence.

Church's evidence

112. TransAlta had two concerns about Church's independence. The first related to a series of questions put to Church during cross-examination about whether he had previously worked for a company that filed a complaint with the MSA regarding the timing of outages at TransAlta's PPA units.

113. When the question was first put to him, Church expressed some reservations about answering the question on the basis that some of the work he had performed in the past for Alberta market participants was subject to confidentiality agreements. He also stated: "I have some suspicions about who the complainant might be, but do I know exactly who the complainant is? I don't know."[54]

114. On the following day, Church sought to correct the record because he recalled, upon reflection, that he had been told who the complainant was, but not by the MSA. Church was then asked again whether he had an economic relationship with the complainant. Church's response was as follows:

> ...the only reason I know who the complainant is because it's information that I've got on another matter where I have a confidentiality obligation. I can't disclose it.
>
> And in my view -- and I'm not a lawyer, as I've testified many times -- I think you've put me in a position where I don't really understand what the legal ramifications are because I have a confidential obligation not to disclose particular information that I've come across in a prior matter.
>
> By asking me to answer this question, it's not rocket science to figure out that the confidential information that I have is going to be disclosed. And so I don't understand, you know, what position that puts me in in terms of breaching a confidential obligation that I have.[55]

115. Church was directed to answer the question. He responded as follows:

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53 *R. v Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC), Section III.
54 Tr. Vol. 2, December 2, 2014, page 415, lines 21-23.
55 Tr. Vol. 3, December 3, 2014, page 627, lines 8-23.

> So, Mr. Chairman, if I may, you're putting me in a very difficult position. And it's not about – my issue is not about whether the complainant is going to be identified or not. My issue is that the source of that information that I know who the complainant is comes about from prior engagement where I have a confidentiality obligation to a particular, you know, organization.
>
> ...
>
> Yes, Mr. Chairman, but if I answer the question, it will be very easy for people to figure out who it is, and then I think I will have disclosed information which I'm not obligated to -- or I have a confidential obligation not to disclose. [56]

116. Upon further direction, Church reluctantly agreed that he had previously had an economic relationship with the unnamed complainant.

117. The Commission does not consider that Church's reticence to answer the question about his previous employment with the complainant was evasive or deceptive. The Commission accepts Church's testimony that he was initially unsure if he knew who the complainant was. When Church reflected on the matter and recalled that he had been informed of the complainant's identity, he did not try to hide that information from the Commission. Rather, Church volunteered that information on his own accord.

118. The Commission finds that Church's reluctance to reveal the identity of the complainant was genuine and related specifically to his wish to honor his confidentiality obligations to a third party. In the Commission's view, Church's conduct in this regard does not suggest that his evidence was tainted by a conflict of interest, as argued by TransAlta. To the contrary, it indicates to the Commission that Church took his contractual and professional obligations seriously and that he was willing to go to considerable lengths to respect those obligations.

119. The Commission likewise finds no reason to discount Church's evidence on the basis of his academic relationship with Kendall-Smith. In the Commission's view, there is no evidence or information before it to suggest that Church's relationship with Kendall-Smith affected the expert evidence that he provided.

Ayres' evidence

120. The Commission understands that TransAlta's concerns about the independence of Ayres' expert opinion arise because of the different roles he played in the events that led to this proceeding. Specifically, Ayres was involved in the OBEG consultation, was the MSA's lead investigator into TransAlta's conduct, and provided expert evidence in support of the MSA's notice and application filed with the Commission. Given his various roles, Ayres provided both factual and opinion evidence at the proceeding. His factual evidence related to the events that led to the MSA filing its notice with the Commission. His opinion evidence related to the price impacts associated with the four outages that form the basis of the MSA's case against TransAlta under sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation*.

[56] Tr. Vol. 3, December 3, 2014, page 628, line 19 to page 629, line 9.

121. As noted in *White Burgess*, an important factor when assessing the admissibility and weight of expert evidence will be the relationship between the expert and the party. In *White Burgess*, the court observed that a "a mere employment relationship" with a litigant will be, in most cases, insufficient to render the evidence inadmissible. However, it suggested that an expert that has some direct economic or familial interest in the outcome of the litigation would be of a greater concern.[57] Essentially, the court recognized that the objectivity of expert evidence may be compromised when the expert has a personal stake in the outcome of the proceeding.

122. In this instance, the expert and the party are effectively one and the same. Ordinarily, that could be cause for considerable concern leading to the evidence in question being accorded little or no weight. However, in this instance, there are a number of factors that mitigate the concerns expressed by TransAlta with respect to Ayres' expert evidence.

123. First, the nature of the expert evidence itself is an important consideration. The core of Ayres' expert evidence was the counterfactual analysis in which he predicted market outcomes based on alternative outage timings at the units in question, and the comparison of these outcomes to the observed outcomes.[58] The counterfactual analysis involved two main elements: alternative outage timings and a method for estimating the corresponding pool prices for the counterfactual timings (i.e., during the hours of alternative outage timing and during the hours of actual outage timing assuming that the outage is not then taken).

124. For the first element, the determination of the alternative outage timings, Ayres relied on the reports of Heath and Eisenhart. For the second element, Ayres used a straightforward procedure, which was consistent with TransAlta's own records that outlined how the effectiveness of the strategy was to be measured.[59] In implementing this procedure to predict market outcomes, Ayres used a set of assumptions regarding responses from price responsive loads, other generators and interties, as well as the treatment of marginal units. While the assumptions had an element of subjectivity, Ayres' calculations based on the those assumptions are effectively transparent. In short, because of the nature of the evidence prepared by Ayres, the concerns about this evidence raised by TransAlta are diminished.

125. Second, TransAlta's own experts, LEI, had an opportunity to review and critique Ayres' work. LEI pointed out what it believed to be the shortcomings in his approach. This was not a case in which the Commission was faced with only a single expert for one party providing expert evidence.

126. Third, and as noted more generally above, Ayres' expert evidence as well as that of TransAlta's expert, LEI, relates to a subject matter with which the Commission is very familiar. Accordingly, it is evidence upon which it can make an informed judgement.

127. Fourth, the Commission accepts that because of his experience and knowledge of the Alberta electricity market, Ayres was well qualified to perform the analysis he did.

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[57] *White Burgess,* paragraph 49.

[58] Ayres' evidence also included the impact of outages on forward prices, which is separate from the analysis of pool price impacts outlined here.

[59] Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF page 3.

128. Fifth, as noted in the MSA's argument, the MSA has a duty to carry out its responsibilities in a fair and responsible manner. The Commission accepts that, as an employee of the MSA and its chief economist, Ayres appreciated this duty and performed his job obligations in good faith.

TransAlta's engineering and economic evidence

129. The MSA's concerns regarding TransAlta's engineering and economic evidence related primarily to the relevance of the evidence. However, in its submission filed in response to the *White Burgess* decision, the MSA argued that errors in the Clark report and the NERA report give rise to concerns regarding partisanship and the objectivity of their respective authors.

130. The Commission finds that the MSA's concerns regarding the independence or objectivity of the authors of the Clark report and the NERA report are general in nature and can be addressed in Section 4 of this decision as part of the Commission's overall assessment of the evidence they prepared.

Evidence from corporate witnesses and the MSA

131. Many of the witnesses who appeared at the proceeding can effectively be described as corporate witnesses. These witnesses included officers and employees of TransAlta, Capital Power and ENMAX. The evidence of these witnesses included evidence relating to the facts pertinent to the MSA's allegations (explanatory evidence), policy evidence and technical evidence.

132. The Commission described its approach to assessing evidence from corporate witnesses in AUC Decision 2011-436 as follows:

> In the Commission's view, the policy and explanatory evidence provided by a corporate witness is akin to ordinary evidence provided by a lay witness. It is essentially an explanation or recitation of facts. Technical evidence, on the other hand, is essentially expert evidence provided by a corporate witness. The Commission evaluates the evidence provided by the applicants' corporate witnesses in the same way it evaluates the evidence provided by the other lay and expert witnesses who participated in the hearing. The Commission will first consider the nature of the evidence provided i.e., does it deal with facts or opinion? If the evidence addresses a specialized or technical subject matter the Commission will then consider whether the corporate witness has demonstrated that he or she has the necessary skill, knowledge and experience to provide an opinion on the subject matter. Finally, the Commission will consider whether or to what degree the policy evidence, factual evidence or technical evidence was influenced by the witness' position as an employee of the applicant. The Commission will assess all of these factors when considering the weight to give to the evidence provided by a corporate witness.[60]

133. The Commission has taken the same approach to the assessment of corporate evidence in this proceeding.

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[60] Decision 2011-436, *AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc., Heartland Transmission Project*, November 1, 2011, page 18, paragraph 93.

134. The MSA's witnesses, Mr. Harry Chandler (Chandler) and Ayres, also provided evidence relating to the facts pertinent to its allegations (explanatory evidence), MSA policy and technical evidence in the form of an expert report prepared by Ayres. The Commission's assessment of the MSA's evidence was premised upon the same principles as its assessment of the corporate evidence described above.

The MSA's application is evidence

135. In his final argument, Connelly argued that the MSA's application itself was neither direct nor circumstantial evidence of any factual matter in issue. He submitted that while the MSA's application alleges facts, those facts must be proved by evidence.[61] Connelly expressed these concerns as follows:

> The only insight that can be gleaned from the MSA Application, if any, is insight into how the MSA claims to have interpreted any given event. But this is not a substitute for evidence from witnesses. When the MSA interprets an email, for example, without having asked whether the author and/or the recipient of the email the nature of the email, its context, or its purpose, the MSA's interpretation of the email should be given no weight.[62]

136. The MSA disagreed with Connelly's submissions above and asserted that its application unquestionably contains evidence. It agreed that its application included many documents and submitted that those documents are direct evidence of what they say. It stated that those documents show, in absence of a live witness, "that a certain communication was sent from A to B at a certain time, or that C reported something to D."[63] The MSA submitted that tribunals are entitled to draw inferences and make findings of fact from such direct evidence. The MSA also submitted that it is trite to state that documentary evidence speaks for itself and often requires little or no interpretation by witnesses nor inferences to be drawn.

137. The Commission finds that the MSA's application is evidence in the same manner that the witness statements provided by TransAlta's witnesses and by Kaiser and Connelly are evidence. The application was signed by Chandler, the Market Surveillance Administrator himself. Appended to the application were the documents relied upon by the MSA in support of the application. At the hearing, Chandler confirmed that the application was prepared by him or under his direction.[64] It was open to the respondents to cross-examine Chandler on any part of the evidence he provided through the application.

4 The outage allegations against TransAlta

138. The MSA alleged that TransAlta contravened provisions of the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation* by removing the committed capacity of its competitors at its coal-fired generating units subject to PPAs during tight supply periods. The MSA submitted that TransAlta implemented this strategy to move prices higher in the power

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61 Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, page 21, paragraph 89.
62 *Ibid.*, page 21, paragraph 90.
63 Exhibit 3110-X0174, Reply Argument of the MSA, February 20, 2015, pages 49-50, paragraph 199.
64 Tr. Vol. 1, December 1, 2014, page 16, lines 7-15.

pool and drive market prices higher for forward contracts by creating uncertainty. The MSA alleged that this conduct did not support the fair, efficient and openly competitive operation of the market and was contrary to TransAlta's obligation as a market participant, set out in Section 6 of the *Electric Utilities Act.* The MSA further submitted that this conduct was also contrary to sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* because it restricted or prevented competition or a competitive response and manipulated market prices away from a competitive market outcome.

139. The MSA's allegations relate to the following outages at coal-fired generating units subject to PPAs:

Table 1. Outage events

Generating unit	Date
Sundance 5	November 19, 2010
Sundance 2	November 23, 2010
Sundance 2, Keephills 1, Sundance 6	December 13-16, 2010
Keephills 2	February 16, 2011

140. The MSA asserted that TransAlta had misused its discretion as to the timing of the above outages so that these outages occurred during times of high demand and limited supply. It stated that this conduct benefitted TransAlta's portfolio position while preventing or restricting the ability of the PPA buyers from making offers to the power pool.[65]

141. TransAlta argued that it did not breach Section 6 of the *Electric Utilities Act* or sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation*. It submitted that its conduct in directing the outages, was not anticompetitive because it was consistent with the statutory scheme, including the terms of the PPAs, and with advice provided by the MSA. In the alternative, TransAlta asserted the defence of due diligence and sought a stay of the proceeding for officially induced error and abuse of process.

142. In this section, the Commission first considers the proper interpretation of Section 6 of the *Electric Utilities Act* and sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* as it relates to this application. The Commission then makes determinations on the following issues: i) interpretation of Section 6 and sections 2(h) and 2(j), ii) the PPAs and the Commission's jurisdiction to interpret them, iii) whether the outages were discretionary, iv) whether the timing of the outages impacted pool prices, v) whether the timing of the outages impacted forward prices, vi) whether the timing of the outages restricted or prevented competition or a competitive response, and vii) whether the timing of the outages manipulated market prices away from a competitive market outcome. Finally, the Commission rules on the defences asserted by TransAlta and its requests for a stay of proceedings.

[65] Exhibit 3110-X0002, MSA Argument part 1, January 20, 2015, pages 4-5, paragraphs 16-18.

4.1 The interpretation of Section 6 and sections 2(h) and (j)

143. Section 6 of the *Electric Utilities Act* and sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* read as follows:

> **6** Market participants are to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market.
>
> **2** Conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market includes the following:
>
> ...
>
> (h) restricting or preventing competition, a competitive response or market entry by another person, including
>
> (i) a market participant directly or indirectly colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition, and
>
> (ii) a market participant engaging in predatory pricing or any other form of predatory conduct;
>
> ...
>
> (j) manipulating market prices, including any price index, away from a competitive market outcome;

4.1.1 Views of the MSA

144. The MSA submitted that Section 6 and sections 2(h) and (j) must be interpreted using the plain and ordinary meaning of the words employed by the statute and the regulation. It argued that the Commission must have regard for the legislative history of the *Electric Utilities Act* when interpreting these provisions and warned against the unwarranted application of competition principles or rules developed under different statutory schemes.

145. The MSA stated that Section 6 imposes a positive obligation on all market participants to support the fair, efficient and openly competitive operation of the electricity market in Alberta. It noted that because Section 6 does not contain any qualifying terms such as "substantially," "unduly," or "unreasonably," materiality is not a requisite element of the standard of conduct imposed by the *Electric Utilities Act*.

146. The MSA stated that the overall structure of the scheme is clear. It argued that if conduct falls within Section 2 of the *Fair, Efficient and Open Competition Regulation,* then a breach of Section 6 is also established. The MSA submitted that conduct that does not meet the requirements of Section 2 but is nevertheless anticompetitive, will breach the standard set by Section 6.

147. The MSA submitted that sections 2(h) and (j) are strict liability regulatory offences and that it is, therefore, unnecessary for it to demonstrate an element of intention on behalf of

TransAlta. Accordingly, it acknowledged that the defence of due diligence is available to TransAlta, with respect to these allegations.

148. The MSA argued that the plain and ordinary meaning of Section 2(h) is clear; for a contravention to have occurred, the impugned conduct must restrict or prevent either competition or a competitive response. It stated that subsection (h) applies to all conduct that restricts or prevents competition, a competitive response or market entry and provided definitions for the words "restrict," "prevent" and "competition" in support of this position.

149. The MSA contended that while subsections (h)(i) and (ii) provide examples of restrictive or preventative behaviour, they must be interpreted as non-exclusive examples because they were preceded by the word "including." It asserted that subsection (h) must be construed in accordance with the statutory purpose of establishing and maintaining an efficient market and submitted that this purpose would be defeated if competition is restricted or prevented. The MSA concluded as follows:

> Therefore, the test is not whether the Buyers, who compete directly with TransAlta's merchant capacity, were extinguished from making offers to the Power Pool, but rather, whether they were restricted or prevented from doing so.[66]

150. The MSA stated that Church's analytical framework provided an effective tool for assessing Section 2(h) from an economics and competition policy perspective. A key element of Church's framework was the distinction between exercise of market power versus conduct that creates, maintains, or enhances market power. Church stated that a firm exercises market power when, through its pricing or production decisions, it can raise the market price above competitive levels and in doing so increase its profits. He explained that the ability of a firm to exercise market power will depend on the willingness and ability of its consumers to substitute to other suppliers or other products. Church stated that conduct that enhances, creates, or maintains market power, on the other hand, reduces the extent to which a firm or supplier's customers are willing, or able, to substitute to other products (i.e., away from electricity) or the extent to which their demand can be met by increased production of electricity by other suppliers.[67] Church concluded that "conduct that restricts or prevents competition is equivalent to conduct that creates, enhances, or maintain (sic) market power" and "conduct that restricts or prevents a competitive response is conduct that creates, enhances, or maintain (sic) market power."[68]

151. Another key element of Church's framework related to the assessment of the effect of conduct on competition. Church stated that establishing whether conduct is anticompetitive involves a demonstration that the exercise of market power has been enhanced, maintained or created, and that, when there is not a change in marginal costs, such an effect can be determined by assessing the effect of the outages on pool prices.[69]

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66 Exhibit 3110-X002, MSA Argument part 1, January 20, 2015, page 103, paragraph 404.
67 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, pages 3-4, paragraphs 9-10.
68 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 23, paragraph 72.
69 *Ibid.*, page 28, paragraph 83.

152. The MSA stated that Section 2(j) prohibits market participants from "manipulating market prices, including any price index, away from a competitive market outcome." It noted that the test for the effect on price is directional, requiring proof that the market price was moved away from a competitive market outcome. It asserted that it was not required to establish what precisely would have occurred in the absence of TransAlta's conduct.[70]

153. The MSA submitted that Church's analytical framework also applies to Section 2(j). In his evidence, Church stated that changes that increase market power move the market outcome away from a competitive outcome and, as a result, assessing the effect of conduct on competition typically involves determining whether the conduct created, maintained or enhanced market power.[71]

154. The MSA argued that, to prove its allegations under sections 2(h) and (j), it is unnecessary for it to demonstrate that the impugned conduct resulted in harm. It submitted that sections 2(h) and (j) are so-called "per se" offences in that the proscribed conduct is itself considered anticompetitive without the need to assess the economic effects of the conduct.

155. The MSA also argued that it is unnecessary under sections 2(h) and (j) to demonstrate that TransAlta acted with an exclusionary, predatory or disciplinary purpose. It stated that while this may be a requirement under the *Competition Act*, such an interpretation is inconsistent with the plain wording of the provisions. It submitted that adopting such an approach would make enforcement of the law exceedingly difficult.

4.1.2 Views of TransAlta

156. TransAlta submitted that Section 6 of the *Electric Utilities Act* creates a very broad and general obligation for market participants "to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market." It stated that Section 2 of the *Fair, Efficient and Open Competition Regulation* articulates the scope of the obligation established by Section 6 by setting out a comprehensive, but non-exhaustive, list of conduct that is inconsistent with that obligation.[72]

157. TransAlta argued that the MSA's interpretation of Section 6 captured many types of conduct that are not contemplated in Section 2 of the regulation. It stated that the MSA's interpretation essentially prohibited any form of market conduct that has some adverse effect on a competitor. TransAlta submitted that there is only limited residual jurisdiction under Section 6 to capture conduct that is not listed in Section 2 of the regulation.[73]

158. TransAlta argued that, given the wording of sections 2(h) and (j), the MSA was required to demonstrate an element of intention on the part of TransAlta to be successful in proving its allegations.

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70 Exhibit 3110-X002, MSA Argument part 1, January 20, 2015, page 105, paragraph 413.
71 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 3, paragraph 7.
72 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 67, paragraph 220.
73 *Ibid.*, page 68, paragraph 222.

159. TransAlta submitted that in accordance with Canadian competition policy, enforcement of unilateral, anticompetitive conduct requires demonstration of market power, predatory or exclusionary conduct and some form of significant or substantial impact on competition.[74]

160. TransAlta argued that unilateral conduct, on its own is not anticompetitive. It stated that for unilateral conduct to be considered anticompetitive, such conduct must handicap or impede the ability of a competitor to compete, particularly by behaviour that is predatory, exclusionary or disciplinary. It noted that this was consistent with the work of Drs. Carlton and Heyer who draw a distinction between unilateral conduct that is extensive and unilateral conduct that is extractive. Extraction was defined as unilateral conduct by a firm to capture more of the value that it has brought into existence absent anticompetitive effects and extension was defined as unilateral conduct that enhances the firm's profit by eliminating or weakening competitive constraints provided by rivals.[75]

161. TransAlta stated that Church accepted this framework as authoritative. It further submitted that this framework underlies the abuse of dominance provisions (sections 78 and 79) of the *Competition Act*. TransAlta submitted that sections 78 and 79 are analogous to Section 6 of the *Electric Utilities Act* and Section 2 of the *Fair, Efficient and Open Competition Regulation*, and address the same subject matter – unilateral behaviour that harms competition.[76] It observed that unlike Section 2, sections 78 and 79 have been interpreted and applied by the courts on numerous occasions. TransAlta stated that such judicial interpretation provides a valuable touchstone for interpreting sections 6 and 2.

162. TransAlta summarised its position on the interpretation of Section 2(h) as follows:

> ...the MSA must establish that TransAlta engaged in anti-competitive conduct that, if implemented, would restrict competition. More specifically, the MSA must establish that TransAlta had market power, and that TransAlta engaged in an exclusionary or predatory act that impaired or impeded the ability of a competitor to respond with a competitive response.[77]

163. Regarding Section 2(j), TransAlta argued that the MSA is required to demonstrate that TransAlta engaged in manipulative or anticompetitive conduct that sought to circumvent the operation of market forces and to impede or restrain a competitive response.

164. TransAlta stated that both subsections (h) and (j) require proof of anticompetitive harm. It submitted that if TransAlta's conduct resulted in no harm to the market or competition, then that conduct cannot be conduct that does not support the fair, efficient and openly competitive market. It stated that for the allegations against it under Section 2(h) to be proven, the MSA must show that, but for the alleged anticompetitive conduct, harm to the market or competition would not have occurred.

165. TransAlta further submitted that, to prove the allegations against them, the MSA is required to demonstrate that TransAlta acted with an anticompetitive purpose. It stated that this

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74 *Ibid.*, pages 86-87, paragraph 273.
75 *Ibid.*, pages 88-89, paragraph 277.
76 *Ibid.*, pages 89-90, paragraph 278.
77 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 92, paragraph 284.

requirement is distinct from the MSA's obligation to demonstrate intent. It explained that the distinction was similar to that between intention and motive in criminal law. TransAlta submitted that, to prove that it engaged in an anticompetitive act, the MSA must demonstrate that TransAlta acted with an exclusionary, predatory or disciplinary purpose.

4.1.3 Commission findings

166. The starting point for interpreting Section 6 and sections 2(h) and (j) is Driedger's modern principle. The Commission set out its understanding of that principle in Decision 2014-135:[78]

> As explained by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd v. Alberta (Energy and Utilities Board),* that principle requires that "the words of an act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."[79] The court explained that its approach was to look first at the grammatical and ordinary meaning of a provision and then examine the entire statutory context and legislative intent. The Court emphasized that "the ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme."[80]

167. The rules governing the interpretation of statutes generally apply equally to the interpretation of regulations.[81] As stated by the Commission in Decision 2014-110, "[r]egulations too must be read in the context of their enabling statute, having regard to the language and purpose of the act in general and more particularly the language and purpose of the relevant enabling provisions."[82]

4.1.3.1 Section 6 of the *Electric Utilities Act*

168. One topic on which there was little disagreement between the MSA and TransAlta was the purposes of the *Electric Utilities Act*. Both parties acknowledged that the thrust of the statutory scheme was the establishment of an efficient electricity market based on fair and open competition and the amelioration of anticompetitive behaviour.[83]

169. This view is one that the Commission has expressed itself in many previous decisions. For example, in Decision 2012-182, the Commission stated:

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78 Decision 2014-135: *TransAlta Corporation, TransAlta Energy Marketing Corp., TransAlta Generation Partnership, Mr. Nathan Kaiser and Mr. Scott Connelly, Complaints about the conduct of the Market Surveillance Administrator*, May 15, 2014, page 5, paragraph 27.

79 *ATCO Gas & Pipelines Ltd. v Alberta (Energy and Utilities Board),* [2006] 1 S.C.R 140, 2006 SCC 4, paragraph 37.

80 *Ibid.*, paragraph 49.

81 *Sullivan on the Construction of Statutes*, 5th edition, page 368, *Interpretation Act*, S.A. 2000, Chapter I-8. Section 13.

82 Decision 2014-110: *Applications for review of AUC Decision 2012-104: Complaint by Milner Power Inc. regarding the ISO Transmission Loss Factor Rule and Loss Factor Methodology*, April 16, 2014, page 12, paragraph 43; *Bristol-Myers Squibb Co. v Canada (Attorney General)* [2005] 1 SCR 533, 2005 SCC 26.

83 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 75, paragraph 241; Exhibit 3110-X002, MSA Argument Part 1, January 20, 2015, pages 91-92, paragraphs 346 – 348.

> ...it is clear that competition and a market based on fair and open competition for all those wishing to exchange electric energy on non-discriminatory terms is the fundamental thrust of legislation governing the electricity market in Alberta. Further, any conduct that serves to restrict or prevent competition, a competitive response or entry into the market is at odds with the legislated structure of the market.[84]

170. The Alberta Court of Appeal has expressed a similar view. In *ATCO Electric v Alberta (Energy and Utilities Board)*, Chief Justice Fraser, writing for the court, stated that "[c]ompetition therefore constitutes a fundamental value in the restructured electric energy industry in this province."[85]

171. The goal of establishing an efficient market based on fair and open competition is manifest throughout the *Electric Utilities Act* and other parts of the statutory scheme. This objective is expressly acknowledged in almost every subsection of Section 5, which sets out the act's purposes. For example, subsection (a) refers to "an efficient Alberta electric industry structure" and subsections (b) and (c) each refer to "an efficient market for electricity based on fair and open competition."

172. The important objective of ameliorating anticompetitive behaviour is also acknowledged in Section 5. Subsection (b) emphasizes the need for the non-discriminatory exchange of electric energy through the power pool. Subsection (c) confirms that neither the market nor the structure of the Alberta electric industry, should be distorted by unfair advantages enjoyed by any participant.

173. Section 6 of the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation* also play an important role in meeting the objective of establishing and maintaining an efficient electricity market based on fair and open competition.

174. Both parties asserted, and the Commission agrees, that Section 6 establishes a positive obligation on all market participants to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the electricity market. Further, both parties were of the view that Section 2 of the regulation sets out conduct that breaches the positive obligation established by Section 6. The Commission finds that this interpretation is consistent both with the plain and ordinary meaning of both provisions and with the goal of the statutory scheme.

175. Where the parties disagreed, however, was the degree to which conduct not listed in Section 2 could nevertheless be considered contrary to the positive obligation under Section 6. The MSA submitted that the obligation on market participants established by Section 6 is extremely broad and applies to any conduct that falls under Section 2 as well as any anticompetitive conduct that may not fall under any enumerated heading in Section 2.[86] TransAlta accepted that there may be behaviour that is not listed in Section 2 that is inconsistent with Section 6 but submitted that "the "residual" types of anti-competitive conduct that might be

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84 Decision 2012-182: *Market Surveillance Administrator Application for Approval of a Settlement Agreement between the Market Surveillance Administrator and TransAlta Energy Marketing Corp.*, July 3, 2012, page 4, paragraph 18.

85 *ATCO Electric Limited v Alberta (Energy and Utilities Board)*, 2004 ABCA 215 (CanLII), paragraph 136.

86 Exhibit 3110-X002, MSA Argument part 1, January 20, 2015, pages 88-89, paragraph 335.

caught by section 6 will be rare given the detailed listing of the traditional types of unilateral and coordinated anti-competitive conduct that are listed in section 2."[87]

176. In the Commission's view, the proper approach to follow in this decision is first to determine whether TransAlta's alleged conduct was in breach of sections 2(h) and (j). In the event that the Commission determines that the alleged conduct did not breach those subsections (h) or (j), the Commission must then determine if the conduct was otherwise inconsistent with the positive obligation set out in Section 6.

4.1.3.2 Sections 2(h) and (j)

The statutory context and legislative intent

177. The *Fair, Efficient and Open Competition Regulation* is a regulation under the *Electric Utilities Act*. Essential to understanding the statutory context for the enactment of that regulation is an understanding of its roots. As explained earlier, the competitive generation market was imposed on the regulatory structure that preceded it, through amendments to the *Electric Utilities Act* and the creation of the PPAs.

178. The PPAs were designed by the Independent Assessment Team (IAT) to reduce the market power of the three incumbent generators and stimulate a competitive generation market. In its report to the Energy and Utilities Board (EUB), the IAT proposed the use of AIPs to ensure that the PPA owners would make generation from PPA units available to PPA buyers. The IAT decided that the use of average pool prices rather than hourly pool prices, was one way to prevent PPA owners from "gaming" the availability incentive payments and stated as follows:

> An Owner with good availability will know, within limits, what increase in Pool Price would result from the deliberate withdrawal of one of its Units. In such a case the Owner may judge that the resulting increase in Pool Prices and the resulting availability payments to its available Units would more than compensate it for its availability incentive penalties for the deliberately withdrawn Unit. The use of average Pool Prices will make it much more difficult for an Owner to predict that the results of such "gaming" will result in unjustified gains.[88]

179. In its report, the IAT specifically recognized the potential for market power issues arising following the PPA auctions and stated as follows:

> Finally, the IAT has not specifically addressed in its determinations the issues of the re-accumulation of market power subsequent to the implementation of the PPAs and the auction of bidding rights. This is a policy issue which will need to be dealt with by government, the Market Surveillance Administrator and the general competition authorities.[89]

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87 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 79, paragraph 255.

88 Exhibit 14.04, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, Appendix A5, Independent Assessment Team report to the EUB 27 August 99 revision, PDF pages 197-198.

89 Exhibit 152.01, Witness Statement of Kelvin Koay, Tab 5, Reply argument of the IAT, PDF page 85, which quotes the Independent Assessment team report to the EUB 27 August 99 revision, page 3.

180. The IAT report went on to state that it was not proposing to include restrictions on the assignment of PPAs to prevent the re-accumulation of market power and stated that "... it is more appropriate to allow general competition law to protect consumers in this respect."[90]

181. Market power issues related to the PPA owners were debated in the EUB hearings that led to the approval of the PPAs. One of the concerns raised by market participants was summarized by the EUB in its decision on the IAT report as follows:

> IPPSA/SPPA stated that the IAT relied on Canadian competition law to mitigate market power without examining that law and without examining the key issues that the law considers in determining market power.[91]

182. In its final argument, the IAT emphasized that the "determination of the PPAs is not the only avenue of controlling market power, and that the PPAs, no matter how written, are not capable, on their own, of controlling market power."[92] The IAT stated that the PPA Auction Rules will also act to mitigate market power. It further noted that:

> It would also be illogical for the IAT, and the Board, to ignore the fact that there are other mechanisms to control market power. Competition law, other legislation which may be introduced, and the Market Surveillance Administrator (see ss.9.1 to 9.91 of the EUA) are also available to mitigate market power. While the PPAs have been determined to accommodate the mitigation of market power, the IAT has reasonably relied upon these other mechanisms as well, and has determined PPAs which allow the market power issues to be addressed.[93]

183. TransAlta participated in the EUB hearing into the PPAs. In its argument for that hearing, TransAlta agreed with the IAT's views on market power and stated "[m]arket power issues are more appropriately dealt with by competition law and regulation than by the Board in this proceeding."[94]

184. In its decision to approve the PPAs, EUB Decision U99113, the Board summarized the IAT's position on the market power concerns expressed by some of the parties:

> The IAT stated that the PPAs have been designed to control market power to the extent possible in an arrangement intended to represent commercial relationships. For example, the availability incentive payment mechanism was in part designed to provide Owners with an incentive not to withhold units for market power purposes. The IAT further indicated that its determination that competition authorities provide market power

90 Exhibit 14.04, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, Appendix A5, Independent Assessment Team report to the EUB 27 August 99 revision, PDF page 233.

91 Decision U99113: *Proceeding No. 990277 Board Review of the Independent Assessment Team's Report of Power Purchase Arrangements and Other Determinations Phase 2*, December 24, 1999, page 58.

92 Exhibit 152.01, Witness Statement of Kelvin Koay, Tab 5, Reply argument of the IAT, PDF page 259.

93 *Ibid.*, PDF pages 263-264.

94 Exhibit 159.01 TransAlta Utilities Corporation Reply Submission and Supporting Evidence, Independent Assessment Team Proceeding October 7, 1999, PDF page 6.

> mitigation rather than PPAs was based on general principles, not on any specific knowledge of Canadian competition legislation.[95] [emphasis added]

185. The Board concluded as follows, with respect to the market power concerns raised by participants:

> The Board considers that market power mitigation is an issue of importance to the public interest. It is also of the view that the mitigation of market power is a policy issue that properly belongs to the Minister of Resource Development.[96]

186. Following the Board's approval of the PPAs but prior to the PPA auction, the IAT published "PPA Q&As." One of the Q&A's asked "how will competition and market power be addressed?," with the answer being:

> A number of mechanisms will mitigate market power and promote competition. First, the PPA auction rules include two types of restrictions on who can hold which PPAs: (1) a limit that no single PPA holder can hold more than 20 percent of the overall PPA capacity and (2) rules that prevent some combinations of PPAs from being held by a single PPA holder. The holding restrictions will be continued for a three-year period beginning January 1, 2001. Second, the PPA auction itself works directly to increase competition, as it will increase the number of wholesale suppliers of electricity in Alberta. Third, the Market Surveillance Administrator will be given increased responsibilities to ensure that the wholesale market is competitive. Finally, the conduct of market participants ultimately is overseen by the Competition Bureau of Canada, which has the authority to enforce the federal Competition Act.[97] [emphasis added]

187. Two Q&As directly addressed concerns regarding the potential for PPA owners to withhold capacity on PPA units to benefit the PPA owners' portfolios and stated:

> 1.14 If the generator-owner also operates merchant plants or holds other PPAs, then aren't there gaming opportunities to withhold output in spite of the Availability Incentive Payment?
>
> The PPA holding restrictions were designed to reduce opportunities for a PPA to withhold output profitably. In addition, the Market Surveillance Administration [sic] is responsible for monitoring anticompetitive behavior in the market and making recommendations to correct such behavior...[98]
>
> ...
>
> 4.8 Are there possibilities under the AIP to strategically withhold capacity?
>
> The PPAs and market restructuring have a number of provisions to reduce the likelihood of such strategic behavior. First, restructuring has introduced a greater number of sellers to the Alberta electricity market who are expected to compete for sales; this will limit the

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95 Decision U99113: *Proceeding No. 990277 Board Review of the Independent Assessment Team's Report of Power Purchase Arrangements and Other Determinations Phase 2*, December 24, 1999, page 59.
96 *Ibid.*, page 60.
97 Exhibit 108.38, ENMAX Attachments to Comments on Draft OBEG, IAT Q&As, PDF page 7.
98 *Ibid.*, PDF page 8.

> degree to which a single supplier can manipulate pool prices by strategically withholding output. Second, the availability incentive payment mechanism in Schedule D and the Degraded Capacity Penalty Payment in Schedule H provide a penalty to Owners and a compensation to Buyers when output is reduced. Third, the Market Surveillance Administrator is charged with monitoring the market to ensure that it functions in a reasonably competitive manner.[99]

188. Another Q&A addressed the MSA's role in the above scenarios:

> 1.15 Could you provide more detail on the role of the Market Surveillance Administrator (MSA)? Specifically, how can the MSA stop the owner of the generating plant from withdrawing PPA capacity in order to raise price it could receive on electricity it sells under a PPA he holds?
>
> The Market Surveillance Administrator is empowered explicitly under the Electric Utilities Act (EUA) to investigate this or similar activities (see EUA S. 9.1(1)) and to make recommendations to the Power Pool Council regarding any sanctions the MSA feels would be appropriate...[100]

189. The Q&As also discussed the circumstances under which the MSA might commence an investigation:

> 7.3 ADRD has stated that the MSA will investigate situations where the Generator Owner withholds capacity from the PPA Holder. In what situations will the MSA investigate?
>
> The Department will create a set of criteria to require the MSA to initiate an investigation into whether a unit owner was withholding capacity for strategic purposes rather than as a result of a legitimate outage. The Department will consult with market participants to establish these initial criteria. The Department will also monitor stakeholder satisfaction with the criteria...[101]

190. Following their approval by the EUB, the PPAs were sold at auction in accordance with the *Power Purchase Arrangement Auction Regulation*. That regulation limited the maximum generating capacity that a market participant could control. The PPAs have a maximum term of 20 years and came into force in 2001. Each PPA is enshrined in the *Power Purchase Arrangements Determination Regulation*.

191. It is evident from the foregoing that the IAT, market participants (including TransAlta) and the EUB recognized that the PPAs could not fully address issues of market power. Further, it is apparent that, as early as 1999, market participants and the IAT had identified concerns about PPA owners improperly withholding capacity at PPA units and that such conduct was generally considered to be anticompetitive. It is also clear that some market participants had expressed concern as to whether Canadian competition law, as it then was, could address the market power issues that could arise in the newly-restructured generation market and that intervention by the Minister of Resource Development, either through policy or new regulation, would be required to address such issues.

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99 *Ibid.*, PDF page 18.
100 *Ibid.*, PDF page 8.
101 *Ibid.*

192. The Alberta Government took two important steps to address the market power issues identified in the IAT process. First, it made substantial amendments to the *Electric Utilities Act* in 2003. Second, following a two year stakeholder consultation program, it enacted the *Fair, Efficient and Open Competition Regulation* in 2009.

193. One important change to the *Electric Utilities Act* in 2003 was that the powers, duties and independence of the MSA were significantly enhanced. The purpose of these amendments was described as follows by the Honorable Mel Knight:

> This bill also gives more independence to the market surveillance administrator to ensure it can fulfill its mandate as the market watchdog for electricity customers. The MSA oversees and monitors electricity market activity to ensure that it is competitive and that the market participants play by the rules. A more independent MSA will give customers greater confidence that the electricity market is operating in a fair, efficient, and openly competitive manner.[102]

194. Important to the issues raised in this proceeding was the addition of Section 49(2)(e) of the *Electric Utilities Act* (now Section 39(2)(a)(v) of the *Alberta Utilities Commission Act*), which expressly stated that the MSA's mandate includes the surveillance and investigation of the "conduct of owners of generating units to which power purchase arrangements apply in meeting their obligations to provide the generating capacity set out in those power purchase arrangements."

195. Another important change made to the *Electric Utilities Act* in 2003 was the addition of Section 6, which obliged market participants to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market. In conjunction with this change, amendments were also made to sections 59 and 67 of the act to make it clear that the MSA could initiate a proceeding against a person on the basis that the person's conduct did not support the fair, efficient and openly competitive operation of the market and that the EUB could make an order against such a person if it determined that the MSA had proved its case. In related amendments, definitions for "market participant" and "person" were added to the act.

196. Additional important changes were the additions of Section 5(g) and Section 96(1). Section 5(g) states that one of the purposes of the act is to continue the framework established for the power purchase arrangements. Section 96(1) states "[a] power purchase arrangement continues to have effect in accordance with its terms and conditions, subject to this act and the regulations." The Commission finds that the additions of Section 5(g) and Section 96(1) make it clear that the PPAs are part of the overall statutory scheme for the regulation of electric energy in Alberta. The Commission notes, in this regard, that TransAlta acknowledged in its argument that if it has a right under the PPA, that right may be curtailed or prohibited as a result of the *Electric Utilities Act* or the *Fair, Efficient and Open Competition Regulation.*[103]

197. In 2007, the Alberta Department of Energy set up a stakeholder consultation process to draft a new regulation to provide direction to market participants regarding their obligation to support the fair, efficient and openly competitive market. The *Fair, Efficient and Open*

[102] Alberta Hansard, February 26, 2003, page 161.
[103] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 53, paragraph 166.

Competition Regulation was enacted in 2009. Because it is a regulation, no Hansard exists in relation to it. However, a few months before it came into force, the Department of Energy provided a copy of the regulation to stakeholders. In the letter accompanying the regulation, the Department stated:

> The Minister of Energy, the Honourable Mel Knight directed the Electricity Branch of the Alberta Department of Energy (the Department) to work with all stakeholders to further clarify Section 6 of the EUA and add a greater level of market certainty by putting in place a well-defined structure for market participants and agencies to address FEOC issues.
>
> ...The *Fair, Efficient and Open Competition Regulation* enhances the clarity and certainty by addressing the underlying principles of Section 6 of the EUA. These include the broad dissemination of market information, the diffusion of offer control in the market, and an awareness of the conduct that would not be considered supportive of the fair, efficient and openly competitive operation of the market.[104]

198. A review of the conduct described in Section 2 of the *Fair, Efficient and Open Competition Regulation* makes it clear that the scope of the regulation extends beyond issues relating purely to market power. While some of the conduct prohibited under Section 2 is conduct that is similar to that described in various provisions of the *Competition Act*, including sections 45, 78 and 79; i.e., the conduct described in Section 2(h), other conduct prohibited under the legislation targets conduct that is often the subject of securities legislation; i.e., sections 2(a)-(c). Section 2(g), on the other hand, addresses the security and reliability of the interconnected electrical system, while Section 2(k) is concerned with regulatory compliance.

199. Based on the above, the Commission finds that the *Fair, Efficient and Open Competition Regulation* was enacted, in part, to address some of the very concerns about market power that market participants expressed during the IAT process that led to the approval and implementation of the PPAs. It is also apparent to the Commission that the government was not content to rely solely upon the *Competition Act* to address issues of the abuse or misuse of market power. Instead, the government chose to strengthen the role and mandate of the MSA through amendments to the *Electric Utilities Act* and enact its own regulation to address, amongst other things, concerns about anticompetitive conduct arising in the unique context of Alberta's competitive generation market.

The meaning of Section 2(h)

200. Considering its plain wording, the Commission finds that Section 2(h) prohibits market participants from engaging in conduct that (a) restricts or prevents competition, (b) restricts or prevents a competitive response, or (c) restricts or prevents market entry by another person. The use of the word "or" indicates that "competition," "a competitive response," and "market entry" may be treated as separate concepts. Further, the use of the word "a" in the phrase "a competitive response" suggests that the provision could conceivably apply to conduct that restricts or prevents a single instance of competitive response. However, given the circumstances in this

[104] Exhibit 3110-X0091, TransAlta Final Argument, Tab 40, letter from Gil Nault to *Electric Utilities Act* Advisory Committee, June 18, 2009.

proceeding (four occurrences of an alleged breach), it is unnecessary in this decision to make a determination on whether a single instance of restricting or preventing a competitive response would result in a breach of Section 2(h).

201. The prohibition in Section 2(h) against restricting or preventing competition, a competitive response or market entry is not qualified. The section does not include words such as "unduly," "substantially" or the like, to qualify the words restrict or prevent.

202. The Commission finds that subsections (i) and (ii) should not be read as limiting the broad words that precede them, as suggested by TransAlta. Rather, subsections (i) and (ii) provide examples of the conduct prohibited by subsection (h) and reflect that the restriction or prevention of competition can take many forms, including conduct that is traditionally proscribed in accordance with competition law and policy such as collusion and predatory pricing.

203. This interpretation is consistent with the Supreme Court of Canada's decision in *National Bank of Greece (Canada) v Katsikonouris* in which the court interpreted the effect of the word "including" when it precedes a list. The court was required to interpret a mortgage clause that obliged the mortgagor to obtain insurance that:

> ...shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk.[105] [emphasis added]

204. The court found:

> ... the very language used to introduce the list of omissions and misrepresentations confirms that it would be erroneous to view them as exhaustive.....This meaning finds confirmation in legal lexicons as well: the entries under "include" and "including" in *Stroud's Judicial Dictionary* (5th ed. 1986) to take but one example, again make it clear that these words are terms of extension, designed to enlarge the meaning of preceding words, and, not, to limit them.
>
> As I have noted, the natural inference is that the drafter will provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it...[106]

205. Similarly, the Competition Tribunal has consistently interpreted Section 78 of the *Competition Act* as establishing a non-exhaustive list of anticompetitive acts for the purpose of the abuse of dominance provision in Section 79 of the *Competition Act*. Section 78 states, in part, that "[f]or the purposes of Section 79, "anti-competitive act", without restricting the generality of the term, *includes* any of the following acts" [emphasis added], and then proceeds to list a number of examples. Relying on this language, the Competition Tribunal has frequently recognized additional anticompetitive acts beyond those identified in Section 78 of the *Competition Act*.

206. For example, in *Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd.*, the Competition Tribunal identified anticompetitive conduct that was not specifically enumerated in Section 78:

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[105] *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 SCR 1029.
[106] *Ibid.*; see also *Sino-Forest Corporation (Re)*, 2012 ONCA 816 (CanLII), paragraph 44.

> There is no general definition in the Act as to what characterizes an anti- competitive act. Section 78 contains a list of examples of behaviour which are included in that definition. There is no dispute that this list is not exhaustive. The various acts of Laidlaw which are alleged to be anti-competitive, that is, a pattern of acquisitions designed to create and maintain a monopoly position together with contracting practices designed to preserve that position, are not among those enumerated in section 78.[107]

207. More recently, the Federal Court of Appeal in *Commissioner of Competition v The Toronto Real Estate Board* affirmed that given the language used in Section 78, the list of anticompetitive acts is clearly inclusive and non-exhaustive:

> The act of the Board that forms the basis of the Commissioner's application is not mentioned in subsection 78(1). However, it is undisputed that by virtue of the opening words of subsection 78(1), the list comprised by paragraphs 78(1)(a) to (i) is not intended to be exhaustive.[108]

208. Subsections (i) and (ii) provide examples of conduct that restricts or prevents competition, a competitive response or market entry. Subsection (i) addresses agreements between market participants for the purpose of restricting or preventing competition whereas subsection (ii) addresses predatory pricing and predatory conduct.

209. Predatory pricing was described by Justice Linden of the Ontario High Court of Justice as follows:

> The classic example that is given to demonstrate the evil of predatory pricing is this: One company, the predator, decides to sell its product at a very low price in order to put his competitor out of business, because they cannot or will not sell at such a low price. If the competitor goes out of business, the predator may then increase his prices, make back any loss as a result of the predatory campaign and continue to reap the benefits of greater profits, because his former competitor has now departed from the scene.[109]

210. The MSA and TransAlta defined the type of conduct prohibited by Section 2(h) similarly. The MSA submitted that conduct that restricts or prevents competition or a competitive response is equivalent to conduct that creates, enhances, or maintains market power.[110] TransAlta indicated that conduct that restricts or prevents competition or a competitive response is conduct that extends market power by impairing or impeding the ability of a competitor to respond.[111] The Commission finds that there is little practical difference between conduct that creates, maintains or enhances market power and conduct that extends market power; both definitions target deliberate conduct designed to increase or entrench a firm's market power by weakening the competitive constraints faced by it.

211. While the parties essentially agreed on what type of conduct will restrict or prevent competition, or a competitive response, they disagreed about what the MSA must prove to establish a breach of Section 2(h). Based on perceived similarities between Section 2(h) and

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107 *Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd.*, , 1991, CT, 002, Document 72, pages 72-73.

108 *Commissioner of Competition v Toronto Real Estate Board,* 2014 FCA 29 (CanLII), paragraph 9.

109 *Regina v Hoffmann-LaRoche Limited* (1980), 1980, ON SC 1615 (CanLII), PDF page 40.

110 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 23, paragraph 72.

111 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, pages 86-92, paragraphs 272-284.

sections 78 and 79 of the *Competition Act*, TransAlta submitted that the MSA must demonstrate that a) TransAlta held a degree of market power; b) that its conduct was carried out with an anticompetitive purpose (specifically, an exclusionary, predatory or disciplinary purpose), and c) that this conduct resulted in harm. The MSA argued that, while each criterion, a) through c), is met in this case, these criteria are not requirements of the provision based on its plain wording.

212. The Commission observes that Section 2(h) differs from section 78 and 79 of the *Competition Act* in a number of ways. First, each statutory scheme has a different purpose. The purpose of the *Competition Act* is "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy." The scope of the act is necessarily broad because it potentially addresses a vast number of markets and products in various jurisdictions. While the purposes section of the *Electric Utilities Act* also promotes an efficient and competitive market, it is focused on a single, unique market within one jurisdiction. In that sense, the purposes of the *Electric Utilities Act* reflect the characteristics and nature of the Alberta electricity market such as the relatively small number of competitors that control most of the generating capacity, the considerable time and cost required to build new generation, the inability to store electricity economically, and the lack of effective substitutes to electricity for consumers.

213. Second, Section 79 applies only to "one or more persons [who] substantially or completely control, throughout Canada or any area thereof, a class or species of business." Section 2(h), on the other hand, applies to all market participants. This recognizes that, given some of the unique features of the Alberta electricity market, there may be greater opportunities for the extension of market power, when compared to other markets.

214. Third, Section 79(1)(c) refers only to the preventing or lessening of competition, while Section 2(h) includes two additional subcategories; i.e., restricting or preventing a competitive response and restricting or preventing market entry. Reference to these two additional subcategories is important because each reflects the purpose and intent of the statutory scheme and nature of the electricity market established by that scheme. Specifically, the prohibitions against restricting or preventing a competitive response or market entry in Section 2(h) relate directly to the statutory purposes found in Section 5 of the *Electric Utilities Act* described above, including:

- the establishment of an efficient market for electricity based on fair and open competition,
- the creation of a power pool that allows all persons wishing to exchange electric energy through the power pool may do so on non-discriminatory terms,
- a market guided by rules that prevent market distortions caused by unfair advantages enjoyed by any participant, and
- a market structure and framework that allows decisions to invest in new generation to be guided by competitive market forces.

215. Given these statutory purposes and the unique nature of the Alberta market, the inclusion of specific prohibitions against conduct that restricts or prevents a competitive response or market entry makes sense, both from a policy perspective and from a practical perspective.

216. Because the purpose of the *Electric Utilities Act* is to ensure the operation of a fair, efficient and openly competitive market, it is entirely consistent with the statutory scheme that conduct that conflicts with or undermines this statutory objective would be prohibited whether or

not such conduct ultimately results in significant harm to competition. In this sense, any conduct that restricts or prevents a competitive response or market entry is conduct that is antithetical to the stated purposes of the act and, if unchecked, will undermine confidence in the statutory scheme. Practically speaking, the additional prohibitions in Section 2(h) recognize that, given the nature of the Alberta electricity market, conduct that restricts or prevents a competitive response or market entry may potentially have greater impacts on competition and the operation of the market than similar types of conduct in other markets.

217. The absence of any words qualifying the phrase "restricting or preventing" is a fourth way in which Section 2(h) differs from Section 79. Under Section 79, it is necessary to demonstrate that the practice[112] of anticompetitive acts "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market" [emphasis added]. The Federal Court of Appeal noted the relevance of the use of the word "substantially" in *Canada (Commissioner of Competition) v Canada Pipe Co.*[113]

> ...the statutory language of "effect of preventing or lessening . . . substantially" clearly demands a relative and comparative assessment. In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(*c*), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial".[114]

218. It is the Commission's view that the absence of any words to qualify the phrase "restricting or preventing" strongly indicates that the drafters of Section 2(h) intended that provision to apply to all conduct that restricts or prevents competition, a competitive response or market entry. Because Section 79 was in force when Section 2(h) was drafted and had, at that time, been interpreted by the courts, it is reasonable to conclude that had the drafters wanted it to be interpreted consistently with Section 79, they would have used identical language. The fact that the drafters chose different language signifies an intention on their part for it to be interpreted on its own terms.

219. Given the differences between the two schemes described above, the Commission cannot agree with TransAlta's assertions that sections 78 and 79 of the *Competition Act* and Section 2(h) must necessarily be interpreted in a similar manner. Accordingly, the Commission concludes that Section 2(h) must be interpreted on its own terms having regard to its plain and ordinary meaning, its place in the statutory scheme and the intent of the legislature.

220. Based on the foregoing, the Commission finds that, pursuant to Section 2(h), the MSA must demonstrate on a balance of probabilities that, by timing discretionary outages at its PPA units to benefit its portfolio position, TransAlta restricted or prevented competition or a competitive response with an anticompetitive purpose.

221. The Commission comes to its conclusion that the conduct prohibited by Section 2(h) must be conduct undertaken with an anticompetitive purpose based upon the plain and ordinary meaning of the provision and not as a result of its similarities to Section 79. Section 2(h)(i)

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[112] Exhibit 132.01, Competition Bureau, *Abuse of Dominance Provisions Enforcement Guidelines*, September 20, 2012, page 10 states "[w]hile a "practice" normally involves more than one isolated act, the Bureau considers that this element may be satisfied by a single act that is sustained and systemic, or that has had or is having a lasting impact in a market."

[113] *Canada (Commissioner of Competition) v Canada Pipe Co.*, [2007] 2 FCR 3, 2006 FCA 233 (CanLII).

[114] *Ibid.*, paragraph 37.

specifically refers to "colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition" [emphasis added]. Subsection (ii) addresses predatory conduct, which is conduct designed to eliminate or impair competitors. Common to subsections (i) and (ii) is an anticompetitive purpose; i.e., the purpose of the act is to have a negative impact on competition or one or more competitors, either by impeding a competitive response or by impeding market entry.

222. The Commission finds support for this conclusion in the Federal Court of Appeal's decision in *Canada (Commissioner of Competition) v Canada Pipe Co.*[115] In that decision, the court reviewed sections 78 and 79 of the *Competition Act.* As noted above, Section 78 shares some similarities with Section 2 of the *Fair, Efficient and Open Competition Regulation* in that it sets out a non-exhaustive list of acts that are defined as anticompetitive acts. The language used in Section 78 to describe nine anticompetitive acts could also be seen as importing an element of intention; some examples are:

> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
>
> (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
>
> (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market; [emphasis added]

223. Notwithstanding the language used in these provisions, the court found that it was unnecessary to have direct evidence of subjective intent when determining if a person had committed an anticompetitive act. The court reviewed the legislative history of the section, including Hansard, and then endorsed the following comments made by the Competition Tribunal in an earlier case:

> Proof of subjective intention on the part of a respondent is not necessary in order to find that a practice of anti-competitive acts has occurred. Such intention is almost impossible of proof in many cases involving corporate entities unless one stumbles upon what is known as a "smoking gun". (A document which makes it clear that the purpose of the conduct in question was to exclude competitors from the market.) Section 79 of the Act provides for a civil proceeding and civil remedies. In that context corporate actors and individuals are deemed to intend the effects of their actions.[116] [emphasis added]

224. The court concluded that direct evidence of subjective intent is not required, and that in establishing an anticompetitive intent, the court can rely on the fact that corporate actors intend the consequences of their actions:

> Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably

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115 *Canada (Commissioner of Competition) v Canada Pipe Co., (Canada Pipe)* [2007] 2 FCR 3, 2006 FCA 233 (CanLII).

116 *Canada Pipe*, paragraph 71.

> foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both. [117]

225. The court went on to explain that although it was unnecessary to demonstrate subjective intention, it was necessary to show that the practice in question had an anticompetitive purpose. The court stated "[a]n anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. The focus of analysis is thus on the act itself, to discern its purpose."[118] [emphasis in original]

226. In *Commissioner of Competition v Toronto Real Estate Board,* the Federal Court of Appeal later clarified that the section is not limited in its application to competitors in a particular market. The court stated:

> *Canada Pipe* is a leading authority on the meaning of subsection 79(1). In analyzing in that case what acts might be considered anti-competitive acts within the meaning paragraph 79(1)(*b*) and subsection 78(1), the Court focused on acts that have as their purpose a negative effect on a competitor that is predatory, exclusionary or disciplinary. However, I do not interpret *Canada Pipe* to mean that as a matter of law, a person who does not compete in a particular market can never be found to have committed an anti-competitive act against competitors in that market, or that a subsection 79(1) order can never be made against a person who controls a market otherwise than as a competitor.[119] [emphasis in original]

227. Consistent with the above, the Commission finds that the requisite anticompetitive purpose for the purpose of Section 2, can be established directly through evidence of subjective intent, or indirectly on the basis that a respondent intends the reasonably foreseeable consequences of its acts.

228. The Commission also finds that Section 2(h) creates a "per se" offence rather than a "rule of reason" offence, in the sense that the Section 2(h) does not require assessment of the economic effects resulting from the impugned conduct. The difference between "per se" and "rule of reason" offences was identified by Gonthier J., in *R. v Nova Scotia Pharmaceutical Society*[120] (*R. v PANS*). In *R. v PANS,* the Crown alleged that a number of pharmaceutical companies in Nova Scotia entered into an agreement regarding the sale of prescription drugs and pharmacist dispensing services. The pharmaceutical companies were charged with two counts of conspiracy to lessen competition unduly under Section 32(1)(c) of the *Combines Investigation Act* (now repealed), which stated:

> 32. (1) Every one who conspires, combines, agrees or arranges with another person
>
> . . .
>
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,
>
> . . .

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[117] *Ibid.*, paragraph 72.
[118] *Ibid.*, paragraph 78.
[119] *Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 (CanLII), paragraph 14.
[120] *R. v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 (SCC).

is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

229. The court concluded as follows:

> The peculiar nature of the inquiry under s. 32(1)(c) of the Act becomes apparent when it is compared with § 1 of the *Sherman Act*. Since the inception of the *Sherman Act*, American antitrust law has developed the two paradigms of adjudication known as the "per se rule" and the "rule of reason". The former attaches consequences to precisely-defined acts, irrespective of surrounding circumstances, whereas the latter is more general and invites in-depth inquiry into the details of the operation. The distinction between the two is not airtight, as leading authors have shown ...
>
> Section 32(1)(c) of the Act lies somewhere on the continuum between a per se rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(c) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.[121]

230. In *R. v Royal Lepage Real Estate Services Ltd.*,[122] Justice Mason of the Alberta Court of Queen's Bench applied Justice Gonthier's distinction between per se and rule of reason offences to sections 61(1)(a) and (b) of the *Competition Act* (as it then was). Those sections read as follows:

> 61. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trademark, copyright or registered industrial design shall, directly or indirectly,
> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or
> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

231. Justice Mason found that subsections (a) and (b) were per se offences and stated: "...the sections are framed on the premise that the proscribed conduct is itself considered anti-competitive without assessing the economic effects of that conduct."[123] In coming to this conclusion, Justice Mason noted that the two subsections were "precise enough not to run afoul of too imprecise definition under the Per Se Rule."[124]

232. The Commission finds that Section 2(h) creates a per se offence in that the proscribed conduct is anticompetitive in and of itself without assessing the economic effects of that conduct. As noted above, the phrase "restricting or preventing" is not qualified. This sets the provision apart from that which was interpreted by the Supreme Court in *R. v Pans*. There, the court made

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121 *Ibid.*, page 650.
122 *R. v Royal LePage Real Estate Services Ltd.*, [1993] ABQB 7148 (CanLII).
123 *Ibid.*, paragraph 34.
124 *Ibid.*

it clear that it was the inclusion of the word "unduly" in the phrase "to prevent, or lessen, unduly, competition" that necessitated an inquiry into the impact on competitive effects. Absent such a qualifier, any conduct that restricts or prevents competition, a competitive response or market entry is prohibited.

233. The Commission is satisfied that the wording of the provision is sufficiently precise to meet the requirements of a per se offence. The Commission's conclusion that Section 2(h) is a per se offence is also consistent with the nature of the statutory scheme, the nature of the market and the apparent intention of the drafters. However, in the event that the Commission has erred in this conclusion, it is satisfied for the reasons provided below, that the MSA has demonstrated that TransAlta's conduct did result in harm and would thus also meet the requirements of a rule of reason offence.

The meaning of Section 2(j)

234. As noted previously, Section 2(j) provides that "manipulating market prices, including any price index, away from a competitive market outcome" is conduct that does not support the fair, efficient and openly competitive operation of the market.

235. The word "manipulate" is defined in the Oxford English dictionary as:

> 1. handle or control with dexterity. ... 3. control or influence cleverly or unscrupulously. 4. alter or present (data) so as to mislead.[125]

236. "Manipulate" is defined in the Merriam Webster dictionary as:

> ... 2 a: to manage or utilize skillfully, b: to control or play upon by artful, unfair, or insidious means especially to one's own advantage. 3: to change by artful or unfair means so as to serve one's purpose.[126]

237. Having regard to the ordinary definition of the word manipulate, the Commission finds that Section 2(j) can reasonably be read as: a) deliberate conduct that moves market prices away from a competitive market outcome, or b) deliberate conduct that is insidious, unscrupulous, discriminatory or unfair that moves market prices away from a competitive market outcome.

238. The Commission finds that the object of the prohibition contained in Section 2(j) is deliberate conduct designed to move market prices away from a competitive market outcome. Accordingly, Section 2(j) may apply to manipulation of market prices through the abuse or misuse of market power or by means that are misleading, deceitful, discriminatory or unfair in nature. Such conduct is clearly contrary to several of the express purposes of the *Electric Utilities Act* because it erodes competition and the efficient operation of the Alberta market.

239. As it did with respect to Section 2(h), TransAlta argued that the MSA is required under Section 2(j) to demonstrate that its conduct "resulted in competitive harm, and that TransAlta acted with an anti-competitive purpose that targeted a competitor."[127] The Commission disagrees. Based upon the plain wording of the provision, the outcome that the MSA is required to demonstrate is the movement of market prices away from a competitive market outcome.

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125 *Concise Oxford Dictionary*, tenth edition, Oxford University Press, 2001.

126 *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/manipulate. retrieved on June 22, 2015.

127 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, pages 85-86, paragraph 271.

However, the Commission does find that the implication of the use of the word "manipulating" in the provision contemplates conduct designed to move market prices by impairing, obstructing, circumventing or defeating the operation of competitive market forces. In this sense, the Commission agrees with TransAlta that an implied element of an offence under Section 2(j) is an anticompetitive purpose.

240. Given the foregoing, the Commission finds that, to establish a breach under Section 2(j), the MSA must demonstrate:

> a) that a person 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,
>
> c) what the competitive market outcome would have been but for the manipulative conduct.

241. Having set out the constituent elements of each offence, the Commission now turns to its analysis of whether subsections (h) and (j) are strict liability or *mens rea* offences.

4.1.3.3 Sections 2(h) and (j) are strict liability offences

242. The starting point for assessing the nature of the offences established by sections 2(h) and (j) is the Supreme Court of Canada's decision in *R. v Sault St. Marie* (*Sault St. Marie*).[128] In that decision, the court identified three categories of offences: *mens rea* offences, strict liability offences and absolute liability offences:

> 1. Offences in which *mens rea,* consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.[129]

243. The court explained its rationale for not requiring proof of intent (*mens rea*) for strict liability offences:

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to *Pierce Fisheries* and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone

[128] *R. v Sault Ste. Marie*, [1978] 2 SCR 1299, 1978 CanLII 11 (SCC).
[129] *Ibid.*, pages 1325 and 1326.

> will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence...[130]

244. Subsequent decisions from all levels of Canadian courts confirm that the classification of offences into one of the three categories described in *Sault St. Marie* is a matter of statutory interpretation with the starting point being a presumption that regulatory or public welfare offences are strict liability offences.[131] Given this presumption, the logical first step when characterizing an offence is to determine the nature of the legislation that sets out the offence.[132]

245. The difference between criminal and regulatory offences was succinctly described by the Supreme Court in *R. v Pierce Fisheries Ltd.*[133] While this decision pre-dates *Sault St. Marie*, the reasoning below was endorsed in subsequent decisions of the Supreme Court, including *R. v Wholesale Travel Group Inc.*[134] (*Wholesale Travel*):

> Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption. Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject-matter with which it deals.[135]

246. In *Wholesale Travel*, Justice Cory discussed the different objectives of regulatory/public welfare offences and criminal offences.

> It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests.

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130 *Ibid.*, page 1325.

131 *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers (AMF)*, [2013] 3 SCR 756, 2013 SCC 63 (CanLII), *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec Inc., (Levis)* [2006] 1 SCR 420, 2006 SCC 12 (CanLII), paragraph 16, *Merchant v Law Society of Saskatchewan, (Merchant)* 2014 SKCA 56 (CanLII), paragraph 64, *R. v Great White Holdings Ltd.*, 2006 ABCA 48 (CanLII), paragraph 10, *R. v 1023803 Alberta Ltd.*, 2014 ABQB 645 (CanLII)

132 *AMF*, paragraph 32, *R. v Hovila, (Hovila)* 2013 CarswellAlta 2082, Alta. QB; exhibit 3110-X0005, MSA Authorities to Final Argument, Tab 42, PDF page 157, paragraph 3; *R. v 1023803 Alberta Ltd*, 2014 ABQB 645 (CanLII), paragraphs 71-72.

133 *R. v Pierce Fisheries Ltd.*, [1971] SCR 5, 1970 CanLII 178 (SCC).

134 *R. v Wholesale Travel Group Inc., (Wholesale Travel)* [1991] 3 SCR 154, 1991 CanLII 39 (SCC).

135 *R. v Pierce Fisheries Ltd.*, [1971] SCR 5, 1970 CanLII 178 (SCC), page 13.

> While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[136]

247. Once the underlying intent of the legislation has been established, the next step is to review the language of the offence itself.[137] In *Sault St. Marie*, the court observed that the use of words or phrases such as "wilfully," "with intent," "knowingly," or "intentionally" in a public welfare statute will be indicative of an intention to create a *mens rea* offence. However, an offence may be classified as a *mens rea* offence even if it does not include such words. In *Merchant v Law Society of Saskatchewan,*[138] the Saskatchewan Court of Appeal observed that "...the absence of such words is not determinative if the nature of the charge and the circumstances as a whole nevertheless lead to the conclusion *mens rea* is required. Whether such is the case must be looked at reasonably."[139]

248. Another factor the courts have considered when characterizing an offence is the nature or severity of the penalty associated with the offence and the level of stigma associated with a conviction.[140] In *Wholesale Travel*, Lamer J. noted as follows:

> Thus, while it is clear that there are some offences for which the special stigma attaching to conviction is such that subjective *mens rea* is necessary in order to establish the moral blameworthiness which justifies the stigma and sentence, the offence of false/misleading advertising is not such an offence.[141] [emphasis in original]

249. Having regard to the foregoing direction from Canadian courts, the Commission has, for the reasons that follow, concluded that subsections 2(h) and (j) are strict liability offences that do not require the MSA to demonstrate subjective intent on behalf of TransAlta. In coming to this conclusion, the Commission had regard for the statutory scheme, the wording of the two subsections, and the potential stigma or penalty associated with an adverse finding.

250. The Commission finds that the statutory scheme in which the offences are found is regulatory in nature. This finding is consistent with the positions of both TransAlta and the MSA.

251. The Commission finds that the aim of the statutory scheme is the protection of societal and public interests through the implementation of an efficient electricity market based on a fair and open competition, market-based model for electricity generation. As noted earlier, this objective is expressly reflected in the purposes section of the *Electric Utilities Act*, Section 6 of that act, and the *Fair, Efficient and Open Competition Regulation.*

252. Section 2 of the *Fair, Efficient and Open Competition Regulation* contemplates the protection of societal interests by setting out specific conduct that does not support the fair, efficient and openly competitive market implemented by the scheme. The conduct set out in

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136 *Ibid.*, pages 218-219.
137 *Hovila*, paragraph 6.
138 *Merchant*, 2014 SKCA 56 (CanLII).
139 *Ibid.*, paragraph 70; see also *Latulippe v Desruisseaux,* (1986), 3 QAC 75, 50 CR (3d) 277 CA, paragraph 20 and *R. v 1023803 Alberta Ltd.*, 2014 ABQB 645 (CanLII), paragraph 70.
140 *R. v Pierce Fisheries Ltd.*, [1971] SCR 5, 1970 CanLII 178 (SCC); *R. v Aftergood*, 2009 ABQB 86 (CanLII), paragraph 33; *Hovila*, paragraphs 7 and 8.
141 *R. v Wholesale Travel Group Inc.*, [1991] 3 SCR 154, 1991 CanLII 39 (SCC), page 186.

Section 2, including sections 2(h) and (j), relates to compliance with Section 6 of the *Electric Utilities Act* which, in turn, promotes the fair and open competition that is relied on to yield an efficient electricity market. While the Commission recognizes that engaging in the conduct described in Section 2 can lead to punitive measures, it is satisfied that those measures are in place to ensure compliance rather than to punish.

253. Having determined that the statutory scheme is regulatory in nature, the presumption arising from *Sault St. Marie* is that the offences set out in sections 2(h) and (j) are strict liability offences. The next step is to examine the specific wording of the two provisions to see if either indicates an intention on the part of the drafters to incorporate subjective intent into the offences set out.

254. Sections 2(h) and (j) state:

> **2** Conduct by a market participant that does not support the fair, efficient and openly competitive operation of the market includes the following:
>
> ...
>
> (h) restricting or preventing competition, a competitive response or market entry by another person, including
>
> (i) a market participant directly or indirectly colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition, and
>
> (ii) a market participant engaging in predatory pricing or any other form of predatory conduct;
>
> ...
>
> (j) manipulating market prices, including any price index, away from a competitive market outcome;

255. TransAlta submitted that the use of the words "restricting" and "preventing" in Section 2(h) "entail an element of intentional and deliberate conduct that is aimed at obstructing or stopping [a] competitive response."[142] It also stated that Section 2(h) must be read in light of the two subsections that follow, which provide specific examples of conduct that restricts or prevents competition, a competitive response or market entry. It noted that those subsections, which address conduct such as collusion and predation, also impute intent. TransAlta submitted that a similar conclusion can also be drawn with respect to the use of the word "manipulate" in Section 2(j).

256. TransAlta argued that, based on the wording of the two subsections, the MSA must prove an element of intention with respect to sections 2(h) and (j) that goes beyond negligence and strict liability but does not necessarily rise to the requirement of demonstrating full *mens rea*. In support of this contention, it relied upon the Supreme Court of Canada's decision in *R. v PANS.*[143]

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[142] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 82, paragraph 263.
[143] *R. v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 1992 CanLII 72 (SCC).

257. As noted above, in *R. v PANS,* a number of pharmaceutical companies in Nova Scotia were charged with two counts of conspiracy to lessen competition unduly under Section 32(1)(c) of the *Combines Investigation Act* (now repealed). The court pointed out that Section 32(1)(c) was amended twice: once in 1976 and once in 1986 when the *Combines Investigation Act* was renamed the *Competition Act*. The amendment in 1986 added the following subsection:

> (1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

258. The court concluded that the Crown was required to prove two fault elements under the provision: one subjective and one objective. It stated that the proof of the subjective element would be satisfied by demonstrating that the accused intended to enter into an agreement and had knowledge of the terms of the agreement. Regarding the objective element, the court found that the crown was obliged to establish, on an objective view, that the accused intended to lessen competition unduly.

259. The MSA disagreed with TransAlta's characterization of sections 2(h) and (j) as hybrid, strict liability offences that require some proof of subjective intention. It stated that the Alberta Court of Queen's Bench rejected a similar argument in *R. v 1023803 Alberta Ltd.* The MSA further argued that TransAlta's interpretation of Section 2(h) is inconsistent with the wording and structure of the provision.

260. The MSA submitted that *R. v PANS* is inapplicable because it is a criminal law case. It further argued that even if it did apply in these circumstances, TransAlta mischaracterized the subjective element that the MSA would be required to establish to prove its allegations.

261. The Commission observes that sections 2(h) and (j) do not include the words or phrases identified by the Supreme Court in *Sault St. Marie* as being indicative of a *mens rea* offence; i.e., "wilfully," "with intent," "knowingly," or "intentionally." While the Commission recognizes that the use of verbs such as "restricting" and "preventing" in subsection (h) and "manipulating" in subsection (j) could be interpreted as having an intentional element inherent in their meaning, it is not satisfied that the wording of the provisions reflects a clear intention on the part of the drafter to incorporate the proof of subjective intent expressly, as an element of either offence.

262. The Commission is not persuaded that sections 2(h) and (j) should be interpreted to include a requirement to prove some element of subjective intent. The Commission does not find the Supreme Court's decision in *R. v PANS* to be of assistance in this matter because the obligation on the Crown to prove subjective intent in that case was an express requirement of the amendments made to the act in 1986: "... in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement" [emphasis added]. No such language is found in the *Fair, Efficient and Open Competition Regulation*.

263. In *R v 1023803 Alberta Ltd.*, the Alberta Court of Queen's Bench recently rejected a proposal to require the Crown to demonstrate some form of subjective intent when proving a strict liability offence. In that case, the owner and operator of an office building in Calgary was convicted by a Justice of the Alberta Provincial Court under the *Safety Codes Act*, for failing to

notify the Fire Department immediately of a diesel fuel spill of more than 50 litres on the roof of the building.

264. The appellants appealed their conviction to the Court of Queen's Bench. One of the grounds advanced by the building owner was that it should not have been found guilty of violating the 50 litre threshold value in the absence of knowledge that the value was exceeded.

265. Justice Gates characterized the owner's position as a proposal to create a " 'fourth' classification of offence somewhere between *mens rea* and strict liability. That is, an offence where the Crown must prove some form or level of knowledge in order to discharge its burden of establishing the prohibited act."[144]

266. Justice Gates stated that the answer to this defence was found in the clear approach to the classification of offences describe in *Sault St. Marie*. He reviewed the law on the topic and concluded as follows:

> The classification scheme established in ***Sault Ste. Marie*** leaves no room for a strict liability offence which incorporates a knowledge element into the *actus reus*. According to the Supreme Court, an offence in which the accused's state of mind comes into play – in any manner – is not a strict liability offence. The cases relied upon by the Applicants do not support the creation of a "hybrid" offence blending strict liability with *mens rea*. The two are distinct.[145]

267. The Commission is mindful of the Supreme Court's caution in *Sault St. Marie* about the difficulty in proving wrongful intention in regulatory cases. In the Commission's view, that concern is manifest with respect to the conduct described in subsections (h) and (j). This is because much of the information necessary to demonstrate intention relating to the conduct described therein will generally be in the hands of the person whose conduct is in question. Accordingly, interpreting sections 2(h) and (j) as requiring proof of wrongful intention could introduce significant barriers to the effective oversight and prevention of conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

268. In the Commission's view, the correct approach contemplated by the statutory scheme, and given its underlying objectives, is to have the MSA establish, on a balance of probabilities, that a person has engaged in the conduct described in subsections (h) and (j) and then provide that person with an opportunity for exoneration through the mechanism of due diligence.

269. The Commission finds support for this conclusion in the Federal Court of Appeal's decision in *Canada (Commissioner of Competition) v Canada Pipe Co.* finding that evidence of subjective intent is not required to establish an abuse of dominance, contrary to Section 79 of the *Competition Act*, as discussed above. The penalty provisions associated with a finding that a person has engaged in conduct that does not support the fair, efficient and openly competitive operation of the electricity market also support the Commission's conclusion that sections 2(h) and (j) create strict liability offences. The penalties available are set out in sections 56 and 63 of the *Alberta Utilities Commission Act* and do not include incarceration. Rather, they provide for administrative penalties and directions from the Commission regarding the future conduct of the sanctioned party. The Commission also observes that the monetary penalties available under the

[144] *R. v 1023803 Alberta Ltd.*, 2014 ABQB 645 (CanLII), paragraph 62.
[145] *Ibid.*, paragraph 80.

Alberta Utilities Commission Act are consistent with the penalties available for other strict liability offences in Alberta.[146]

270. Considering the nature of the penalties available to it, the Commission is satisfied that they are consistent with the prevention of future harm through the enforcement of minimum standards of conduct and care and are not intended to operate solely as a punishment of the contravening party.

271. Having regard for the regulatory nature of the scheme from which the offences arise, the absence of words expressly signalling the intention to create a *mens rea* offence, the difficulty in proving wrongful intent because of the nature of the offences and the nature and purposes of the available penalties, the Commission concludes that sections 2(h) and (j) are strict liability offences for which the defence of due diligence is available. Accordingly, the MSA's burden is to demonstrate, on a balance of probabilities, that TransAlta engaged in the conduct described in sections 2(h) and (j). To satisfy this burden, the MSA is not obliged, as alleged by TransAlta, to demonstrate any element of subjective intent on behalf of TransAlta. Consequently, the defence of due diligence is available to TransAlta.

4.2 The PPAs and the Commission's jurisdiction to interpret the them

272. There are a number of provisions in the PPAs that the MSA and TransAlta argued were relevant to the issue of outages, although they disagreed on the effect that these provisions have on the TransAlta's alleged contravention of Section 6 of the *Electric Utilities Act* and sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation*. As described in other parts of this decision, the PPAs were statutorily created to increase competition in the generation sector of the electricity market by auctioning a prescribed level of power production from incumbent producers to successful buyers. The PPA buyer obtained the right to offer the prescribed quantity of electricity into the power pool in return for certain payments to the incumbent owner, which included operating and maintenance costs and a return on the owner's investment.

273. The terms and conditions of the PPAs were approved by the EUB in Decision U99113. Accordingly, subject to the differences attributable to each generating unit as reflected in each PPA, the general terms and conditions of each PPA are substantially similar. For the purposes of this section, the Commission has referenced the PPA for Sundance that was attached to one of the expert reports submitted by the MSA.[147]

274. As discussed earlier, an important feature of the PPAs was the monthly AIP.[148] The AIP is the amount of money payable by either the buyer or the owner depending on the variance, if any, between target availability and actual availability of electricity for each month. The AIP is calculated by taking the difference between target availability and actual availability, multiplied

[146] See for example, the penalty provisions of the *Environmental Protection and Enhancement Act*, sections 228, 230 and 231 and the *Securities Act*, section 194.

[147] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, PDF page 35.

[148] *Ibid.*, PDF page 41, ,PDF page 48.

by the rolling average pool price over a 30 day period less an energy payment scheduled in the PPA.[149]

4.2.1 Views of the MSA

275. The MSA maintained that the overall scheme of the PPAs required the PPA owner to make the committed capacity (and system support services) of the power plant exclusively and continuously available to the PPA buyer. It argued that TransAlta's timing of discretionary outages during peak and super peak hours was contrary to this basic obligation to the PPA buyer and did not constitute good operating practices as described in the PPAs. The MSA concluded that this outage conduct, which TransAlta admitted was an integral part of its Portfolio Bidding Strategy, breached the above noted sections of the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation*.

276. The MSA referred to a number of PPA articles in support of this view:

> 1.1 Definitions
>
> "Good Operating Practice" means any of the range of practices, methods and acts engaged in or approved by a significant proportion of the industry in North America involved in the supply of electricity from and the operation of generating units similar to the Units, from time to time, or any other practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known or reasonably ascertainable, could have been expected to accomplish the desired result at a reasonable cost consistent with applicable Laws, reliability, safety and expedition.[150]
>
> 2.1 (a)
>
> Throughout the Effective Term, the Owner shall make exclusively available to the Buyer the Committed Capacity of each Unit and shall sell to the Buyer, and the Buyer shall be entitled to purchase from the Owner, the Electricity up to the Committed Capacity of such Unit and the Buyer shall pay the Owner for the exclusive availability of the Committed Capacity of the Unit and the Electricity actually supplied by such Unit (net of any Plant Supply); all upon and subject to the terms and conditions of this Arrangement;[151]
> ....
>
> 7.2(a)
>
> Without limitation on, and in addition to, any of the specific obligations of the Owner hereunder, the Owner shall at all times during the Effective Term do all things necessary to assure performance by it of its obligations herein, operate and maintain the Units and the Plant in accordance with Good Operating Practice so as to guard against diminutions and interruptions in the supply of Electricity and System Support Services to the Buyer and shall cause such diminutions and interruptions to be terminated with all reasonable

[149] Exhibit 152.01, Witness Statement of Kelvin Koay, December 5, 2014, page 5, paragraph 23.
[150] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 39.
[151] *Ibid.*, PDF page 45.

> dispatch. Such actions by the Owner shall include entering into and maintaining any necessary TA [Transmission Administrator] Agreements and, in the usual and ordinary course, complying with applicable Laws and refraining from doing anything or entering into any agreement or arrangement which could reasonably be expected to materially adversely affect the Owner's ability to perform its obligations hereunder.[152]

277. The MSA's position was that good operating practice must be assessed in the context of the operation of a PPA unit on its own and not extraneous factors such as a portfolio bidding strategy that included other power plants. Capital Power, one of the PPA buyers in this case, echoed this view, noting that while a PPA owner has some latitude in deciding what is a reasonable operating practice, that discretion cannot include considerations that do not relate to the specific plant in question, otherwise the market power of the owner, in this case TransAlta, remains unabated, undermining the reason that the PPAs were created by the legislature in the first place.

278. The MSA submitted that Section 39(2)(a)(v) of the *Alberta Utilities Commission Act* gives it the express jurisdiction to scrutinize the conduct of PPA owners in "meeting their obligations to provide the generating capacity" set out in the PPAs. It was the MSA's position that the inclusion of this provision in the 2003 amendments to the *Electric Utilities Act*[153] was "entirely consistent with the public interest in addressing market power concerns identified by the EUB and specifically the possibility that Owners may have "gaming" opportunities by withholding electricity to benefit a portfolio position..."[154]

4.2.2 Views of TransAlta

279. TransAlta made two basic arguments in response to the MSA's interpretation of the relevant PPA provisions. First, the PPA buyers received the electricity that they were entitled to and second, TransAlta had the unfettered right to time the outages (which it described as forced outages).

280. TransAlta made a distinction between the committed capacity of a PPA unit and its capacity. It argued that the committed capacity of a PPA unit is fixed but its capacity is the actual electricity that is generated by the unit at any particular time and it is this capacity to which the buyer is entitled. Capacity is determined through the unit's target availability during the term of the PPA. TransAlta maintained that in the case of the outages in question, the committed capacity of the unit did not change; rather, the capacity was curtailed because the plants could not generate electricity during the outages. It maintained that these events met the definition of an outage as defined in the PPA:

> Outage means with respect to any Unit, any condition that requires or causes such Unit to be either removed from service or to be derated to a Capacity level below the Committed

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152 *Ibid.*, PDF page 54.

153 As noted above, Section 39(2)(a)(v) of the *Alberta Utilities Commission Act*, was first added to the statutory scheme in 2003 as one of a number of amendments to the *Electric Utilities Act* and was found in Section 49(2)(e).

154 Exhibit 3110-X0002, MSA Final Argument part 1, January 20, 2015, page 25, paragraph 93.

> Capacity for inspection, general overhaul or repair of some element of the Plant, or for any reason in accordance with Good Operating Practice.[155]

281. TransAlta concluded that PPA buyers were not entitled to receive electricity if the plant could not produce the energy because of an outage; rather, buyers were entitled to availability incentive payments.

282. TransAlta's second argument primarily relied on Section 5.2 of the PPA. The provision reads:

> 5.2
>
> The Owner shall have the right to interrupt the provision of Generation Services from any Unit at any time to the extent 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, whether such interruption is caused by an event of Force Majeure or otherwise. To the extent and as soon as may be practicable, the Owner shall: (i) limit the duration of such interruptions, and (ii) other than upon the occurrence of an event of Force Majeure, give notice to the Buyer of its intention to interrupt the provision of Generation Services. The provisions of Schedules D and H shall continue to apply in the event the Owner interrupts the provision of Generation Services pursuant to this Arrangement.[156]

283. TransAlta contended that this section confirmed that the PPA owner retained the absolute right to decide when to time outages that were required to preserve life, property or the environment and that the four outage events in this case complied with that criterion. TransAlta also referred to article 16.1 of the PPA,[157] which provided that the power plant remained the sole and exclusive property of the owner and that the buyer did not acquire any rights regarding the availability, operation, maintenance, repair or dispatch of the plant, except as provided in the PPA. TransAlta submitted that in light of the relevant provisions of the PPA and the circumstances surrounding the four outage events, it had acted in accordance with its obligations under the PPA.

284. TransAlta argued that the PPAs are to be treated as commercial contracts for the purposes of assessing the rights and obligations of a party to a PPA arising from the PPA.[158] TransAlta submitted that this viewpoint was supported by various statements made by the EUB and the IAT in the process leading up to the approval of the PPAs. TransAlta submitted that "the IAT produced a PPA that is structured, and approaches the rights and obligations, in a way that is close to those that would normally be seen in a commercial contract."[159]

285. TransAlta also argued that the Commission does not have the jurisdiction to rule on whether a market participant contravened provisions of the PPA. It noted that Section 56(3) of the *Alberta Utilities Commission Act* states in part:

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[155] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 41.
[156] *Ibid.*, PDF page 53.
[157] *Ibid.*, PDF page 70.
[158] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 52, paragraph 163.
[159] *Ibid.*, page 53, paragraph 165.

(3) The Commission may make an order (a) if it is of the opinion that a person

(i) has contravened the Electric Utilities Act, a regulation under that Act, an ISO rule or a reliability standard

286. TransAlta submitted that the PPA is not a regulation under the PPA and relied on EUB Decision 2002-048 in support of that contention. It noted that "Power Purchase Arrangement" is defined in the *Electric Utilities Act* as "a power purchase arrangement included in Alberta Regulation AR 175/2000." It suggested that the use of the word "included" signifies that they are included in the regulation but distinct from the regulation.

287. TransAlta argued that the MSA's mandate under Section 39(2)(a)(v) of the *Alberta Utilities Commission Act* is very narrow in its application. It submitted that the provision authorizes the MSA to scrutinize the conduct of PPA owners in meeting their obligations under the PPAs to provide generating capacity to the PPA buyers. TransAlta submitted that "capacity" is a technical term defined in the PPAs that refers to the ability of a PPA unit to generate electricity. It was TransAlta's view that this provision applies in only limited circumstances; i.e., "whether it [the PPA owner] is making electricity it is able to produce available to the market via the PPA Buyer."[160]

288. TransAlta concluded that there are no provisions in the *Alberta Utilities Commission Act* or the *Electric Utilities Act* that imply or suggest that the AUC has jurisdiction to decide if a party has complied with a PPA.

4.2.3 Commission Findings

289. The Commission finds, for the reasons that follow, that the PPAs are a component of a comprehensive statutory scheme enacted to ensure the fair, efficient and openly competitive operation of the electricity market in Alberta. The Commission finds that neither the historical record nor the nature of the PPAs themselves support TransAlta's assertion that the PPAs should be treated as commercial contracts that are immune from Commission review or interpretation. The IAT itself addressed the proper characterization of the PPAs in its August 1999 report to the EUB in which it stated:

> The IAT has elected to proceed on the basis that the PPAs will not be agreements. It is proposed that the PPAs be specifically authorized and implemented in accordance with the legislation and the regulations which will specify that a particular arrangement attached by reference will operate as between the named Owner and successful bidder at the PPA auction(s)...
>
> As a general rule, the IAT has drafted the PPAs to be as close to a contractual form as possible recognizing the limitations involved. There are recitals but they do not record any agreement as between the parties. Certain other clauses to contracts have been left

[160] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 57, paragraph 184.

> out and, finally, there is no provision for the document to be executed since it will be in effect by virtue of the legislation and the regulations.[161]

290. The PPAs were incorporated into the statutory scheme by their inclusion in Alberta Regulation AR 175/2000, the *Power Purchase Arrangements Determination Regulation,* as was contemplated by the IAT.

291. As acknowledged by TransAlta in its final argument, the PPAs were never intended to be the exclusive and only response to market power concerns.[162] One of the additional responses to market power concerns was, as discussed earlier, the strengthening of the MSA's mandate and the expansion of its investigatory and enforcement authority through amendments to the *Electric Utilities Act* in 2003.

292. One such amendment was the addition of Section 49(2)(e) of the *Electric Utilities Act*, which is now Section 39(2)(a)(v) of the *Alberta Utilities Commission Act*. That provision states that the MSA mandate includes the surveillance, investigation and enforcement of "the conduct of owners of generating units to which power purchase arrangements apply in meeting their obligations to provide the generating capacity set out in those power purchase arrangements."

293. Section 39(2)(a)(v) uses the generic phrase "generating capacity" rather than the term "capacity," which is a defined term in the PPAs. Because this section was added to the statutory scheme in 2003, after the PPAs had been approved and auctioned, the Commission considers that the use of the more generic phrase, rather than the defined term, was intentional and suggests a broader interpretation of the jurisdiction granted to the MSA under the provision. In the Commission's view, this broader interpretation is also consistent with, and appears to address directly, concerns expressed by stakeholders in the PPA development process regarding potential gaming by PPA buyers by withholding generating capacity, as discussed above.

294. Further, Section 39(3) states:

> In carrying out its mandate, the Market Surveillance Administrator shall assess whether or not
>
> (a) the conduct of electricity market participants and natural gas market participants supports the fair, efficient and openly competitive operation of the electricity market or the natural gas market, as the case may be,
>
> (b) the person carrying out the conduct has complied with or is complying with
>
> (i) the *Electric Utilities Act*, the regulations under that Act, the ISO rules, reliability standards, market rules and **any arrangements entered into under the *Electric Utilities Act* or the regulations under that Act**, in the case of an electricity market participant, [emphasis added].

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[161] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, Appendix A5, Independent Assessment team report to the EUB 27 August 99 revision, PDF page 179.

[162] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 54, paragraph 168.

295. Having regard to the plain and ordinary wording of the provision, the Commission finds that the phrase "any arrangements entered into under the *Electric Utilities Act* or the regulations under that Act" reasonably includes power purchase arrangements. Accordingly, when carrying out its mandate, the MSA is required by this subsection to assess a market participant's compliance with a power purchase arrangement.

296. The authority for the MSA to review and interpret the provisions of the PPAs is a necessary implication of the authority granted under sections 39(2) and (3) of the *Alberta Utilities Commission Act*. In other words, an investigation by the MSA into whether a PPA buyer has met its obligations under the PPA necessarily requires the MSA to determine and understand what those obligations are. Should the MSA be satisfied that a PPA buyer has not met its obligations under a PPA, it can commence a hearing into the conduct by filing a notice with the Commission. Accordingly, the Commission must also have the jurisdiction to review and interpret the PPAs to rule on the MSA's application and the reply submissions of the respondent.

297. The Commission finds that Decision 2002-048 does not support TransAlta's contention that the Commission lacks the jurisdiction to interpret the provisions of the PPAs for two reasons. First, that decision was issued before the significant amendments to the *Electric Utilities Act* were made with the intention of strengthening the enforcement role and mandate of the MSA and the AUC. Second, the Board did not find in that decision that it could not interpret the provisions of the PPA. Rather, it found that it was unnecessary to do so in the circumstances.

298. The Commission also notes that it had subsequently interpreted provisions of a PPA in Decision 2010-293,[163] which related to Proceeding 514. Proceeding 514 was initiated by the Commission pursuant to a request by TransAlta for a Commission ruling on whether a PPA owner needed an order from the Commission under Section 3 of the *Fair, Efficient and Open Competition Regulation,* to share with a PPA buyer, non-public records related to increased capacity on a PPA generating unit. Section 3(2)(e) of the *Fair, Efficient and Open Competition Regulation* stated:

> 3(1) Subject to subsection (2), a market participant shall not share records that are not available to the public relating to any past, current or future price and quantity offer made to the power pool or for the provision of ancillary services.
>
> (2) Records that are not available to the public referred to in subsection (1) may be shared
>
> ...
>
> (e) by a market participant with another person, where required or permitted to do so by any enactment, except an ISO rule [emphasis added]

299. In its decision, the Commission ruled on two issues: a) whether the PPA was an "enactment" as contemplated in subsection (e) above, and b) if the provisions of the PPA require or permit the sharing of records.

[163] Decision 2010-293: *Application of Section 3 of the Fair, Efficient and Open Competition Regulation to Provisions of Power Purchase Arrangements*, June 24, 2010.

300. The Commission reviewed the history of the PPAs, the evolution of the statutory scheme through the deregulation process and its own decisions relating to the PPAs, and concluded that the PPAs were an "enactment" for the purposes of Section 3(2)(e) of the *Fair, Efficient and Open Competition Regulation*. In coming to that conclusion, the Commission also considered the definition of "enactment" in Section 28(1)(m) of the *Interpretation Act,* which states: "In an enactment…"enactment" means an Act or a regulation or any portion of an Act or regulation."

301. The Commission next reviewed and interpreted the PPAs. It then concluded that the PPAs authorized the sharing of records between a PPA owner and a PPA buyer.

302. Having regard to the foregoing, the Commission concludes that it has the jurisdiction to interpret the provisions of the PPAs for the purpose of deciding upon the MSA's application. The Commission finds that this conclusion is consistent with the statutory scheme, and the PPAs function as a component of that statutory scheme, the expectations of market participants and a previous decision of the Commission.

4.3 Were the outages discretionary?

303. In this subsection, the Commission reviews the evidence relating to whether or to what degree, TransAlta exercised discretion in determining the timing for each of the four outage events that are the subject of the MSA's allegations. First, to provide the context in which the outages occurred, the Commission describes TransAlta's Portfolio Bidding Strategy. Second, the Commission reviews the expert evidence filed by the parties that addresses whether or not the outages were discretionary and makes findings about that evidence. Third, the Commission examines each of the four outage events and makes findings on whether or to what degree, TransAlta exercised its discretion in determining the timing of each outage.

4.3.1 The Portfolio Bidding Strategy

304. In the fall of 2010, TransAlta developed its Portfolio Bidding Strategy, which it outlined in an executive summary dated October 21, 2010. The executive summary was prepared by Kaiser and O'Connor, both Asset Optimizers with TransAlta, for Mr. Rob Schaefer (Schaefer), TransAlta's Vice President of Commercial Operations and Development.[164]

305. The Portfolio Bidding Strategy identified the opportunity to use two key strategies to capture higher revenues: economic withholding and discretionary outages. The authors of the executive summary stated that "[t]he aim of both strategies is to move settled pool price higher by physically removing MW from the supply curve by offering them in at a higher price or by removing [them] from the system altogether."

306. The authors went on to state:

> To implement the strategy, we would need to satisfy the following requirements:
>
> i. Full authorization to dispatch our units at any price under the market cap. Previously we have shied away from setting price during tight periods because of the "optics" of this.

[164] Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF pages 2-4.

ii. Ability to coordinate discretionary outages at any point. E.g. [t]wo units are down in the province and one of our units develops a leak. We take the unit down immediately instead of scheduling the unit off for the upcoming weekend. During this period we may still offer up some of our merchant MW at $999.

iii. Dispatch of wind. Ability to call the wind operators to have them reduce output by a MW value. We believe there is the opportunity to economic dispatch our wind farms by simply turning off during periods of high wind.

iv. Move Hydro schedulers to the trading floor. All their offers are coordinated by the Asset Optimization team.

v. If needed and the value is there, we pursue the implementation of a new hydro model that will allow for more effective dispatching of the hydro assets.

vi. Standing authorization for the proprietary desk to take a 500 MW position in any one month.

vii. Standing authorization for the asset book to carry a 500 MW long position into any one month.

viii. IT enhancement project for TMS for the ability to price hourly offer blocks on the Sundance and Keephills uprates. Currently we can only offer one price for the entire 24 hour period.

ix. We need authorization to move on this strategy by mid-November. The forward markets do not put a premium on the risk to higher prices that would come as a result of portfolio bidding. In order to capture some of this value we may want to begin trading around it before the market moves up.[165]

307. The Portfolio Bidding Strategy was sent by Mr. Dean Luciuk (Luciuk), TransAlta's Vice President of Trading and Asset Optimization, on November 16, 2010, via email to several TransAlta executives for approval, including Ms. Dawn Farrell (Farrell), TransAlta's Chief Operating Officer, Schaefer, and Mr. Brett Gellner (Gellner), TransAlta's Chief Financial Officer. The Portfolio Bidding Strategy was also carbon copied to Mr. Ken Strickland (Strickland) and Mr. Sterling Koch (Koch), TransAlta's Chief Legal Officer and Vice President of Regulatory and Legal Affairs, respectively. The November 16, 2010 email stated in part:

> Trading and Asset Optimization (TAO) believes a strategy that involves managing the corporate Alberta power position as a total portfolio (including expected physical generation and financial positions) will be of benefit to TransAlta. This will be a change to the current practice where proprietary financial positions are not optimized in conjunction with any specific asset related energy offer to the AESO that may be a revenue reduction for the specific asset but a revenue gain for the corporate portfolio. We believe there are economic benefits to TransAlta in combining the optimization of these two portfolios into a single strategy.
>
> ...

[165] Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF pages 2-4.

> If the Portfolio Bidding strategy is approved by the VP COD [Commercial Operations and Development], COO [Chief Operations Officer] and CFO [Chief Financial Officer], actions would be implemented immediately.[166]

308. On November 18, 2010, Luciuk sent an email to the asset optimizers, Kaiser and O'Conner and others, announcing that the Portfolio Bidding Strategy had been approved. The email stated in part:

> Portfolio Bidding has been approved. There is some work I need to do on hydro, wind and risk limits but the approval to move forward with Portfolio Bidding in Alberta is granted within the principles and boundaries of this email.
>
> The overarching principles of our portfolio bidding strategy will include:
>
> 1. Continued adherence to all trading guidelines for compliance in the Alberta Market, both internal and external;
>
> 2. Clear authority at the Alberta Portfolio Optimizer level and Real Time Trader to adjust the offered energy blocks for merchant capacity on the AESO;
>
> 3. Daily reporting of revenue benefit – clear and auditable methodology and reporting framework;
>
> 4. Weekly review by Commercial leadership alongside regulatory and Risk Management to discuss performance, upcoming strategy changes and regulatory updates
>
> 5. Weekly reporting by the VP Trading and Asset optimization to the VP COD on the net benefit/loss to the TransAlta portfolio in any week attributed to the strategy.
>
> Nate:
>
> In regards to point 2 above, I am withholding the authority of the RT traders to adjust bids without yours or James approval at this time...[167]

309. TransAlta implemented the Portfolio Bidding Strategy immediately after its approval by senior management with the first outage event taking place the next day on November 19, 2010.

4.3.2 Outage Events

4.3.2.1 Introduction

310. The MSA alleges that TransAlta's anticompetitive behaviour centres on the timing of four outage events that occurred between November 19, 2010 and February 16, 2011 at Sundance 2, 5 and 6 units, and Keephills 1 and 2 units, all of which were subject to PPAs. In each case, TransAlta was the PPA owner while ENMAX (Keephills 1 and 2), Capital Power (Sundance 5 and 6) and TransCanada (Sundance 2) were the PPA buyers.

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166 Exhibit 14.10, MSA Application, Tab 2, *Portfolio Bidding in Alberta Power Market* memo from Dean Luciuk to TransAlta executives, November 16, 2010, PDF pages 6, 8.

167 Exhibit 14.15, MSA Application, Tab 55, November 18, 2010, PDF page 16.

311. The MSA asserts that the four events in question were discretionary outages in the sense that the boiler tube leaks or other mechanical problems were not significant, the plant could have continued to operate in steady state[168] and TransAlta could have taken the outages during off peak hours,[169] instead of during peak or super peak hours on each occasion. The MSA defines discretionary outage as an outage that allows the owner to exercise judgement over whether the unit will require an outage prior to a planned outage and, if so, the timing of the outage.[170] In the Commission's view, this is consistent with TransAlta's own language used to describe outages where "[t]he nature of the leak does not require an immediate outage and thus is discretionary – although the unit must come off (either voluntarily or forced) in the near future."[171]

312. TransAlta submitted that the timing of the outages or derates[172] of the Sundance and Keephills units were necessary because of safety and operational reasons and met the standard of good operating practices in the electric power industry in Alberta as well as compliance with the terms of the PPAs, which gave it the unrestricted right to time outages as it saw fit.

313. The MSA testified that TransAlta scheduled the outages at times of high demand and tight supply with the purpose of driving up prices in the wholesale electricity market to advance and benefit TransAlta's short and longer term Portfolio Bidding Strategy to the competitive detriment of its PPA buyers (who were deprived of their megawatts to bid into the market) and the market as a whole and that these actions constituted a breach of Section 6 of *Electric Utilities Act* and sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation.*

314. The MSA stated that TransAlta compared the amount of AIP it would have to pay the PPA buyers for taking the plant off-line against the forecast revenue it would earn through its Portfolio Bidding Strategy during super peak hours and made its decision to take an outage or not. The MSA's basic position is that the timing of the outages was not determined by good operating practices carried out by the plants' operations staff but rather by TransAlta's asset optimizers in the marketing and trading group.

315. TransAlta submitted that under the terms of the PPAs, it is the PPA owner that has the sole discretion to decide whether a plant must shut down for operational reasons and that outage timing was determined by the operations staff at the plants based on evaluations within the plant and taking account of the safety of its employees, further consequential damage to the plant and the availability of parts and personnel to make the repairs. TransAlta said that once the logistics had been settled, a range of timing was determined by plant operations staff and it was within

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168 *The Oxford Canadian Dictionary*, second edition, 2006, defines steady state to mean an unvarying condition in a physical process.

169 The PPAs define peak hours as 7:00 am to 9:00 pm on Alberta business days, with all other hours being off peak.

170 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 2, paragraph 3.

171 Exhibit 114.01, TransAlta letter to Harry Chandler regarding fact patterns, September 30, 2010, PDF page 4.

172 For the definition of outage see exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, Appendix A2, PDF page 41. A derate is a reduction in the capacity level below the committed capacity of a unit.

that period of time that asset optimizers gave recommendations about the specific start time of the outage.[173]

316. TransAlta agreed that its Portfolio Bidding Strategy involved the timing of forced outages at its Sundance and Keephills PPA units to optimize its portfolio revenue and costs.[174]

4.3.2.2 Expert Evidence

317. Both the MSA and TransAlta provided expert evidence related to the four outage events. The evidence was in the form of written reports and testimony from their respective expert witnesses. The MSA experts were Heath and Eisenhart who each prepared an expert report. TransAlta's experts were Clark, Paterson, and Burnett who jointly prepared a single expert report (the Clark report).

318. The evidence of Heath was based on his own experience in operating power plants in Alberta and on a review of theTube Failure and Repair reports, emails related to the specific outage (including emails between TransAlta plant staff, and emails between TransAlta plant staff and TransAlta's marketing group), log book entries both from the unit operators (Control Room Operator logs) and the Shift Supervisors, Lock out Tag Out (or "LOTO") forms and Transaction Management System (TMS) entries and transcripts arising from interviews conducted by the MSA.

319. Heath has first-hand, practical knowledge regarding the day-to-day operation of coal-fired generating units in Alberta, including TransAlta's Wabamum and Sundance generating units. Additionally, as an employee of the Power Pool of Alberta, Heath was that organization's representative when the PPAs were being developed and was personally involved in the development of some elements of the PPAs. Heath is also the former Vice President of Alberta's Balancing Pool and, as such, has a comprehensive understanding of the structure and operation of Alberta's electricity industry.

320. The Commission accepts Heath as an expert witness knowledgeable in the operation of coal-fired power plants in Alberta subject to PPAs, including the analysis of the nature and severity of the four outage events in question.

321. Heath's evidence generally showed that discretionary outages, as defined by the MSA, are usually taken during off peak hours by PPA owners so that the reliability of the Alberta Interconnected Electrical System is not compromised and there is mitigation of the upward pressure on pool prices during periods of high demand.[175] Heath testified that in his experience, boiler leaks and other mechanical problems are common and well understood by the operators of coal-fired power plants and that in Alberta, PPA owners whenever possible, schedule discretionary outages on the weekend starting on Friday night after 9:00 p.m. He explained that

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[173] Exhibit 150.01, Witness Statement of Ronald Dewalt, filed on December 5, 2014, paragraphs 39-42; Exhibit 151.01, Witness Statement of Trevor Gelinas, filed on December 5, 2014, paragraphs 41-44.

[174] Exhibit 155.01, Witness Statement of Robert Schaefer, page 6, paragraph 33; Tr. Vol. 6, December 9, 2014, page 1301, lines 6-25 and page 1302, lines 1-10.

[175] The PPA owner has an incentive to minimize the amount of the AIP paid to the buyer by minimizing the amount of availability that is not provided to the buyer, and choosing outage periods when the rolling average pool price is the lowest.

when a leak or mechanical event occurs, plant operators determine the severity of the event, if an outage is required and, if so, the timing of the outage.

322. For each of the four outage events, Heath analyzed the relevant logs and related reports and relying on his experience in operating power plants in Alberta, concluded that in each outage event, the units could have been taken off during off peak hours, including on the weekend.

323. He agreed that some situations require an immediate shut down in order to repair the leak or equipment but many events like boiler leaks or tube leaks, are not severe and do not require immediate outages for repairs. In his opinion, units can continue to run with minimal risk until the next planned outage or to an off peak time like the weekend. Heath said that a weekend outage was common because all of the weekend hours are off peak, resulting in lower available incentive payments from the PPA owner to the PPA buyer, as well as usually providing sufficient time to repair the problem and make the unit ready for Monday's peak hours. Heath disagreed with the observations about the timing of outages contained in Appendices D and E of TransAlta's expert report, stating that the charts included all types of outages, including discretionary outages, as defined by the MSA, and non-discretionary outages requiring an immediate shut down.

324. The MSA's other expert witness, Eisenhart, provided a report and testified at the hearing. Eisenhart has considerable experience in the management and operation of coal-fired generating units and other types of generating units in the United States. Eisenhart also has a background in power plant risk management and failure analysis.

325. The Commission accepts Eisenhart as an expert witness in the areas described in the previous paragraph.

326. Eisenhart's evidence largely supported Heath's views on the nature of discretionary outages and their timing. He concurred that the North American power plant operational practices recognize discretionary outages as defined by the MSA and that the Electric Power Research Institute's guidelines outlining accepted practices around discretionary outages were followed by electric power plants throughout North America and the world.[176]

327. Eisenhart's report stated that if the severity of the event is low; for example, a boiler leak that does not automatically trip from the abnormal condition and which the plant's staff determines does not require immediate attention, then an outage can be scheduled taking into account three primary factors: the potential risks to staff safety, damage to other plant equipment and whether the outage can be scheduled for an off peak period. In Eisenhart's experience, North American industry practice means that discretionary outages are often scheduled to start at or around the off peak period of Friday evening, with maintenance work scheduled through the weekend, when electricity demand is generally lowest.

328. Eisenhart also reviewed the four outage events in question based on the material contained in Heath's report. His conclusions were similar to Heath's: basically, in each case, the

[176] Exhibit 14.05, MSA Application, Appendix 3, Expert report prepared by Mr. Eisenhart: *North American Industry Practices Management of Discretionary Outages for Coal Fired Electric Generating Facilities in North America*, March 18, 2014, paragraphs 11-12.

outage could have been scheduled for an off peak period without risk to the safety of the operating staff or further damage to the plant or its operation.

329. Each of the authors of the Clark report: Clark, Paterson, and Burnett, has over 30 years of experience in dealing with the operation of power plants, although not in Alberta.[177] Clark has a Ph.D in Metallurgical and Metals Engineering and provides consulting services to utility companies in the areas of engineering, failure analysis, condition assessment and asset management. Burnett has a Bachelor's degree in Marine Engineering and he has experience in plant operations and maintenance as well as supervision of major outage projects, including boiler inspections and repair, boiler component replacement and assessing the root cause of equipment failure. Paterson has a Master's degree in Metallurgy and Materials Engineering and has had a lead role in many projects on boiler tube damage and failures, including recent projects focused on the evaluation of the impact of unit operation on waterwall tube corrosion fatigue issues, and failures of superheater and reheater tubing.

330. The Commission finds that Clark, Paterson and Burnett are experts through their experience and qualifications in the areas outlined in the previous paragraph.

331. The Clark report provided an analysis of each of the outage and derate events and concluded that the timing of the outages met good operating practices because delay in effecting the repair of the boiler tube leaks or mechanical problems in question posed serious risks to the safety of plant personnel and consequential damage to other plant equipment.

332. The Clark report concluded that most equipment failures are non-critical and do not affect a plant's ability to operate. However, the report characterized boiler tube leaks as a failure of a major component in a power unit that does affect the continued operation of the plant and has the potential for significant consequential damage. The authors of the Clark report stated that this type of failure requires a forced outage; that is, the plant must be shut down as soon as is practicable.

333. The Clark report described the initial boiler tube leak or mechanical problem experienced by the relevant power plant for each outage event, analyzed how the initial failure could lead to a cascading sequence of other equipment failures and concluded that in all four event outages, the plants had to be taken off line in order to maintain operational integrity and plant safety.

334. In addition to reviewing the operational information in logs and reports related to the four outage events of the power plants in question, the Clark report also examined data related to forced outages in power plants in North American and data related to forced outages at TransAlta's coal-fired power plants.

335. The Clark report stated that there are numerous types of outages that are defined by organizations such as the Canadian Electric Association (CEA), the North American Electric Reliability Corporation, the AESO and in the PPAs. The Clark report referenced three types of outages as defined by the CEA State Code for the evaluations set out in Appendix D of its

[177] Exhibit 73.05, Expert report prepared by Mr. Clark, Mr. Burnett, Mr. Paterson: *Engineering Evaluation of Market Surveillance Administrator's Application Dated March, 2014*, September 22, 2014.

report,[178] which dealt with data related to TransAlta's own outages over a number of years. The outage definitions in the Clark Report read as follows:

> Sudden Forced Outage (Outage Code 21.1) - The occurrence of a component failure or other condition which results in the Generating Unit being made unavailable immediately.
>
> Immediately Deferrable Forced Outage (Outage Code 21.2) - The occurrence of a component failure or other condition which requires that the Generating Unit be made unavailable within 10 minutes.
>
> Deferrable Forced Outage (Outage state 21.3) - The occurrence of a component failure or other condition which requires that the Generation Unit be made unavailable from 10 minutes up to and including the very next weekend.[179]

336. The Commission finds that there is little practical difference between the definition of a Deferrable Forced Outage and the MSA's definition of a discretionary outage as "an outage that allows the owner to exercise judgement over whether the unit will require an outage prior to a planned outage, and if so, the timing of the outage."

337. The Commission observes that the categories of outages included in the analysis in Appendix D of the Clark report (Outage Codes 21.1 and 21.2) were outages that are associated with problems that require an immediate shut down or the unit being made unavailable within ten minutes of the component failure. In the Commission's view, only the third type of outage (Outage Code 21.3) has direct relevance to the facts of this case because it recognizes that for some equipment failures, there is discretion in delaying the time of the outage to off peak hours, including the weekend.

338. The Commission finds in the paragraphs that follow, that each of the four outage events in question was consistent with the MSA's definition of a discretionary outage and the definition of a Deferrable Forced Outage used in the Clark Report. Because, none of the outage events required an immediate outage and all of the outages were deferred beyond ten minutes, the Commission finds that the inclusion of data from those two categories of outage events could have the effect of skewing the results by showing more outages during peak and super peak. Accordingly, the Commission finds the analysis in Appendix D of the Clark report to be of limited assistance.

339. Notwithstanding this significant shortcoming, the report shows that TransAlta's past boiler tube forced outages, which included all three of the categories described above, were more often taken at off peak hours. Some 58 per cent of all outages, including outages that must be taken immediately, occurred in the off peak weekend and weekday periods from 9 p.m. to 6:59

[178] Exhibit 73.05, Expert report prepared by Mr. Clark, Mr. Burnett, Mr. Paterson: *Engineering Evaluation of Market Surveillance Administrator's Application Dated March, 2014*, September 22, 2014, Appendix D, PDF pages 56-57.

[179] *Ibid.*, Glossary of Terms, Appendix A, PDF page 26.

a.m. Further, the analysis showed a bias for outages starting on a Friday night for the period 2000-2005 and 2006-2011.[180]

340. Further, the Clark report showed that for similar North American power plants:

- there was a bias for starting forced outages on Saturdays
- a majority, approximately 70 per cent, of the outages occurred during off peak hours, and,
- there was a bias for forced outage starts between 12 a.m. and 2 a.m.[181]

341. For large western North American power plants, the Clark report was unable to exclude what it described as maintenance outages from forced outages and among its other observations noted that boiler tube failures were twice as likely to start between 9 p.m. and 6 a.m.,[182] or off peak hours.

342. With respect to all of the expert evidence, the Commission prefers Heath's evidence over the Clark report where there is a conflict in their respective views. The Commission's findings are set out more specifically in the examination of the outage events that follow but, overall, the Commission was influenced by the testimony and background of Heath and, in particular, by his experience in the Alberta power industry. The authors of the Clark report do not have Alberta power industry experience. Heath, on the other hand, has over 30 years of experience in the power generating sector in Alberta including first hand, practical experience working in power plants as a shift supervisor in the day to day operation of generating units. These units included some of the Sundance power plants involved in this proceeding. He is also the former Vice President of Alberta's Balancing Pool, a government agency, which was a deemed buyer of certain power plants including coal-fired units at the time of the PPA auction and has extensive knowledge from the perspective of a PPA buyer, about the operation of the units. The Commission finds that he has a comprehensive understanding of the structure and operation of the industry and power plants subject to PPAs.

343. Further, the Commission finds that Heath gave convincing evidence about the importance of the various log books required at a power plant and the significance of information that was included or omitted from them. His testimony at the witness table was candid and straight forward and he was consistent and convincing under cross examination.

344. Most importantly, the Commission finds his evidence about the nature and severity of the boiler tube failures and other mechanical problems was confirmed by TransAlta's own contemporaneous communication among its plant staff, the asset optimizers and management during the events leading up to the outages.

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[180] *Ibid.*, Appendices E and F.
[181] *Ibid.*, Appendix E, Analysis of North American Large (> 200 MW) Subcritical Coal-Fired Units Forced Outages, PDF page 80.
[182] *Ibid.*, Appendix F, Analysis of a Large Western North American Utility Forced Outages, PDF page 88.

4.3.2.3 Other Evidence

345. There was a great deal of documentary evidence in the nature of statutorily required plant log books, emails among various TransAlta staff including asset optimizers, plant staff, trading staff, research analysts and management, surrounding the four outage events. This evidence is examined commencing in Section 4.3.2.4 below.

346. ENMAX and Capital Power, PPA buyers of the Keephills and Sundance units, respectively, also provided evidence about the timing of outages. Both indicated that prior to November, 2010, TransAlta generally scheduled discretionary outages during off peak hours on the weekend or week day but that in November, this approach changed and discretionary outages were taken on weekdays during peak hours, without any apparent justification.[183]

347. ENMAX described the timing of the outages in the context of the PPA environment:

> The PPAs contain terms that create incentives for PPA Owners to take outages in low price periods and to minimize the frequency and length of outages. It is in the off-peak periods when availability incentive payments are lowest for TransAlta. It is also in the off-peak periods when the cost of replacement power is lowest for EEC because the Alberta pool price is lower. In the case of discretionary outages in a peak period, EEC must replace the power arising from any such outage as it has normally sold this power to third-party customers. The cost to EEC of replacing that power is higher during peak periods because the demand for power is higher and the supply-demand balance is tighter. Therefore, the corresponding price during peak periods is higher than that during off-peak periods. While ENMAX does receive some compensation if the PPA units are available (or declared available) at less than Target Availability, in most cases, the cost and harm to ENMAX is significantly greater than any limited compensation paid under the PPAs by PPA Owners when outages or de-rates occur during peak periods.[184]

348. TransAlta also called two of its senior plant managers to give evidence along with the company's chief engineer. They generally testified that there were operational or safety reasons for timing the plant outages at the times they were taken off line.

349. The Commission will now review each of the four outages to determine whether the outages could have been scheduled during the weekend or during off peak hours without compromising plant safety or operations and in keeping with good operating practice.

4.3.2.4 Event 1: Sundance 5 on November 19, 2010

350. Early in the morning of November 19, 2010, Sundance 5 plant staff discovered that the deaerator level control valve was failing. The deaerator is responsible for providing positive suction pressure for the boiler feed pumps and the deaerator level valve controls the water level in the deaerator. At approximately 07:00, the unit was derated from 370 MW to 280 MW in response to the problem. Plant staff then used a manual bypass valve to control the deaerator level. A problem with the hotwell level signal also emerged that morning. The hotwell is the feed

[183] Exhibit 14.07, MSA Application, Appendix 5, *Witness Statement of Bryan DeNeve/Capital Power Corporation*, March 19, 2014, paragraphs 12-13; Exhibit 14.08, MSA Application, Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, paragraphs 17-20.

[184] Exhibit 14.08, MSA Application, Appendix 6; Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 3.

for the overall feedwater system, and water is pumped from the hotwell to the deaerator through the deaerator level valve. This meant that the level in the hotwell was also being manually controlled. Notwithstanding these manual work arounds, the unit ran at steady state producing 280 MW until it was completely shut down by 18:00 that day.

351. TransAlta initially advised Capital Power, the PPA buyer, through its communication system known as the TMS that the derate would last until noon. At 11:26 that morning, TransAlta restated the status of Sundance 5 indicating that the derate would continue to 21:00 and then come offline for 48 hours to repair the deaerator control valve and hotwell control.[185]

352. At 16:31, TransAlta informed Capital Power that the unit would be offline at 17:30 rather than 21:00. The unit was completely offline by 18:00.

353. Emails throughout the morning and early afternoon of November 19, 2010, between the plant's operations staff and TransAlta's asset optimizer, show that the Sundance staff believed that the plant would likely have to come offline but had not decided on a firm time for the outage. The operating staff sought the input of the asset optimizer, Kaiser, as to the best time for an outage from a trading or financial perspective. At 09:58, for example, Kaiser emailed the plant's senior management and stated: "I've just worked through the numbers here and it makes sense to remove it from service as soon as possible. The cost of the penalty for the On peak hours today will be about $50k higher than if we wait until 21:00 tonight; we can [sic]will be able to make this up with higher prices today."[186]

354. Also at 12:37 is an email to the plant manager from Mr. Michael Edge (Edge), Sundance 5/Sundance 6 Shift Supervisor, saying: "Marketing has identified TA as long. Nathan [Kaiser] mentioned ideal is off line 16:00. ..."[187]

355. The next day in his November 20, 2010 Portfolio Bidding Report, Kaiser stated "Sun 5 came down early" and "[w]ith the unit coming offline and Poplar Creek pricing up, prices jumped to $400 over the peak hours. Our portfolio benefited from a ton of length."[188] Schaefer responded to this Report on November 20, 2010 via email, writing: "[g]reat job this first week. Some great value and it's clear we're learning a ton."[189]

356. Mr. Ronald Dewalt (Dewalt), the plant's operations manager and chief steam engineer at the time, testified that in his view, the situation with the deaerator control valve and the hot well level signal posed significant operational and safety risks to the continued operation of the plant and taking it offline by 18:00 that day was an exercise of good operating practice. He said that once they learned that the asset optimizer wanted the plant down earlier, there was no reason to delay the outage.

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185 Exhibit 14.15, MSA Application, Tab 57, TMS Restatements for November 18 and 19, 2010, PDF page 21; Exhibit 150.01, Witness Statement of Ron Dewalt, December 5, 2014, paragraph 51.
186 Exhibit 14.15, MSA Application, Tab 56, email from Nathan Kaiser, November 19, 2010, PDF page 18.
187 Exhibit 14.16, MSA Application, Tab 66, email from Michael Edge, November 19, 2010, PDF page 21.
188 Exhibit 14.15, MSA Application, Tab 58, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 19*, November 20, 2010, PDF page 22.
189 Exhibit 14.15, MSA Application, Tab 59, email from Rob Schaefer, November 20, 2010, PDF page 24.

357. In the Commission's view, the salient fact surrounding this outage is that the unit continued to run at steady state from the detection of the problems until the unit was completely shut down at the time that the asset optimizer selected. The plant's initial communication about the problem was not the necessity of an immediate outage to repair the unit; rather, it was to pass on information that would assist TransAlta in advancing its portfolio position because the timing had not been determined by the plant staff.[190]

358. The Commission finds that the timing of the outage was based on financial reasons involving the asset optimizer's calculation of the availability incentive payments to its PPA buyer compared to gains to be realized through TransAlta's Portfolio Bidding Strategy.

359. It is important to note that at 11:26 on the morning of November 19, 2010, TransAlta had notified Capital Power, the PPA buyer, through the TMS that the derate to 280 MW would continue to 21:00 at which time, it would come offline for the weekend to repair the deaerator control valve and hotwell control. Both malfunctions were known at that time and the manual operation of the equipment was in place or was about to be put in place. Notwithstanding this state of affairs, it is not apparent that plant safety and operations were a particular concern since the plant intended to take the outage at 21:00 and make repairs over the weekend. Heath, the MSA's expert, wrote in his report that he had not seen any material in the logs and other associated reports that indicated that the unit could not have been operated for 3 hours longer and taken off line after the super peak hours. This supports the Commission's view that the timing of the outage was taken on the advice of the asset optimizer and that the timing was not dictated by safety or operational reasons.

360. This finding is further reinforced by TransAlta's emails and reports generated internally both before and after the November 19, 2010 event. For example, the asset optimizers' October 21, 2010 executive summary to Schaefer outlining the Portfolio Bidding Strategy recognizes that outages would be timed on the basis of the strategy. Safety or operational considerations are not mentioned. Paragraph 5 ii. reads:

> Ability to coordinate discretionary outages at any point. E.g. Two units are down in the province and one of our units develops a leak. We take the unit down immediately instead of scheduling the unit off for the upcoming weekend. During this period we may still offer up some of our merchant MW at $999.[191]

361. The reference to the exercise of discretion to take the plant down before the weekend confirms both Heath's evidence that the practice in Alberta is to take an outage on the weekend where the particular leak or malfunction is not severe and the plant can run at steady state until the weekend. The practice to take an outage during off peak hours is also confirmed by the evidence of Capital Power, the PPA buyer of Sundance 5. In his witness statement, Mr. Bryan DeNeve (DeNeve), Capital Power's Senior Vice President of Corporate Development and Commercial Services, stated that TransAlta changed its approach to scheduling outages in

[190] Exhibit 14.16, MSA Application, Tab 63, email from Michael Edge, November 19, 2010, PDF page 15; Exhibit 14.16, MSA Application, Tab 64, email from Trevor Gelinas, November 19, 2010, PDF page 17; Exhibit 14.16, MSA Application, Tab 66, email from Michael Edge, November 19, 2010, PDF page 22.

[191] Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF page 4.

November, 2010 by taking outages at PPA units including Sundance 5, during peak periods rather than off peak periods, with outages occurring on weekdays rather than on a weekend.[192]

362. In a report dated November 20, 2010, the day after the outage, Kaiser, one of the asset optimizers, wrote to his senior management and the trading group that the plant came down early. He refers to the early shut down twice. In the first paragraph, he writes: "...A strong night last night as we priced up units, Sun 5 came down early..."[193]

363. And again, in the second paragraph:

> "In the end the cost to Sun 5 from going off a few hours early was abou t [sic] $5,000 total."[194]

364. In the Commission's view, "going off a few hours early" is a reference to the plant staff's intention of taking the outage at 21:00 on November 19, 2010, after the super peak period.

365. Kaiser sent another email on November 22, 2010, to his senior management and others about what happened three days earlier and the discretion that was exercised to take Sundance 5 off line during super peak hours. He wrote in part:

> Strategy
>
> Friday – G3 was at full load due to operational constraints, Sun 5 came offline at our discretion,...[195] [emphasis added]

366. There is also evidence that it was trading/market considerations rather than operating concerns that determined the outage. This is found in TransAlta's response to an information request issued by the MSA in the course of its investigation. The MSA asked:

> Did the determination of the time at which the outage commenced involve an element of discretion, in other words the exact timing of the removal from service of the generating unit was not established solely by a technical assessment of the risk of danger or damage to personnel, the public or the physical plant?[196]

367. TransAlta confirmed that the Sundance 5 outage of November 19, 2010 was discretionary. TransAlta further confirmed that the discretion over the timing of the outage was exercised in whole or part, to obtain financial benefit from TransAlta's portfolio position.[197]

368. TransAlta submitted that the outage data in the Clark report supports the conclusion that these types of outages, which it described as forced outages, occur throughout the week during peak and off peak hours, including the weekend. The Clark report examined TransAlta's own

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192 Exhibit 14.07, MSA Application, Appendix 5, *Witness Statement of Bryan DeNeve/Capital Power Corporation*, March 19, 2014, pages 5-6, paragraphs 12-13.
193 Exhibit 14.15, MSA Application, Tab 58, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 19*, November 20, 2010, PDF page 25.
194 *Ibid.*, PDF page 25.
195 Exhibit 14.16, MSA Application, Tab 60, *Portfolio Bidding Report – Nov 19 – 21*, November 22, 2010, page 1.
196 Exhibit 14.16, MSA Application, Tab 61, TransAlta response to MSA IRs, June 20, 2011, PDF page 7.
197 *Ibid.*, PDF page 8.

outage records for the Sundance and Keephills plants, North American plants of a similar size and type, as well as a subset of power plants in the western United States, in reaching this conclusion.

369. The Commission does not find that this statistical evidence is helpful for the reasons outlined in Section 4.3.2.2.

370. The Commission acknowledges that malfunctioning equipment may very well create safety concerns, consequential damage and operational issues for a power plant that necessitate an immediate or earlier than usual outage to repair. However, the Commission finds that the MSA has demonstrated that such conditions did not exist in this particular outage event. The Commission finds that the Sundance 5 outage could have been scheduled without undue risk to safety, plant operations, or the environment for off peak hours starting at 21:00 Friday, November 19, 2010 on the weekend, which in this case would have been consistent with good operating practices of coal-fired power plants in Alberta subject to PPAs. In other words, the timing of the outage was determined by market conditions rather than by the need to safeguard life, property or the environment as described in Article 5.2 of the PPA.[198]

4.3.2.5 Event 2: Sundance 2 on November 23, 2010

371. TransAlta derated the Sundance 2 generating unit to 125 MW during peak hours on Tuesday, November 23, 2010, because of a problem with the north boiler feed pump control valve, returning to service at approximately midnight. At the time of the outage, TransCanada was the PPA Buyer for Sundance 2. The chronology of the derate is reflected in AESO restatement data;

- On Sunday, November 21, 2010 at 11:02, Sundance 2 was derated from 280 MW available capability to 250 MW due to "nbfp c/v [north boiler feed pump control valve] problems."[199]
- On Tuesday, November 23, 2010 at 09:11, Sundance 2 was derated from 255 MW available capability to 125 MW due to "Nbfp c/v repair."[200]
- On Wednesday, November 24, 2010 at 00:00, Sundance 2 returned to 280 MW available capability and "normal ops."

372. Evidence from TransAlta's Sundance 2's operations manager, Mr. Trevor Gelinas (Gelinas), filed on December 5, 2014,[201] states that if there was some flexibility from a safety and operational consideration in scheduling an outage, then the plant would try to accommodate the asset optimizer's preferred timing but that the final decision remained with him and the plant manager. He stated that the boiler feed pump control valve malfunction posed a serious problem to the operation of the plant because the valve was an essential part of the feed water line for drum level control. He also stated that delay created a safety risk to plant staff and equipment

198 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 53.
199 Exhibit 14.17, MSA Application, Tab 76, AESO restatement data for November 21, 2010, PDF page 17.
200 Exhibit 14.17, MSA Application, Tab 77, AESO restatement data for November 23, 2010, PDF page 19.
201 Exhibit 151.01, Gelinas Witness Statement, paragraphs 41and 42.

due to a packing leak, which caused hot, high pressure boiler feed water to spray from the packing on the valve. There was delay from the initial detection of the problem at 11:02 a.m. on the Sunday to the derate at 09:11 a.m. on the Tuesday. Gelinas recalled that the delay in starting the repairs was the lack of personnel and parts.[202]

373. The Clark report supports the decision to time the derate during peak hours because of the safety issue described by Gelinas and the potential for greater damage to plant equipment. A description of the function of the valve, related pumps and equipment is found in the report. The report confirms that Sundance 2 continued to operate in steady state from November 21 until the derate on November 23. The report does not identify any document or entry in any log books that relates to the safety issue of high pressure water spraying from the packing on the valve. It relies on Gelinas' interview conducted by the MSA in July, 2013 for this information.[203]

374. The MSA's expert witness, Heath, described the situation based on his review of the relevant logs, including the control room operator logs. In his report, he explained that the boiler's two feed pumps together move large volumes of high pressure water steadily into the steam drum on the boiler. He wrote that the logs showed that the control valve on the north pump was not responding and was stuck at 25 per cent open, although the pump itself was in good working condition. Operators controlled the changes in the drum level during operation through the second fully working pump.[204]

375. In Heath's opinion, there was no risk to plant staff or equipment from scheduling the repair to the next weekend or any day that week after the peak period, including on Tuesday, November 23, at 9:00 p.m. He based his view on the fact that the plant ran at steady state from Sunday to Tuesday and that this showed that the steady state could continue to an off peak period, in keeping with Alberta industry practice.

376. Heath also challenged Gelinas' evidence[205] concerning the serious safety risk created by the scalding water spraying out of the packing because Heath could not find any entries in the plant's relevant operation log books that identified this safety risk. In his report and testimony, Heath said that if high pressure, boiling water was spraying everywhere:

> ...I can assure you that a packing leak on a boiler feed pump control valve would have been in the unit operator's logbook, it would have been in the AES's logbook and it would have been in the shift supervisor's logbook. That would be a very significant event.

377. Heath wrote in his report and also testified that the logbooks and emails between staff showed that plant instrument technicians had been sent to examine the valve and determined that

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202 *Ibid.*, paragraphs 58-59.

203 Exhibit 73.05, Expert report prepared by Mr. Clark, Mr. Burnett, Mr. Paterson: *Engineering Evaluation of Market Surveillance Administrator's Application Dated March, 2014*, September 22, 2014, PDF page 15, footnote 5.

204 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF pages 15-16, paragraph 33.

205 Tr. Vol. 3, December 3, 2010, pages 664-668.

they did not have the necessary parts. He stated that this type of examination would not have been possible if scalding water was spraying out from the packing.[206]

378. Gelinas responded to this in his witness statement, where he wrote:

> Operations staff did not always document every detail surrounding an outage and a lot of communication was conducted verbally. In my experience working at various power plants, log books can contain limited information at times and sometimes do not contain all the factual information around an outage event.[207] [emphasis added]

379. As pointed out on cross-examination, Dewalt, who was Gelinas' counter-part at Sundance 5, used nearly identical words in his witness statement to describe the state of the log books:

> In my experience working at power plants, operations staff did not always document every detail surrounding an outage and a lot of communication was conducted verbally. Log books can contain limited information at times and sometimes do not contain all the factual information around an outage event.[208] [bold added]

380. The two witnesses could not explain why they both used the same words to respond to Heath's testimony but in the Commission's view, it appears to advance a self-serving position of TransAlta's well after the event.[209]

381. The transcript of the MSA's cross-examination of the two witnesses on this point follows:

> Q. Mr. Gelinas, can you have your witness statement? And it wasn't mentioned in your opening statement, but that's Exhibit now 151 in the proceeding.
>
> If you can turn to paragraph 52, you'll see it's a paragraph in your report or in your evidence, and you say this: (as read)
>
> "I note that Mr. Heath in his October 15th, 2014, replay report takes issue with my statement that there was a packing leak and water was spraying all over. My recollection has always been that there was a packing leak in Sun 2. I advised the MSA of that during my interview on July 9th, 2013, and my recollection has not changed even after review of the control room logbooks, relevant correspondence, the TMS or LOTO, L-O-T-O, documents. Operations staff did not always document every detail surrounding an outage and a lot of communication was conducted verbally. In my experience, working at various power plants, logbooks can contain limited information at times and sometimes do not contain all the factual information around an outage event."
>
> Do you see that?
>
> A. MR. GELINAS: Yeah, yes.

[206] Tr. Vol. 3, December 3, 2010, page 667, lines 1-21.
[207] Exhibit 151.01, Gelinas Witness Statement, December 5, 2014, page 8, paragraph 52.
[208] Exhibit 150.01, Dewalt Witness Statement, December 5, 2014, page 10, paragraph 62.
[209] Tr. Vol.7, pages 1580, lines 13-25; page 1581, lines 1-25; page 1582, lines 1-24.

Q. Did you write those words, sir? It's in your witness statement.

A. MR. GELINAS: I did with the help of counsel.

Q. Yeah. With the help of counsel; right?

A. MR. GELINAS: Yes. But it's my words. They just helped me with the grammar.

Q. Okay. You say it's your words.

Mr. Dewalt, can you turn up your witness statement. That's Exhibit 150. If you can turn, sir, to paragraph 62 of your witness statement, and you'll see the last sentence: (as read)

"Logbooks can contain limited information at times, and sometimes do not contain all the factual information around an outage event."

Do you see that?

A. MR. DEWALT: Yes.

Q. Mr. Dewalt, are those your words?

A. MR. DEWALT: Yes, they are.

Q. And do you notice that Mr. Gelinas wrote the exact same words?

A. MR. DEWALT: It appears he did. Yes.

Q. Exactly when did you write those words, sir?

A. MR. DEWALT: I wrote those words shortly before this statement was issued as evidence.

Q. Was that over the weekend?

A. MR. DEWALT: No. This was filed on Friday, so probably it was Wednesday and Thursday of last week.

Q. And, Mr. Gelinas, when did you write your words?

A. MR. GELINAS: Would have been Wednesday/Thursday of last week.

Q. And do you got any explanation why you have exactly the same words at Mr. Dewalt?

A. MR. GELINAS: No, I do not.

382. The MSA also questioned Dewalt and Gelinas regarding their obligation to maintain a logbook pursuant to the *Safety Codes Act*.

Q. Thank you. Now, Mr. Gelinas, Mr. Dewalt, are you familiar with the *Safety Codes Act* Power Engineer's Regulation?

A. MR. GELINAS: We are.

Q. And if we -- Ms. Neuhart, if you can call that up on the screen. It should be in a folder. And if we can turn the next page, you'll see paragraph 6 -- I'm sorry, Section 6.

You know very well that this regulation has a provision directly relating to the maintenance of a logbook for a generating plant; correct?

A. MR. GELINAS: Correct.

Q. And you see that it starts out in paragraph 6: (as read)

"A chief power engineer of a power plant and the power engineer in charge of a heating plant or thermal liquid heating system must ensure that a logbook is updated and maintained to record."

And you see items (a) through (c). Do you see that?

A. MR. DEWALT: Yeah.

A. MR. GELINAS: Yes.

Q. There's no doubt -- no issue, Mr. Gelinas, Mr. Dewalt, that you considered a chief steam engineer had the obligation to maintenance a proper logbook; correct?

A. MR. DEWALT: As it says, they have the obligation to ensure a logbook is maintained. They don't personally do it.

Q. They don't what, sorry?

A. MR. DEWALT: They don't personally maintenance the logbook.

Q. But you have to put in controls, procedures, so that a logbook is kept up to date; right?

A. MR. DEWALT: That's correct. And again a logbook is a reflection of events that have occurred and not necessarily contain all of the realtime data and all of the verbal conversations that occur. It is a log sequence of events log with time.

Q. In 2010 and 2011, were you aware of this regulation, sir, Mr. Dewalt?

A. MR. DEWALT: Absolutely.

Q. How about you, Mr. Gelinas?

A. MR. GELINAS: Yes, I was.

Q. And so you would agree, Mr. Gelinas, as the chief steam engineer for Sundance 1 and 2 that you had the role and responsibilities of chief power engineer as outlined in the Power Engineer Regulation?

A. MR. GELINAS: I did.

> Q. And, Mr. Dewalt, you would agree that as operations manager and chief steam engineer at Sundance Units 5 and 6, you had the role and responsibilities as chief power engineer as outlined in the Power Engineer Regulation?
>
> A. MR. DEWALT: That is correct.[210]

383. The Commission considers that the information contemporaneously recorded in the various log books is relevant and reliable in determining the facts surrounding the November 23, 2014 derate of Sundance 2 and, in particular, the situation with the high pressure boiler water spraying out of the packing. The maintenance of the log books is a statutory requirement under the *Safety Codes Act Power Engineers Regulation* (AR 85/2003),[211] which Gelinas acknowledged was his responsibility as the chief steam engineer for Sundance 2.[212] The regulation requires that the log books be updated and maintained to record operational and maintenance matters and "any other matter that may affect the safety of the power plant...".

384. In the Commission's view, the information in the log books is intended by the regulation to be complete and accurate because it will be relied upon to provide valuable information to public authorities carrying out their duties under the *Safety Code Act* in the event of a serious safety incident at the plant. The evidence of TransAlta is that there was a serious safety issue with the spraying boiler water yet there was no mention of this hazard in the logs despite the regulation's direction to record exactly this kind of information. The Commission draws a strong inference from the omission of this information that the event was not a serious threat to the safety of the plant or its staff. This finding is supported by what appears to be a coordinated attempt through nearly identical portions of two witness statements, to discount the importance of the recording of important, contemporaneous, highly relevant information in the log books. It also calls into question the reliability of the memory of the witnesses three years after the derate incident.

385. The Commission also gives little weight to TransAlta's experts' evidence that safety was a significant concern, since the opinion was not grounded in the contemporaneous log book information but based on the memory of TransAlta's witnesses.

386. There is additional evidence surrounding the outage event of November 23, 2010 that leads the Commission to find that the outage was timed primarily for the purpose of benefiting TransAlta's portfolio position, not operational or safety considerations. An email exchange on Monday, November 22, 2010, between Gelinas and Kaiser, highlights this point,[213] as does Kaiser's Portfolio Bidding Report sent on November 23, 2010, which reads in part:

> The big impact today was due to the timing of a derate at Sundance 2. Trevor Gelinas, Operations Manager for Sun 1/2, had called me Monday afternoon about timing a 150 MW derate in order to fix the ongoing derate the plant had been experiencing. We determined to take the derate during the day for a price impact. This derate by far had the

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210 Tr. Vol. 7, December 10, 2014, page 1580, line 13 to page 1585, line 3.
211 Exhibit 164.01, *Safety Codes Act Power Engineers Regulation* AR 85/2003 Section 6, PDF page 2.
212 Tr. Vol. 7, December 10, 2014, page 1582, line 25; page 1583, lines 1-25; page 1584, lines 1-25; page 1585, lines 1-2.
213 Exhibit 14.17, MSA Application, Tab 71, email from Nathan Kaiser, November 22, 2010, PDF page 6.

> largest impact on price. This was a great example of the ongoing coordination we have had with AB Thermal to optimize outages.[214] [emphasis in original]

387. Kaiser's Portfolio Bidding Report email says: "We determined to take the derate during the day for a price impact." It goes on to congratulate the plant staff for cooperating with the business decision. The Commission finds that the motivating reason for the timing of the derate is expressed in this email. Both the plant staff and the trading group made the timing decision based primarily on business reasons not operational or safety concerns. Further emails that week continue to support this conclusion. On Wednesday, November 24, 2010, Gelinas emailed Kaiser: "[i]f you get some good feedback on the market strategy for Tuesday let me know. Will share with 1/2 team the impact of the business decisions that were made."[215]

388. Kaiser wrote the next day:

> I wanted to follow up on the impact of the other night.
>
> What I was looking for in having you guys come off for the afternoon and evening was to see an impact on pool price. Although you guys ended up paying more for that derate because it was during On Peak RAPP, the impact you had on pool price was significant. ....I send this report out every morning to quite a few people, including Doug Jackson. I know he is keen to see how this strategy benefits the company. I put in a good word for you too – I think James and I probably have the best communication with you of all the plant managers and we value that immensely. So keep up the great work![216] [emphasis added]

389. Other pertinent evidence on this issue is found in an interview conducted by the MSA three years after the November 23, 2014 derate, in which Gelinas confirmed that it was unusual to take a derate during peak hours.[217] This aligns with the MSA's evidence regarding the practice of timing derates and outages for PPA units for off peak hours.

390. Although TransAlta characterized this outage as not having any element of discretion in response to an MSA information request during the investigation, the Commission finds that this is an inaccurate assessment given the evidence discussed in the preceding paragraphs.[218]

391. The Commission adopts the reasoning and findings it expressed in Section 4.3.2.2 about the Clark report's data on the distribution of outages throughout the week during off peak and peak hours. The Commission prefers the MSA's evidence on the practice of scheduling the type of outage or derate taken by TransAlta in this instance; that is, TransAlta could have timed the outage for off peak or weekend hours.

392. The Commission finds that the derate of Sundance 2 on November 23, 2010 was timed during peak hours for the purpose of benefiting TransAlta's portfolio position and not for safety, operational or environmental reasons. The Commission accepts the MSA's expert evidence that

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214 Exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 23*, November 24, 2010, PDF page 12.
215 Exhibit 14.17, MSA Application, Tab 75, email from Nathan Kaiser, November 25, 2010, PDF page 15.
216 *Ibid.*, PDF page 15.
217 Exhibit 14.17, MSA Application, Tab 73, transcript of interview, PDF page 9.
218 Exhibit 14.16, MSA Application, Tab 61, TransAlta response to MSA IRs, June 20, 2011.

the unit had been running at steady state for two days and could have continued to do so, in keeping with good operating practices of coal-fired power plants in Alberta subject to a PPA, at least to the off peak hours of November 23, 2010, if not longer. In other words, taking the outage at the time scheduled by TransAlta was determined by market conditions rather than by the need to safeguard life, property or the environment as described in Article 5.2 of the PPA.

4.3.2.6 Event 3: Sundance 2 and Keephills 1 on December 13, 2010 and Sundance 6 on December 14, 2010

393. TransAlta scheduled outages on December 13, 2010 at its Sundance 2 and Keephills 1 units and on December 14, 2010, at its Sundance 6 unit, which had the effect of removing 1,020 MW of supply from the market. At the time of the outages, the PPA buyers for the respective units were TransCanada, ENMAX and Capital Power. The Commission finds the following facts relevant to the reasons for the outages on December 13 and 14, 2010.

December 11 and 12, 2010

394. The Sundance 2 unit experienced a small internal boiler leak sometime on Saturday, December 11, 2010. Plant staff decided to continue monitoring the situation and had not decided on a specific outage time.[219] That evening, Gelinas emailed the asset optimizer with a question: "...thoughts on when to take off for an outage?"[220] The next morning, an internal email sent by operations staff provided an update on the condition of the leak, which included the statement "...I came in this AM & listened, still pretty small but it is here, it will probably run until the Weekend if that is what you want. Will monitor daily."[221]

395. Later in the early afternoon that Sunday, December 12, 2010, emails were exchanged between Gelinas and O'Connor, an asset optimizer, about the timing of the outage. There are no references in the communication about the severity of the leak or operational or safety concerns. Gelinas suggested taking the unit offline sooner than the weekend; that is, on the Wednesday that week.[222] O'Connor thought that a Wednesday evening outage at 5:00 p.m. was the best time. He wrote:

> As it stands today, forecast is calling for cold temperatures Thursday and Friday so coming off Wednesday evening (HE17) is the most opportune time from a marketing perspective. If the forecast holds, the portfolio benefit of stronger prices from the cold temps and Sun 2 offline should offset the increased RAPP penalty. I would like to rerun the numbers tomorrow with a more accurate weather forecast but a Wed. evening outage looks very promising.[223] [emphasis added]

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219 Exhibit 14.18, MSA Application, Tab 85, email from Michael Edge, December 11, 2010, PDF page 14.

220 *Ibid.*

221 Exhibit 14.18, MSA Application, Tab 86, email from Stan Petersen, December 12, 2010, PDF page 16.

222 Exhibit 151.01, Witness statement of Trevor Gelinas, December 5, 2014, pages 9-10, paragraphs 61-63; Exhibit 14.18, MSA Application, Tab 86, email from Trevor Gelinas, December 12, 2010, PDF page 16.

223 Exhibit 14.18, MSA Application, Tab 87, email from James O'Connor, PDF page 18. The term HE 17 refers to "hour ending 17" which the AESO defines as the sixty minute period ending that hour. For example, HE 17 means the period between 16:00 and 17:00 or 4:00 p.m. and 5:00 p.m..

396. In Gelinas' witness statement filed in this proceeding, there is very little information showing that an outage was immediately required for safety or operational reasons.[224] Sundance 2 remained on line throughout Sunday until the next day, Monday, December 13, 2010.

December 13, 2010

397. Two events occurred on Monday, December 13, 2010, which had a significant influence on TransAlta's determination of the timing of the outage of the Sundance 2 unit and, as it turned out, Keephills 1 and Sundance 6. First, TransAlta's Keephills 1 power plant (ENMAX is the PPA buyer) and second, ATCO Power's Battle River 5 unit (Capital Power is the PPA buyer) both experienced operational problems. Keephills 1 had a suspected boiler leak, which was discovered at 08:00 that day. The Battle River 5 unit was dispatched down from 385 MW to 0 MW starting at noon and ending just before 2:00 p.m. that day.[225]

398. At 09:05 on Monday, December 13, 2010, the Keephills 1 shift supervisor described the problem as "... a suspected boiler leak in the upper area of the furnace...". He stated that there were no present plans to take the unit offline.[226] An e-mail from the plant manager at 09:20 indicated that the repair might be timed for the coming Wednesday.[227] E-mails exchanged throughout that the morning among Keephills 1 operating staff and the asset optimizers do not refer to operational or safety concerns requiring an immediate or forced outage. While there were witness statements and live testimony from TransAlta's plant operators about the events at the Sundance units over the December 13 and 14, 2010 period, there was no witness statement or testimony from the operations staff at Keephills 1.

399. The MSA's expert, Heath, said that a review of the relevant logs and related documents showed that there was no indication that the leak was significant or that there was any risk to staff or equipment that required an immediate repair. He expressed the opinion that the plant could have been operated without risk until the weekend. He wrote that the ex-post report on the repair showed that there were two leaks and both were small.

400. During the morning, the asset optimizers were reviewing various timing scenarios for the outage based on the comparative price impact of taking both Sundance 2 and Keephills 1 offline on Friday compared to Wednesday that week.[228] Their first price forecast concluded that the optimum timing for taking Sundance 2 and Keephills 1 offline was Wednesday evening not on Friday evening.[229] A second price forecast was prepared in the early afternoon of that Monday taking into account the outage that had just occurred at ATCO Power's Battle River 5 unit. The e-mail from Mr. Brendan Farris (Farris), who prepared the forecast, read:

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224 Exhibit 151.01, Witness Statement of Trevor Gelinas, December 5, 2014, pages 9-10, paragraphs 60-66.
225 Exhibit 14.18, MSA Application, Tab 88, hand written notes, December 12, 2010, PDF page 20.
226 Exhibit 14.19, MSA Application, Tab 90, email from Tim Rylance, December 13, 2010, PDF page 2.
227 Exhibit 45.02, Heath report, *Expert Report of Doug Heath, Appendix A3*, PDF page 367.
228 Exhibit 14.19, MSA Application, Tab 90, ,email from Nathan Kaiser, December 13, 2010, PDF page 2; Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, page 17, paragraph 38.
229 Exhibit 14.19, MSA Application, Tab 91, email from Brenden Farris, December 13, 2010, Tab 91, PDF page 4, with price forecasts at PDF pages 5-10.

> I am assuming with KH2, SD2 and BR5 we lose 1000MW of base load generation. I am seeing some pretty expensive prices for tomorrow. I was conservative on some of the early morning prices tomorrow. The [F]riday offer curve was showing some $800 hours during the morning ramp. Let me know if you want to discuss.[230]

401. A few minutes later, Farris confirmed the two units could come off immediately with the same increased price impact of an outage scheduled later in the week: "It shouldn't matter when you take them off, should have a similar [e]ffect on price. Unless Battle River 5 doesn't come back for [T]hursday/[F]riday[.]"[231]

402. At 1:46 p.m. that day (Monday, December 13, 2014), O'Connor, the asset optimizer, sent the following note to Gelinas, and others at TransAlta:

> Sundance -- let's make sure Sun 5 is restated to ~$24 for HE17 and onwards. We also want to take Sun 2 down for HE17 (5pm)to repair the boiler leak Keephills—similar to Sun 2, we want to take the unit down for repair beginning HE17 (5pm)
>
> All restat[e]ments must be submitted by 1:59.[232]

403. The PPA buyers, ENMAX and TransCanada were notified of the impending 48 hour outages a few minutes after O'Connor's email. ENMAX immediately called the plant about the outage. ENMAX wanted the outage rescheduled until 19:00 and made three calls that afternoon with the same request. TransAlta advised ENMAX that there was a big boiler leak that had gotten worse and the outage would not be rescheduled. In an internal e-mail sent by O'Connor at 2:17 p.m., he states:

> I just received a call from the shift supervisor Tim Rylance at Keephills. He has advised Enmax is requesting KH1 stay on until 19:00 (KH1 is scheduled to come offline for HE17 to repair a boiler leak). Please confirm that we have no obligation to stay on for the extra hour.[233]

404. At 2:50 p.m., O'Connor provided this response to Mr. Timothy Rylance (Rylance), the Keephills 1 shift supervisor: "[i]f Enmax gets in touch with you again about the KH1 outage, please advise that we have considered their request but will proceed with the original schedule."[234]

405. Both Sundance 2 and Keephills 1 went offline for the boiler repairs around 5:00 p.m. on Monday, December 13, 2010.There is little contemporaneous evidence to show that the boiler leaks in the two units created safety, operational or environmental risks requiring an immediate or forced outage. To the contrary, the plant operating staff at both units were operating the plants at steady state without any operational problems and were either initially planning outages for the weekend or certainly considered that option with the asset optimizers if weekend timing benefited TransAlta's portfolio position.

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230 Exhibit 14.19, MSA Application, Tab 93, email from Brenden Farris, December 13, 2010, PDF page 14.
231 Exhibit 14.19, MSA Application, Tab 94, email from Brenden Farris, December 13, 2010, PDF page 18.
232 Exhibit 14.19, MSA Application, Tab 97, email from James O'Connor, December 13, 2010, PDF page 24.
233 Exhibit 14.19, MSA Application, Tab 98, email from James O'Connor, December 13, 2010, PDF page 26.
234 *Ibid.*

406. The Commission accepts the evidence of Heath and finds that the Sundance 2 leak was small and located in an area that would allow for its impact to be accurately monitored. The particular tubing had also been replaced in 2008 indicating that the tubes would have been in relatively good shape.[235] It is implicit in the email exchange between Gelinas and the asset optimizer that the unit could have continued to operate in steady state until the weekend but that the plant operators could schedule an earlier outage if it would benefit TransAlta's portfolio position. The asset optimizer calculated the incentive payment that TransAlta would have to make to its PPA buyer, TransCanada, against the forecast earnings it would make from removing the unit's production from the market and concluded that a Wednesday outage during super peak hours was the optimal time.

407. With respect to the Keephills 1 outage, the Commission finds that an important piece of evidence is TransAlta's response to the ENMAX request to push the outage of Keephills 1 to 7:00 p.m. from 5:00 p.m. TransAlta told ENMAX that the unit had a big boiler leak that had taken a turn for the worse. This state of operations at the Keephills 1 unit is not supported by the evidence and, in the Commission's view, was intended to mask TransAlta's reason for the timing of the outage to the PPA buyer, which was to benefit TransAlta's portfolio.

408. The boiler leak at Keephills 1 was also small and, from the evidence, did not appear to pose a safety or operational issue. TransAlta's response to an MSA information request also confirms that this outage was discretionary.[236] Given the outage timing scenarios being prepared by the asset optimizer and the plant's operations staff's apparent willingness to take the plant offline at a time that suited the profitability of TransAlta, the Commission finds that the Keephills 1 repairs could have been delayed to off peak hours including the weekend.

409. In this context, the e-mail from O'Connor at 1:46 p.m. on December, 13, 2010, is a clear direction to Sundance 2 and Keephills 1 to shut down immediately for financial not safety, operational or environmental reasons. The Commission finds that the reason for scheduling both outages at the same time on Monday, December 13, 2010 and not mid-week or on the weekend was TransAlta's overwhelming intention to take advantage of the extremely high prices that would be caused during super peak hours because of the concurrent removal of the combined megawatts from Sundance 2, Keephills 1 and the Battle River 5 units.

410. The Commission adopts the reasoning and findings it expressed in Section 4.3.2.2 about the Clark report's data on the distribution of outages throughout the week during off peak and peak hours. The Commission prefers the MSA's evidence on the practice of scheduling the type of outage or derate taken by TransAlta in this instance; that is, TransAlta could have timed the outage for off peak or weekend hours.

411. Based on the foregoing evidence, the Commission finds that the outages at Sundance 2 and Keephills 1 units were discretionary outages that could have been scheduled for non-peak hours during the week or on the weekend without undue risk of safety, operational or environmental issues, in keeping with good operating practices of coal-fired power plants in Alberta subject to a PPA. In other words, the timing of the outage was determined by market

[235] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, page 18, paragraph 38.
[236] Exhibit 14.02, MSA Application, March 21, 2014, pages 48-49, paragraphs 176-178.

conditions rather than by the need to safeguard life, property or the environment as described in Article 5.2 of the PPA.

December 14, 2010

412. A leak at the Sundance 6 unit in the reheater section of the boiler was detected in the morning of Tuesday, December 14, 2010. The Sundance 2, Keephills 1 and Battle River 5 units remained offline from the day before. At 10:06 the plant manager described the leak as small and said:

> Bob [Nelson], sun 6 boiler leak is small and we will be waiting till sun 2 and Keephills come back before we schedule it off. Ron is working with marketing to optimize the time and we will send out a detailed plan by end of day[.][237]

413. The e-mail shows that the plant staff did not require an immediate outage to make the repairs but that they were waiting for the asset optimizer to determine the time. Plant staff worked closely with the asset optimizer to schedule the outage to benefit TransAlta's portfolio position as well as to organize plant resources to repair the leak at the selected time. The communication at the time does not reflect any pressing requirement to take the unit offline in order to avoid any safety, operational or environmental risks.[238]

414. At 10:38, the plant manager wrote: "James [O'Connor] is working out the numbers still on when to take it off."[239] The price calculations were based on scheduling the outage that night on December 14, 2010, later in the week or on the weekend.[240] The numbers showed that the highest prices resulting from the outage of the three TransAlta plants and ATCO Power's Battle River 5 unit would occur that day, Tuesday, during the super peak hours between 5:00 p.m. and 9:00 p.m. At 12:38 O'Connor, the asset optimizer, advised the plant's operation manager to take Sundance 6 offline for 17:00 that day and it was fully offline by that time.[241] The discretionary nature of the decision to take the outage immediately for financial reasons as opposed to operational reasons, is apparent in an e-mail in the afternoon of December 14 from the Sundance 6 operation manager to the plant manager when he wrote:

> Market recommendation/impact??
>
> Market dictated time off of 16:00 today[242]

415. Other evidence supports this view as well. For example, the next day on December 15, 2010, Kaiser described the impact of the outage of Sundance 6 in his Portfolio Bidding Report. It was sent to senior TransAlta management and the trading group. Excerpts from the report included:

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237 Exhibit 14.20, MSA Application, Tab 101, email from Len McLachlan, December 14, 2010, PDF page 4.
238 Exhibit 14.21, MSA Application, Tab 112, email from Ron Dewalt, December 14, 2010, PDF page 7.
239 Exhibit 14.20, MSA Application, Tab 102, email from Len McLachlan, December 14, 2010, PDF page 6.
240 Exhibit 14.20, MSA Application, Tab 108, email from Brenden Farris, December 14, 2010, PDF page 17.
241 Exhibit 14.18, MSA Application, Tab 82, email from James O'Connor, December 14, 2010, PDF page 6; Exhibit 14.20, MSA Application, Tab 108, email from Brenden Farris, December 14, 2010, PDF page 19.
242 Exhibit 14.21, MSA Application, Tab 112, email from Ron Dewalt, December 14, 2010, PDF page 7 of 23.

- The higher outage costs for the thermal units was more than offset by the higher margin earned on the rest of the fleet.

- A big determining factoring in taking Sun 6 off rather than waiting until colder temps later in the week was the size of our wind position.

...

- Again for a base case on the cost of the RAPP penalty we have used what our penalty would have been had we taken the units off on the weekend; ...

- The additional cost of 3 units offline on a weekday vs. the weekend was $745,000 for all 3 PPA units at committed capacity.

One final note – great work by our plant managers at AB Thermal over the past 2 days. All 3 of the outages were discretionary and all 3 plant managers worked with us on the timing. It means juggling schedules and moving into position faster than they might have to otherwise, but we received full support through the process. Great work![243]

[emphasis in the original]

416. A further portfolio bidding report on December 16, 2010 was to the same effect about not taking the unit off on the weekend.[244]

417. Heath stated that based on the operations records and reports that he reviewed and given the severity and location of the leak, the continued operation of Sundance 6 to later in the week or the weekend did not pose any safety or operational risks at the plant. He said that the post event report prepared by TransAlta's maintenance staff showed that the repair method used was to overlay the two areas in order seal the leaks and that immediate tube replacement was not warranted, meaning that the problem was minor and did not affect the ability of the plant to continue operating.

418. Further, in his view, scheduling the three overlapping TransAlta outages along with the Battle River 5 outage was contrary to industry practice as they should have been scheduled sequentially to avoid significant upward pressure on the pool price and system reliability concerns. Eisenhart agreed that North American industry practice for discretionary outages is to time the outage during periods of the lowest electric power demand so as to minimize the potential impact on the customers, considering the economic impact and the reliability of the electric grid.[245]

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[243] Exhibit 14.18, MSA Application, Tab 84, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 14*, December 15, 2010, PDF page 11-12.

[244] Exhibit 14.21, MSA Application, Tab 118, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 15*, December 16, 2010, PDF pages 19-20.

[245] Exhibit 14.05, MSA Application, Appendix 3, Expert report prepared by Mr. Eisenhart: *North American Industry Practices Management of Discretionary Outages for Coal Fired Electric Generating Facilities in North America*, March 18, 2014, page 26, paragraph 57.

419. Capital Power was the PPA buyer of Sundance 6 and gave evidence that the practice in Alberta was to take a discretionary outage during off peak hours. In his witness statement, DeNeve, Capital Power's Senior Vice President of Corporate Development and Commercial Services, states that TransAlta changed its approach to scheduling outages in November, 2010 by taking outages at PPA units including Sundance 6, during peak periods rather than off peak periods with outages occurring on weekdays rather than on a weekend.[246]

420. Dewalt, the plant's operation manager, wrote in his witness statement:

> We continued to monitor the leak [at Sundance 6] throughout the day and were informed that the leak was small. I therefore concluded it was not an immediate risk and we continued to operate the plant and monitor the leak while we put together an outage plan.[247]

421. He also stated that when the plant staff got in to repair the boiler, they discovered and repaired damage on an adjacent boiler tube and another boiler tube leak. He stated that given this, the outage could not have been scheduled by more than three additional days to December 17, 2010 at 21:00, for example. TransAlta's experts agreed with Dewalt.

422. There was also evidence filed by the MSA in connection with TransAlta's response to information requests about the discretionary nature of the Sundance 6 outage in which TransAlta confirmed that this outage was discretionary.[248]

423. The Commission adopts the reasoning and findings it expressed in Section 4.3.2.2 about the Clark report's data on the distribution of outages throughout the week during off peak and peak hours. The Commission prefers the MSA's evidence on the practice of scheduling the type of outage taken by TransAlta in this instance; that is, timing the outage for off peak or weekend hours.

424. The Commission considers that the most persuasive evidence relating to the nature of the outage of the Sundance 6 unit on December 14, 2010 during super peak hours is that the plant staff wanted to wait until Sundance 2 and Keephills 1 came back on production before they scheduled the outage. Further, there was no evidence at that time that the plant could not operate at steady state until later that week or on the weekend. The fact that other consequential damage was identified during the repairs after the outage does not obviate the fact that the plant staff relied exclusively on the asset optimizers to schedule the outage and not on safety, operational or environmental considerations. The overall communication among TransAlta staff demonstrates to the Commission's satisfaction that these outages could have been taken on the weekend but were not because TransAlta could earn more revenue through its Portfolio Bidding Strategy if the outage was taken on weekdays at super peak hours. To emphasize, the Commission finds that the outage was not scheduled for safety, operational or environmental reasons. In other words,

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246 Exhibit 14.07, MSA Application, Appendix 5, *Witness Statement of Bryan DeNeve/Capital Power Corporation*, March 19, 2014, pages 7-8, paragraph 12.

247 Exhibit 150.01, Witness Statement of Ron Dewalt, December 5, 2014, paragraph 59, page 10.

248 Exhibit 14.16, MSA Application, Tab 61, TransAlta response to MSA requests, June 20, 2011.

the timing of the outage was determined by market conditions rather than by the need to safeguard life, property or the environment as described in Article 5.2 of the PPA.[249]

4.3.2.7 Event 4: Keephills 2 on February 16, 2011

425. TransAlta scheduled an outage at Keephills 2 at 16:45 on Wednesday, February 16, 2011, which had the effect of removing 395 MW of supply from the market. ENMAX was the PPA buyer at the time of the outage. The unit was back to normal operation by 20:30 Friday, February 18, 2011.

426. The issue with the timing of this outage, as with the other outages considered in this decision, is whether the outage could have been delayed to off peak hours later that day or later in the week without impairing the safety of the staff, the operational integrity of the plant or the environment.

427. Staff at Keephills 2 identified a boiler leak in the economizer section of the boiler on the fifth floor around 2:30 p.m. on Monday, February 14, 2011. The plant operator sent an e-mail to the plant manager and others stating that he had talked to the asset optimizer who was proposing an outage for either the next day, Tuesday, February 15, 2010 at 5:00 p.m. or on Wednesday, February 16, 2010 at 5:00 p.m. A little later in the afternoon the plant manager confirmed to his colleagues that the outage would commence on Wednesday, February 16, 2011 at 18:00. ENMAX was also formally notified of the 48 hour outage at 17:13 on Monday, February 14, 2011. In arranging the resources to conduct the repair, the plant manager wrote to his maintenance supervisors at 18:28 that the leak was "[s]mall at present but we are scheduled to come off on Wednesday evening for work Thursday."

428. In the early morning of Tuesday, February 15, 2011, the asset optimizers exchanged emails about the relative advantages to the portfolio of a Wednesday versus a Thursday or Friday outage that week.[250] Notwithstanding the higher costs to TransAlta by taking the outage on Wednesday, the assessment of higher pool prices during the super peak hours resulting from the outage, made the Wednesday timing profitable for the TransAlta portfolio.[251]

429. ENMAX, the PPA buyer of Keephills 2, wrote to TransAlta's senior commercial management in the late afternoon of Tuesday, February 15, 2011 expressing ENMAX's displeasure about the lack of detailed communication surrounding the Wednesday outage. ENMAX wanted the outage delayed until after the super peak on Wednesday. Part of the correspondence included:

> In any event, ENMAX requests that this outage be postponed from February 16 at HE 19 to February 16 at HE 22 in order to move it out of the peak/super peak hours. This will benefit TransAlta Availability Incentive Payment as peak RAPP is approximately $120, and off-peak RAPP is approximately $53. If there are any direct additional costs in excess of the AIP benefit resulting from this change in schedule we would be willing to discuss compensation. [emphasis in the original]

[249] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 53.
[250] Exhibit 14.23, MSA Application, Tab 134, email from James O'Connor, February 15, 2011, PDF pages 10-13.
[251] Exhibit 14.22, MSA Application, Tab 126, transcript of interview, PDF pages 19-20.

430. In the Commission's view, TransAlta's response was evasive and intended to avoid providing the real reason for the scheduled outage. The next morning, Wednesday, February 16, 2011, TransAlta's Commercial Manager, Thermal replied that he could not tell ENMAX where the leak was because it was speculative.[252] He then e-mailed his colleagues at 09:15, including the Keephills 2 plant manager and wrote:

> A warning: I think your operators are going to get pestered a lot about this outage today.
>
> I've told Tracy Coutts at Enmax the following:
>
> -I don't have any of the information she's requesting
>
> - I cannot move an outage or bypass operational decisions
>
> -I will not bypass any traditional information channels such as TMS or operator to operator calls
>
> -I received guidance from our Regulatory Group last November not to provide speculative information
>
> Tracy has indicated they are going to get in touch with the plant directly.
>
> It is entirely your discretion as to what info you want to provide on this but if the outage cannot be moved for a specific reason then let's give some information to get them off our back.[253] [emphasis in the original]

431. ENMAX and TransAlta met mid-afternoon that day but TransAlta advised that it was proceeding with the scheduled outage. It does not appear that any detailed reason was given about the nature of the leak and why the outage could not be moved to 22:00 after the super peak. Later that afternoon, the plant manager sent an e-mail to the TransAlta's commercial manager in response to the commercial manager's earlier email that day: "...if the outage cannot be moved for a specific reason then let's give some information to get them off our back." He stated that steam and water were leaking out of the casing and if it worsened, there would be safety and operational risks.[254] This information was not communicated to ENMAX,[255] which was concerned because the outage was scheduled to occur during the same time that the AESO had identified that supplies were inadequate to meet minimum reserve levels, making a very tight market.[256]

432. No description of a deteriorating condition of the leak appears in the Control Room Operator log or Shift Supervisor log,[257] as pointed out by Heath, the MSA's expert. He testified that there would be other indicators of a worsening condition; for example, water consumption

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252 Exhibit 14.08, MSA Application, Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 11, paragraph 49.
253 Exhibit 14.23, MSA Application, Tab 135, email from John Grieco, February 16, 2011, PDF page 12.
254 Exhibit 14.23, MSA Application, Tab 137, email from Jerry Navarro, February 16, 2011, PDF page 17.
255 Exhibit 17.03, MSA Application, Tab 138, transcript of phone call: ENMAX to Keephills, March 25, 2014.
256 Exhibit 14.08, MSA Application, Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, paragraph 47.
257 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 27, paragraph 53.

changes that were not identified in any of the log books. He characterized the leak as a small one with no consequential damage, as verified by the post incident boiler tube failure report. Heath testified that because the plant had been operating for two days without a problem, the unit could have certainly run until 9:00 p.m. on Wednesday, February 16, 2010 with no risk or minimal incremental risk and could have also been operated without undue risk until 9:00 p.m. on Thursday, February 17, 2011 or to 9:00 p.m. on Friday, February 18, 2011.[258]

433. In the Commission's view, the Clark report's opinion that this leak required immediate attention on February 16, 2011 does not sufficiently take into consideration that the plant had been operating at steady state for two days. The opinion reflected in the Clark report about this leak is based, to a large degree, on the plant manager's e-mail of 4:01 on February 16, 2010 to the commercial manager: "... Should it get worse, it could put personnel at risk. If the leaks gets worse we can also put water down the gas path and into the precip which could create a serious issue in the precipitator plugging hoppers and even freezing in the hoppers." But reliance on this information, in the absence of any recording of it in the log books and noting that it was provided to placate ENMAX but never communicated to ENMAX, persuades the Commission to accept Heath's evidence regarding the necessity of taking the unit offline during super peak hours.

434. The Commission adopts the reasoning and findings it expressed in Section 4.3.2.2 in this decision about the Clark report's data on the distribution of outages throughout the week during off peak and peak hours. The Commission prefers the MSA's evidence on the practice of scheduling the type of outage taken by TransAlta in this instance; that is, timing the outage for off peak or weekend hours.

435. Further, the Commission finds that evidence from TransAlta plant staff supports Heath's view of the problem. In an interview conducted by the MSA during the investigation of the outage, the operations manager of the Keephills 2 plant provided the following:

> Q. Is it clear from any of the reports or the shift supervisor logs that the leak got bigger or that it just kind of managed to live [*sic*] long until it was fixed?
>
> A. No, there's not a scale – there's not a measureable scale. There's subjective comments in this here.
>
> Q. But there's no indication that you suddenly had to take it off quicker than the plan was?
>
> A. No, I don't see that or they would have been directed – they would have either done it on their own or they would have been directed and recorded that to do the change.[259]

436. In a response to an information request from the MSA during the investigation, TransAlta confirmed that the Keephills 2 outage on February 16, 2011 was discretionary.[260]

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[258] *Ibid.*, PDF page 29, paragraph 60; Tr. Vol. 3, December 3, 2014, page 687, line 24 to page 691, line 2.
[259] Exhibit 14.23, MSA Application, Tab 139, MSA interview with TransAlta transcript, March 21, 2014, PDF page 22, lines 3-13.
[260] Exhibit 14.16, MSA Application, Tab 61, TransAlta response to MSA information requests, PDF pages 7-8.

437. On Thursday, February 17, 2011, the asset optimizer sent around the portfolio bidding update. In part, it read:

> Up week over week with yesterday being our strongest day year to date. Value add was $1.7 million. Keephills 2 came off with a leak last night tightening up the market for the evening. Given the expected strong prices over the peak hours, our biggest impact was through the ramp up in HE 17 and the ramp down in HE 23.[261]

438. The portfolio bidding report of March 23, 2011 also confirms that advancing TransAlta's Portfolio Bidding Strategy was the reason for the timing of the Keephills 2 outage:

> February portfolio bidding benefit is up $3.1MM week over week (not a typo, honest). The large increase can be explained by the impact we had on pool price from Feb 17th to Feb 23rd and the great thermal production the following 30 days. The price impact was had was attributable to the combination of cold weather, offer behavior, and timing of a Keephills 2 (KH2) outage. KH2 developed a boiler leak earlier in the week and we recommended that the unit come down Wednesday evening.[262]

439. Taking all the circumstances and facts into account, the Commission finds that the outage of Keephills 2 plant on February 16, 2011 could have been scheduled for 9:00 p.m., after the super peak hours instead of three hours earlier that evening, without experiencing risks to plant staff or the plant's functioning or could have also been scheduled without undue risk at 9:00 p.m. on Thursday, February 17, 2011 or to 9:00 p.m. on Friday, February 18, 2011 in keeping with good operating practices of coal-fired power plants in Alberta subject to a PPA. In other words, the timing of the outage was determined by market conditions rather than by the need to safeguard life, property or the environment as described in Article 5.2 of the PPA.[263]

4.3.3 Conclusion: the outages were timed to benefit TransAlta's portfolio position

440. In summary, the Commission finds that the MSA has demonstrated, on a balance of probabilities, that TransAlta's determination on the timing of each of the above outages, was based on advancing its Portfolio Bidding Strategy rather than on the condition of the units themselves and the operational, safety or environmental factor associated with the condition. The Commission concludes, based upon clear, cogent and convincing evidence that TransAlta could have deferred each of the above described outages to off peak hours but chose instead to take them during peak or super-peak hours so as to maximize the benefit to its own portfolio. The evidence also shows that an important consideration for TransAlta was the AIP payment associated with each outage. It specifically considered whether its AIP payments to the PPA buyers would be offset by the profits generated by its overall portfolio position.

441. While the Commission accepts TransAlta's evidence that the plant operators had the final say regarding outages, the evidence before the Commission overwhelmingly shows that the plant

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261 Exhibit 14.24, MSA Application, Tab 142, email from Nathan Kaiser, *Portfolio Bidding Update – Feb 16*, February 17, 2011, PDF page 6.

262 Exhibit 14.22, MSA Application, Tab 124, email from James O'Connor, *Portfolio Bidding Update – Mar 23*, March 24, 2011, PDF page 14.

263 Exhibit, 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 17, 2014, PDF page 29, paragraph 60; Tr. Vol. 3, December 3, 2014, page 687, line 24 to page 691, line 2.

operators deferred to the recommendations of the asset optimizers as to timing on each occasion. In the Commission's view, it is the motivation behind the timing of the outages that is important; i.e., it is whether the outages were timed for market or operational reasons that is of crucial importance in this proceeding, not who made the decisions.

4.4 Did the timing of the outages impact pool prices?

4.4.1 Views of the parties

442. The issue of the impact of outage timing on pool price was the subject of expert reports by Ayres, and by Frayer of LEI.[264] Further, the portfolio bidding reports prepared by TransAlta staff immediately after each of the outage events included a summary of the specific elements of the Portfolio Bidding Strategy that impacted the price and the resulting daily benefit to TransAlta from implementing the Portfolio Bidding Strategy.

4.4.1.1 Views of the MSA

443. Ayres, the MSA's Chief Economist, prepared a report for the proceeding assessing the price impacts associated with the outages in question.[265]

444. The methodology that Ayres used to assess the price impacts associated with TransAlta's timing of the discretionary outages at the PPA units involved constructing two sets of counterfactual merit orders. The first set of counterfactual merit orders is constructed in order to estimate the pool price during the hours when the actual outages were taken but assumed that no outages were taken during those hours. The second set of counterfactual merit orders assumed that the outages were taken at alternative off peak periods and is used to estimate the pool price for those alternative hours.[266] Ayres stated that the alternative outage timings were based on the timings considered by TransAlta's asset optimizers and outlined in the reports of Heath or Eisenhart.[267]

445. An example is helpful to illustrate Ayres' approach. On November 19, 2010, Sundance 5 began to ramp down at 16:40 (HE17). The start of an alternative outage for this event, as specified in the Heath or Eisenhart reports, was 9 p.m. Therefore, Ayres' first set of counterfactual merit orders would be used to calculate the pool price for the period starting at HE17 (hour ending 17:00) while assuming that the Sundance 5 capacity of 280 MW, which was removed due to an outage, was now available and fully dispatched (offered at $0) from HE17 to HE20, and started ramping down over HE21. Based on these counterfactual merit orders, which now included the 280 MW associated with Sundance 5, Ayres determined the counterfactual

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264 These reports also include assessments and discussions relating to potential transfers between consumers and suppliers, efficiency losses, and impact on forward prices.

265 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014.

266 *Ibid.*, pages 2-4; the methodology is also outlined in Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, pages 28-29, paragraphs 84-85.

267 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, page 1.

system marginal prices for the same period, HE17 to HE20.[268] Then, using the counterfactual system marginal prices calculated within the hour, Ayres calculated the counterfactual pool price. For example, Ayres did this by calculating the average of the time weighted system marginal prices over an hour to arrive at the counterfactual pool price of $70.01 for HE18. In comparison, the actual pool price for HE18 was $407.63.[269]

446. Ayres constructed the second set of counterfactual merit orders for the hours when the alternative outage timing would be implemented, in this case starting at 9 p.m. on November 19. Ayres determined the counterfactual system marginal price by using the counterfactual merit order, which excluded the 280 MW. Pool prices were then determined by taking the time weighted average of the system marginal prices over the relevant hours. For example, for HE4 on November 22, Ayres calculated the counterfactual pool price to be $28.81, whereas, the actual price was $22.41.[270]

447. In this approach, changes in the pool price can be observed only in those hours where available capacity associated with Sundance 5 differed between the actual and the counterfactual outage timings. To evaluate the overall effect of the outage on the pool price, Ayres aggregated the hourly pool prices by averaging over the hours in which available capacity changed; in this case, from HE17 to HE21on November 19 and from HE18 on November 21 to HE5 on November 22.[271] For the November 19 event, he concluded that the alternative outage timing would have resulted in an average pool price of $126, as opposed to the observed price of $147.[272]

448. In carrying out this exercise, Ayres accounted for dynamic responses from imports, exports, price responsive loads and other generators, as well as any dispatches associated with Dispatch Down Service.[273]

449. Ayres assessed seven scenarios for the four outage events: one scenario for each of the November 19 and November 23 outage events, three scenarios for the December 13 outage event and two scenarios for the February 16 outage event. For each of the last two outage events, multiple scenarios were considered because there were multiple alternative outage timings put forward by Heath and Eisenhart.

450. Ayres found that in six of the scenarios, the alternative timing of outages would have resulted in lower average pool prices over the hours where the actual merit order differed from the counterfactual. Under these six scenarios where the actual average pool price was higher than the counterfactual average pool price, the difference between the actual average pool price and

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268 For the ramp down period a lower capacity is assumed to be in merit.
269 Exhibit 14.09, MSA Application, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, Appendix E.1, page 41.
270 *Ibid.*
271 *Ibid.*
272 *Ibid.*, page 8, Table 2.2.
273 *Ibid.*, page 5.

the counterfactual average pool price, over the hours relevant to the analysis, ranged from $9 (December 13 outage event, scenario 1) to $121 (February 16 outage event, scenario 2).[274]

451. In the February 16 scenario, in which the alternative timing was the delay of the outage by about three hours on Wednesday, the counterfactual average pool price was higher than the actual average pool price. In this case, the alternative timing had the effect of avoiding 3 peak hours on Wednesday at the expense of having the unit unavailable during the same hours on Friday, which resulted in estimated average pool prices being higher by $79.

4.4.1.2 Views of TransAlta

LEI evidence regarding pool price impacts

452. In its report titled *Independent Review & Analysis of Dr. Ayres Report*,[275] LEI stated that Ayres used assumptions that predispose his analysis to overstate the pool price impacts and indicated that LEI's analysis resulted in estimated pool price impacts that are significantly below the estimates presented by Ayres.[276]

453. In its analysis, LEI used a methodology similar to the one used by Ayres and assumed the same alternative outage timings. However, some of its modelling assumptions differed from those of Ayres. The major differences related to the modelling of responses from price responsive loads and imports, and the determination of the intra-hourly load (i.e., the amount of capacity dispatched from the marginal block). LEI's analysis did not include responses from other generators as, in its view, that would require rigorous and complex models and access to confidential data that is not readily available even to the MSA.[277]

454. LEI presented its average pool price impacts for peak and off peak separately;[278] these are reproduced in Table 2 below. LEI concluded that average pool prices were temporarily higher (though not as high as Ayres' estimates) as a result of the outage timing strategy.[279] LEI further submitted:

> [A]lthough the Pool Price impacts were short-lived, LEI and Dr. Ayres can agree that, directionally, Pool Prices would have been lower but for the outage timing strategy of TransAlta.[280]

455. NERA, another expert retained on behalf of TransAlta, agreed with LEI's conclusion that the outage timing increased pool price. NERA submitted:

> [N]o one disputes that TransAlta's actions to schedule maintenance on a weekday raised the price on that day, *ie.*, in a transitory way. Nor does anyone dispute that TransAlta's timing of the outage was predicated at least partially on the effects on price from the timing.[281]

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274 *Ibid.*, page 8, Table 2.2.
275 Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014.
276 *Ibid.*, page 6.
277 *Ibid.*, page 24.
278 *Ibid.*, pages 92, 97, 101 and 112.
279 *Ibid.*, page 18.
280 *Ibid.*, page 18.

TransAlta's estimated benefits associated with the Portfolio Bidding Strategy

456. As noted previously, TransAlta stated that it implemented its Portfolio Bidding Strategy with the intent to raise prices in the power pool by physically removing megawatts from the market through the scheduling of discretionary outages at its Sundance and Keephills PPA units during peak or super peak hours. As it implemented its strategy, TransAlta calculated the impact on pool prices and the resulting revenues that it earned from its portfolio strategy. In a report prepared by the asset optimizers dated October 21, 2010, the daily impact of the outage strategy is described:

> The effectiveness of this strategy can be measured in two ways:
>
> - Intrinsic value: This is the daily measureable gain in revenues due to the offer strategy that can be calculated on a look back basis. The benefit is measured as the gross margin of the position at settled pool price versus the gross margin of what would have happened had the offer strategy not been deployed. This benefit will be realized in the assets, the asset trading books and the proprietary books.[282]
>
> - Extrinsic value: If in a given month prices are much stronger than anticipated by the market we would expect to see a lift in various periods of the forward curve. This lift can be attributed to the uncertainty caused by our bidding behaviour. If we are then able to sell into this strength in the forward curve and later lock in MTM gains on these sales, this can be recognized as successful result of the portfolio bidding strategy. This value can be measured for the value of the balance of month as well as future years where we are looking to hedge production.
>
> ...
>
> The measure of the strategy's effectiveness is straightforward. Based on the published offer curve for every hour of the day it is possible to compare actual settled price where the hourly price would have settled had a pricing strategy not been implemented. Next, using these two prices, the gross margin can be calculated for the two positions, the actual position with MW out of merit and the base position with all units at marginal cost. The difference in gross margin is the benefit of the dispatch strategy.[283]

457. As has already been identified, TransAlta's daily measureable gain was usually set out in a Portfolio Bidding Report that was prepared and circulated by the asset optimizers after each of the four outage events.[284]

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281 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 17, paragraph 53.

282 Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF pages 2.

283 *Ibid.*, PDF pages 3-4.

284 See for example Exhibit 14.15, Tab 59, email from Rob Schaefer, *Re: Portfolio Bidding Report – Nov 19*, November 20, 2010, PDF page 25; Exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report – Nov* 23, November 24, 2010, PDF page 12; Exhibit 14.18, MSA Application, Tab 83, email from Nathan Kaiser, *Portfolio Bidding Report - Dec 10 - 13*, December 14, 2010, PDF page 8; Exhibit 14.21, MSA Application, Tab 118, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 15*, December 16, 2010, PDF page 19; Exhibit 14.24, MSA Application, Tab 142, email from Nathan Kaiser, *Portfolio*

4.4.2 Commission findings

458. A summary of TransAlta's estimated overall Portfolio Bidding Strategy gains and the pool price impacts, as calculated by Ayres and LEI during the timing of the four outages at the heart of the MSA's allegations, is set out below:

Bidding Update – Feb 16, February 17, 2011, PDF page 6; and Exhibit 14.24, MSA Application, Tab 146, email from Nathan Kaiser, *Portfolio Bidding Update – Feb 23*, February 24, 2011, PDF page 20 (not an exhaustive list).

Table 2. Impacts associated with outage events[285]

Date	Generating unit	Gains calculated by TransAlta	Pool Price Impact Ayres $/MWh[286]		Pool Price Impact LEI $MW/h[287]		
						Peak	Off peak
Nov 19, 2010	Sundance 5	$247,862[288]	Actual	$147	Actual	$133.60	$69.16
			Counter -factual	$126	Counter -factual	$40.22	$91.03
Nov 23, 2010	Sundance 2	$457,500[289]	Actual	$192	Actual	$351.89	$35.11
			Counter -factual	$160	Counter -factual	$251.07	$74.60
Dec 13-16, 2010	Sundance 2 Keephills 1 Sundance 6	$4,619,902[290]	Actual	$109 - $111	Actual	$179.69	$72.23
			Counter -factual	$82 - $100	Counter -factual	$33.83	$144.21
Feb 16, 2011	Keephills 2	$1,712,404[291]	Actual	$333 - $569	Actual	$590.53	$113.35
			Counter -factual	$212 - $649	Counter -factual	$225.59	$376.78

459. While there is a discrepancy in the results due to the different assumptions used, both approaches by LEI and Ayres clearly demonstrate an increase in average pool prices due to the specific outage timings chosen by TransAlta. This conclusion is supported by TransAlta's own contemporaneous calculations of the benefit from executing its Portfolio Bidding Strategy as described above. For example, in a portfolio bidding report sent out on November 24, 2010, Kaiser stated:

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285 Tables showing Alberta pool prices for various hours during and around the outages at the heart of the MSA's allegations are contained in Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, Appendix E, March 6, 2014, PDF page 52-77. The data is largely (although not exactly the same timeframes are presented) repeated in Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, PDF pages 29-38 and Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014, PDF pages 94-119.

286 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*,March 6, 2014, page 8, Table 2.2. The ranges reflect different scenarios that were considered.

287 Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014, pages 92, 97, 101 and 112.

288 Exhibit 14.10, MSA Application, Tab 4, *Re: MSA FILE 0630 – Answers to Undertakings*, June 17, 2013, PDF page 15, Undertaking 2.

289 Exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 23*, November 24, 2010, PDF page 12.

290 Exhibit 14.18, MSA Application, March 21, 2014, Tab 83, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 10 – 13*, December 14, 2010, PDF page 8; Exhibit 14.18, MSA Application, Tab 84, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 14*, December 15, 2010, PDF page 11; Exhibit 14.21, MSA Application, Tab 118, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 15*, December 16, 2010, PDF page 19.

291 Exhibit 14.24, MSA Application, Tab 142, email from Nathan Kaiser, *Portfolio Bidding Update – Feb 16*, February 17, 2011, PDF pages 6-7.

> [T]he Sun 2's derate was a factor in the strong prices. Had we taken the outage at another period of the day, we would have seen much lower prices during the afternoon and evening peak (as evidenced by the prior evening's prices).[292]

460. Similary, in a report sent out on December 15, 2010, Kaiser stated:

> Daily settle was $170.47. Our look back on the daily price had we not taken our units offline was a settled price of $35.84.[293]

461. Having regard to the foregoing, the Commission finds that TransAlta's timing of outages did increase average pool prices from what they would otherwise have been had the outages been scheduled to commence on off peak hours, as demonstrated by the analyses set out above, and as agreed to by all the parties. While one of the alternative timings resulted in higher average pool prices for the February 16 event, another alternative timing was available for that outage event that would have resulted in a lower average pool price.

4.5 Did the timing of the outages impact forward prices?

462. The issue of the impact of outage timing on forward prices was also the subject of expert reports by Ayres, and LEI. Church also provided his views on the relationship between the exercise of market power in the power pool and the forward markets in his report. In addition, the MSA relied upon contemporaneous TransAlta records in support of its contention that the outage events had an impact on the forward market.

4.5.1 Views of the MSA

463. The MSA submitted that the impact of the Portfolio Bidding Strategy on forward markets was "patently obvious on TransAlta's own records."[294] The MSA observed that TransAlta's October 21, 2010 Executive Summary in which it set out the business case for the Portfolio Bidding Strategy explicitly stated that the "Extrinsic" benefit of the Portfolio Bidding Strategy was the impact on the forward markets.[295] The MSA referenced similar comments from a number of other contemporaneous TransAlta documents.[296] The MSA submitted that Ayres demonstrated in his expert report that TransAlta's conduct had the effect of increasing forward electricity prices. However, it clarified that it had not undertaken a separate assessment of harm arising from this impact on forward market prices.[297]

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292 Exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report– Nov 23*, November 24, 2010, PDF page 12.

293 Exhibit 14.18, MSA Application, March 21, 2014, Tab 84, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 14*, December 15, 2010, PDF page 11.

294 Exhibit 3110-X0002, MSA Argument Part 1, January 20, 2015, page 38, paragraph 143.

295 Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF page 2.

296 Exhibit 14.10, MSA Application, Tab 3, *Alberta Portfolio Bidding – Strategy Review*, PDF page 10; Exhibit 14.24, MSA Application, Tab 142, email from Nathan Kaiser, *Portfolio Bidding Update – Feb 16,* February 17, 2011, PDF page 6; Exhibit 14.24, MSA Application, Tab 143, email from Nathan Kaiser, *Portfolio Bidding Update – Mar 2,* March 3, 2011, PDF page 9.

297 Exhibit Exhibit 14.02, MSA Application, March 21, 2014, page 96, paragraph 337.

464. Ayres testified that he did not believe there would have been forward price impacts associated with the first two outage events in November 2010.[298] However, he did analyze the impact of the December and February events on forward markets.[299] Ayres stated that he focused on these two events where the pool price impact was the largest and limited his assessment to forward financial products with reasonably high liquidity, flat contracts for the three following months.[300] In his assessment, Ayres identified several factors as alternative causes for forward price increases: changes in scheduled outages for generators and the AB-BC intertie, changes in gas prices and other changes; i.e., new rules, regulations or guidelines that might be expected to have an impact on pool price. Ayres indicated that he considered the application of a statistical method to study forward price impacts as problematic due to the gaps in price series and unavailability of good data on explanatory factors that has sufficient variation to be useful.[301]

465. For the December 13, 2010 outage, Ayres looked at the prices for the January, February and March 2011 flat contracts traded on each day for the remainder of the week (December 14, 15, 16 and 17). He stated that, following the December event, the prices for that January contract were between $7/MW and $8/MW higher, the prices for the February contract were approximately $8/MW higher, and the prices for the March contract were between $2/MW and $3/MW higher. Ayres did not consider the observed price increases to be attributable to changes in scheduled generator or intertie outages or gas prices.[302]

466. For the February 16 outage, Ayres looked at the prices for the March, April and May 2011 flat contracts traded on each day for the remainder of the week (February 15, 16, 17 and 18). He stated that, by February 18, 2011, the prices for the March contract had increased by over $10/MW and the prices for the April and May contracts had increased by over $13/MW. Ayres did not consider the observed price increases to be attributable to changes in scheduled generator or intertie outages or gas prices. However, Ayres acknowledged that high pool prices during the period were in part caused by the long term outages at Sundance 1, 2 and 3 and a two day outage at Sheerness 2 and it was possible that these high prices would have influenced expectations of forward prices even in the absence of the outage at Keephills 2 on February 16.[303]

467. LEI filed a critique of Ayres' empirical assessment of the impact on forward prices and conducted its own statistical analysis of the four outage events.[304] Ayres subsequently reviewed LEI's analysis and submitted that it suffered from a number of shortcomings or flaws including: failure to correct for heteroskedasticity and autocorrelation, inappropriate use of seasonal dummies and dummy variables for Sundance outages and the inclusion of an expected supply

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298 Tr. Vol. 2, December 2, 2014, page 368, lines 9-11.

299 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014.

300 *Ibid.*, page 11.

301 Exhibit 43.02, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 1-27, July 31, 2014, MSA-TAC-18, page 28.

302 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, page 14.

303 *Ibid.*, page 17.

304 Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014.

shift variable based on erroneous data which entered the estimated econometric equations with the wrong sign.[305]

468. Ayres submitted that correcting some of these identified flaws and re-estimating the LEI model, produced "very different results" that supported "the hypothesis that the outage events did move forward prices higher."[306]Ayres also contended that LEI misrepresented its statistical methodology.[307]

469. Church submitted in his evidence that conduct that creates, enhances or maintains market power in the power pool would increase both the average pool price and the dispersion of pool prices.[308] Church indicated that the former would be expected to raise forward prices due to arbitrage, while the latter would result in an increase in forward prices to the extent that the electricity buyers are risk averse. Church concluded that "[h]ence as market participants in forward markets for electricity in Alberta became aware of TransAlta's conduct and its effect on the pool price, forward prices would increase, especially if market participants expected TransAlta's conduct to be persistent."[309]

4.5.2 Views of TransAlta

470. TransAlta stated that Ayres confirmed at the hearing that his opinions regarding forward price impacts stemmed from his pool price assessment. TransAlta argued that because Ayres' assessment of pool price impact was flawed, his conclusions regarding forward price impacts were also unreliable.[310]

471. TransAlta characterised Ayres' assessment as "nothing more than an observation of a price trend for a period of time following an event."[311] It submitted that Ayres' assessment lacked "any proven analysis of what factor(s) may have caused or contributed to the observed price movement."[312] TransAlta submitted that LEI's econometric analysis was one of four methodologies identified in the MSA's framework for estimating harm and submitted that it should be preferred over Ayres' observational review of forward price movements.[313]

472. In its report, LEI submitted that Ayres' forward market assessment was selectively biased because it excluded the two November outages.[314] LEI also questioned why Ayres' assessment was limited to the four trading days following the start of each event. It stated that Ayres also failed to consider what forward prices would have been "but for" the actual timing of the outages

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305 Exhibit 3110-X0003, MSA Argument part 2, January 20, 2015, paragraph 812, referencing exhibit 83.02, Reply Expert Report prepared by Dr. Ayres, October 15, 2014, pages 11-15.
306 Exhibit 83.02, Reply Expert Report prepared by Dr. Ayres, October 15, 2014, page 11, paragraph 16.
307 *Ibid.*
308 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 37, paragraph 108.
309 *Ibid.*
310 Exhibit 3110-X0162, TransAlta Final Argument, February 10, 2015, page 26, paragraph 390.
311 *Ibid.*, page 126, paragraph 392.
312 *Ibid.*, page 127, paragraph 393.
313 *Ibid.*, page 127, paragraph 394.
314 Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014, pages 31-32.

and noted that because the outages were operationally required, they would have occurred at a time close to actual timing.[315]

473. LEI submitted that Ayres "cherry picked" trading dates around the December and February outage events "to show an increase in forward prices without looking into how these price trends fit in with the general trend in forward price movements prior to and after the outage event."[316] LEI pointed out that the price for the May 2011 monthly flat forward contract started to decline on February 23, 2011, five days after the latest date used by Ayres in his analysis. LEI observed that by February 25, 2011, the forward price for the May contract had declined by $6/MW or 8.7 per cent, "reversing most of the temporary increase in forward prices experienced earlier in February."[317] LEI also submitted that Ayres failed to consider if the increases fell within "an acceptable price band as dictated by observed volatility of forward price movements from day to day."[318] LEI stated that, based on its review, the trade prices during and after the December and February outages were "well in line with overall variability in forward market prices."[319]

474. LEI stated that it conducted an econometric analysis of the four events to measure the statistical significance of their impact on forward prices, while controlling for other factors that simultaneously impact forward market prices.[320] LEI stated that it identified a number of statistically significant variables that influenced electricity forward prices, including natural gas forward prices, seasonal demand and expected supply shifts caused by new entrants and retirements and generation outages. It further identified two variables specific to the structure of electricity forward contracts that impact market prices: remaining term time until delivery of the forward contract and volume of forward contracts. LEI further noted that the issuance of the OBEG in January and the long term outage at Sundance 1 and 2 also impacted the forward prices during the time identified.[321]

475. As a result of its statistical analysis, LEI concluded that the four outages were not a statistically significant driver of forward market prices.[322]

4.5.3 Commission Findings

476. The Commission finds that one of the reasons that TransAlta engaged in the Portfolio Bidding Strategy was to create uncertainty and, therefore, influence forward markets. This finding is supported by TransAlta's own documents from the time of the strategy's implementation. In its *Alberta Portfolio Bidding Business Case – Executive Summary*, TransAlta stated that there were two ways in which the effectiveness of the strategy could be measured. One of them was:

> Extrinsic value: If in a given month prices are much stronger than anticipated by the market we would expect to see a lift in various periods of the forward curve. This lift can

315 *Ibid.*, page 32.
316 *Ibid.*, page 33.
317 *Ibid.*, pages 33-34.
318 *Ibid.*, page 34.
319 *Ibid.*
320 *Ibid.*, page 36.
321 *Ibid.*
322 *Ibid.*, page 37.

> be attributed to the uncertainty caused by our bidding behaviour. If we are then able to sell into this strength in the forward curve and later lock in MTM gains on these sales, this can be recognized as successful result of the portfolio bidding strategy. This value can be measured for the value of the balance of month as well as future years where we are looking to hedge production.[323]

477. The Portfolio Bidding Strategy updates, which were prepared by Kaiser while the strategy was being implemented, indicate that TransAlta believed that the strategy was generating volatility and having the desired effect on forward markets. For example, in his February 16, 2011 update, Kaiser stated: "[o]n the market side, the volatility is driving the markets. We're selling into the strength in our May and Q3 positions and selling the balance of the month to all takers at $150."[324]

478. Another example is Kaiser's March 2, 2011 update, in which he stated:

> Although the days weren't as strong from a settled basis as the fireworks in the previous week, portfolio bidding for the final week of February was up $1.4 m. That brought us to $13million for the month of February. It was a strong month by all accounts with the final price setting $122.45. With the high margins we saw in February, it ended up being a very profitable month for both the assets and trade books. **The knock-on benefit of portfolio bidding is impact on the forward curve. As such we saw a strong lift in the forward curve for the balance of the year. With Sun 1/2 offline, the market has put a premium on prices – this strong February gives good reason to be bullish the curve.**[325] [emphasis added]

479. In Section 4.4, the Commission concluded that TransAlta's timing of outages did increase average pool prices from what they would otherwise have been had the outages been scheduled to commence on off peak hours. Consistent with the MSA's evidence, the Commission considers that, everything else being equal, such increases in average pool price are likely to influence forward market prices to some degree. This is supported by TransAlta's contemporaneous observations at the time. Therefore, the Commission finds that TransAlta's implementation of the Portfolio Bidding Strategy did affect the forward market. However, having regard to the limited evidence, with respect to this issue, provided by the parties in this phase of the proceeding, the Commission makes no finding, at this time, regarding the magnitude of the effects associated with the discretionary outages in question.

4.6 Did the timing of the outages restrict or prevent competition or a competitive response?

480. As noted earlier, the Commission believes that TransAlta and the MSA essentially agreed that conduct that restricts or prevents competition or a competitive response is conduct that creates, maintains or enhances market power, or extends market power. However, they differed significantly on whether TransAlta's conduct in relation to the outage events was conduct that created, maintained or enhanced market power. The MSA and TransAlta each filed expert

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323 Exhibit 14.10, MSA Application, Tab 1, *Alberta Portfolio Bidding Business Case – Executive Summary*, October 21, 2010, PDF page 2.

324 Exhibit 14.24, MSA Application, Tab 142, email form Nathan Kaiser, *Portfolio Bidding Update-Feb 16*, February 17, 2011, PDF page 6.

325 *Ibid.*, Tab 143, email from Nathan Kaiser, *Portfolio Bidding Update – Mar 2*, March 3, 2011, PDF page 9.

reports on this issue; the MSA retained Church and TransAlta hired NERA Economic Consulting.

4.6.1 Views of the MSA

481. The MSA submitted that Church's analytical framework provided a clear overarching framework with which to assess Section 2(h) of the *Fair, Efficient and Open Competition Regulation* from an economics and competition policy perspective.[326] The MSA stated:[327]

> In summary Dr. Church's framework is:
>
> - Market power depends on the willingness and ability of consumers to substitute.
> - The willingness and ability of consumers to substitute is measured by the residual elasticity of demand of a firm.
> - Conduct that is anticompetitive reduces the ability of competitors to increase their output or reduces the willingness of a firm's consumers to substitute to the product of a competitor by reducing the quality or otherwise adversely affecting consumers' absolute valuation of competitors' products.
> - The effectiveness of anticompetitive conduct is measured by its effect on market power, which is indicated by the change in the residual demand of a firm from the conduct.
> - Harm follows from the increase in exercise of market power: higher prices lead to reduced output.

482. In his framework, Church distinguished between the exercise of market power and conduct that creates, maintains, or enhances market power.

483. Church stated that a firm exercises market power when, through its pricing or production decisions, it can raise the market price above competitive levels and in doing so, increase its profits.[328] He submitted that the ability of a firm to exercise market power depends on the willingness and ability of consumers to substitute to other suppliers or other products.[329] Church explained that conduct that enhances, creates, or maintains market power, on the other hand, reduces the extent to which a firm or a supplier's customers are willing, or able, to substitute to other products (away from electricity) or the extent to which the customers' demand can be met by increased production of electricity by other suppliers.[330]

484. Church stated that in the context of the electricity market in Alberta, generators exercise market power by engaging in economic withholding,[331] and explained that economic withholding

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326 Exhibit 3110-X0002, MSA Argument part 1, January 20, 2015, pages 104-105, paragraph 409.
327 Exhibit 3110-X0174, MSA Reply Argument, February 19, 2015, page 19, paragraph 72.
328 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 3, paragraph 9.
329 *Ibid.*, page 3, paragraph 9.
330 *Ibid.*, page 4, paragraph 10.
331 *Ibid.*, page 4, paragraph 11.

occurs when a generator bids capacity at a price that ensures that it is not dispatched.[332] According to Church, the exercise of market power through economic withholding is not anticompetitive in and of itself.[333]

485. Church stated that the response of consumers and competitors to economic withholding can be summarized by the residual demand function of a generator, which shows the sales quantity of a generator as it varies its price, assuming consumers and other suppliers respond optimally.[334] Church explained that the residual demand elasticity of a generator shows the percentage decrease in its quantity demanded when it increases its price by one percent,[335] and it measures the willingness and ability of consumers to substitute.[336] Church submitted that the greater the effect of the PPA outage on residual demand elasticity, the more effective and profitable economic withholding and the exercise of market power.[337]

486. During his cross-examination on the difference between discretionary outages at PPA units versus merchant plants, Church clarified the difference in terms of residual demand elasticity as follows:[338]

> A. DR. CHURCH: The mechanism is very different. In one I am taking my capacity out, right. I'm not affecting my own residual demand. In the other one I'm taking a competitor's capacity out and thereby affecting my residual demand and changing my market power.
>
> Q. So if I hear your answer correctly, again it comes back to this negative effect on elasticity of residual demand?
>
> A. DR. CHURCH: Because it's doing something to a competitor.

487. Church stated that establishing whether conduct is anticompetitive involves a demonstration that the exercise of market power has been enhanced, maintained or created, and that, when there is not a change in marginal costs, such an effect can be determined by assessing the effect of the outages on pool prices.[339] Church submitted that the choice of the timing is anticompetitive if it results in higher average pool prices than alternative timings, which could have been chosen by TransAlta.[340] In an exchange with TransAlta counsel regarding the

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332 *Ibid.*, pages 11-13, paragraph 35.
333 *Ibid.*, page 4, paragraph 11.
334 *Ibid.*, page 14, paragraph 40.
335 *Ibid.*, The residual demand function for a firm can also be described as the difference between market demand and the supply of the firm's competitors at each price level set by the firm. [Exhibit 43.05, *Market Power in the Alberta Electricity Industry*, May 22, 2014, pages 12-13].
336 *Ibid.*, page 15, paragraph 41; exhibit 3110-X0174, MSA Reply Argument, February 19, 2015, page 19, paragraph 72.
337 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 27, paragraph 79.
338 Tr. Vol. 3, December 3, 2015, page 588, lines 10-20.
339 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 28, paragraph 83.
340 *Ibid.*, page 7, paragraph 22.

relationship between observation of price impacts and anticompetitive conduct, Church explained his position as follows:[341]

> Q. And you infer from your price simulations, which show a price increase, that, therefore, the conduct must have been anticompetitive; is that right?
>
> A. DR. CHURCH: So I have two things. I have the conduct that I know happened. I have the theory about what the effect of the conduct should be, and I have empirical evidence which is consistent with the predictions of the theory.
>
> So I have conduct, plus theory, plus higher prices. I can then infer backwards that I have anticompetitive conduct.
>
> Q. Because of the price increase?
>
> A. DR. CHURCH: Because of all three things.

488. Church endorsed the methodology adopted by the MSA to determine the effect on pool prices of the timing of the discretionary outages, as described in Section 4.4 above. Church submitted that the empirical evidence of the MSA on the price impact of the timing of TransAlta's discretionary outage for the PPA capacity confirms that the effect of its conduct was anticompetitive.[342]

489. During cross-examination by TransAlta on the threshold beyond which the particular timing of an outage becomes anticompetitive conduct, Church responded as follows:

> So that's not a decision for me to make. That's a decision for the Commission to make. I can just present evidence in -- on terms of how big the effect is. I mean, what's at issue here is that when TransAlta -- [t]hey had an alternative feasible timing, they exercise this timing when they actually did it, it's going to have an effect on their residual elasticity of demand regardless because the outage has to happen at some time.[343]
>
> [...]
>
> They are going to create market power whenever they take this outage out. The question is, is can you control the amount of market power that's created. That's the issue. It's not a line between exercise and conduct that creates or maintains. When the outage happens, it creates market power, but the outage has to happen sometime. So then it's a relative question about when do you take it.[344]

Market power

490. In response to an information request posed by TransAlta, Church stated that defining the relevant market is not necessarily a preliminary step in identifying market power when there is

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341 Tr.Vol. 3, page 598, lines 4-16.
342 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 37, paragraph 106.
343 Tr. Vol. 3, December 3, 2015, page 576, line 20 to page 577, line 4.
344 Tr. Vol. 3, December 3, 2015, page 579, lines 17-24.

direct evidence of the exercise of market power.[345] Accordingly, Church points to *Assessment of Price Impact*,[346] which, in his view, demonstrates the exercise of market power based on the effect of TransAlta's timing of the discretionary outages at its PPA owned capacity on market power.[347] Church noted that the extent of the constraint on market power can be more directly identified by determining residual demand elasticities.[348]

491. Church also referred to *Abuse of Dominance Provisions Enforcement Guidelines*[349] in support of his position that the Competition Tribunal may accept direct indicators as evidence of market power: [350]

> A. DR. CHURCH: ...And if you look at Footnote 18, it says: (as read)
>
> "The Tribunal" -- the Competition Tribunal -- "has accepted some direct indicators as evidence of market power."
>
> Which is not defining a market.
>
> Q. So you're suggesting from Paragraph 18 that --
>
> A. DR. CHURCH: Footnote 18. I'm just saying that the direct approach is sometimes used and accepted, in this case by the Competition Tribunal.

492. Church stated that defining relevant markets and then inferring or presuming market power is complicated, difficult and prone to error.[351] In his analysis, Church indicated that elements of the relevant product market include electricity and intervals of time, with each interval corresponding to a separate relevant product market.[352]

493. Church submitted that naïve application of the hypothetical monopolist test[353] would identify all suppliers of electricity during the interval as alternative suppliers that should be

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345 Exhibit 43.04, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 28-33, July 31, 2014, page 10.

346 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014.

347 Exhibit 43.04, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 28-33, July 31, 2014, page 5.

348 *Ibid.*, pages 13-14.

349 Exhibit 132.01, Competition Bureau, *Abuse of Dominance Provisions Enforcement Guidelines*, September 20, 2012.

350 Tr. Vol. 2, December 2, 2014, page 485, line 23 to page 486, lines 1-7.

351 Exhibit 43.04, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 28-33, July 31, 2014, pages 10-11.

352 *Ibid.*, page 10.

353 The Competition Bureau states that "[t]he Bureau generally employs the "hypothetical monopolist" test to initially conceptualize substitutability between products by considering whether a hypothetical monopolist would impose and sustain a small but significant and non-transitory price increase for the product in question above a given benchmark...The smallest candidate market considered is the allegedly abusive firm's product. If a hypothetical monopolist controlling that product would not impose a small but significant and non-transitory price increase above the benchmark, assuming the terms of sale of all other products remained constant, the candidate market is expanded to include the next-best substitute...The analysis is repeated until the point at which the hypothetical monopolist would profitably impose and sustain such a price increase over the set of

included in the market, and that given that consumers are unlikely to substitute away from electricity to other products and sources of energy, it is likely the case that the hypothetical monopolist test is satisfied if the hypothetical monopolist controls all generation capacity.[354] Church noted that this likely results in a market definition that is too broad, including suppliers and their capacity that are not required to be under the control of the hypothetical monopolist to find a small but significant and non-transitory increase in price (SSNIP) profit maximizing.[355]

494. Church suggested that the hypothetical monopolist test likely needs to be modified in the case of electricity, to be defined as a generator's own capacity plus the smallest set of capacity above the competitive price such that a firm with control of that capacity would find it profit maximizing to impose an SSNIP.[356] According to Church, the relevant product market to assess a generator's market power is likely defined by a range of the merit order above the competitive price in addition to its capacity.[357] Church noted that the relevant market will be different depending on the realization of demand and supply conditions, it will be generator dependent, and sensitive to assumptions regarding the competitive price.[358]

495. Regarding durability, Church noted that if there are factors that limit entry, including economies of scale, then the increase in the average price level caused by the anticompetitive conduct will still attract entrants, but the extent of entry will be limited and prices will not return to the level established before PPA owners engaged in their anticompetitive conduct.[359] Church explained as follows:[360]

> We start at some level of price, of which there's no entry.
>
> We ask, given this anticompetitive conduct created market power and raise the price, would there be entry to come back in to drive the price all the way back down?
>
> Well, if there was entry that came in to drive all the way the price back down, that entry couldn't have been profitable because the entry is only profitable because of the raise in the price.
>
> So what happens is, if there is entry for it to be profitable, the conduct still has to continue, which means that entry doesn't discipline the conduct.

Are PPA buyers competitors?

496. Church indicated that an appropriate way to determine whether the PPA buyer is a competitor of the PPA owner is to consider the effect of the PPA capacity on the ability of the

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candidate products. In general, the smallest set of products in which the price increase would be sustained is defined as the relevant product market." [footnotes omitted] See Exhibit 132.01, Competition Bureau, *Abuse of Dominance Provisions Enforcement Guidelines*, September 20, 2012, page 3.

354 Exhibit 43.04, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 28-33, July 31, 2014, page 12.

355 *Ibid.*, page 12.

356 *Ibid.*, page 13.

357 *Ibid.*

358 *Ibid.*

359 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, page 8, paragraph 23.

360 Tr. Vol. 3, December 3, 2015, page 563, line 15 to page 564, line 2.

PPA owner to exercise market power.[361] Church stated that the reduction in supply due to the discretionary outage of PPA capacity, reduces the competitive constraint on the PPA owner, affecting its market power.[362]

497. Church indicated that the reduction in supply due to an outage, reduces the competitive constraints on the PPA owner, and to the extent that this reduction affects the owner's ability to exercise its market power, the PPA buyer is a competitor of the PPA owner.[363] The MSA emphasized that the PPAs were intended to put electricity generated by PPA units into the hands of competitors to address market power.[364]

498. Church stated that the record of the policy development and approval of the PPAs show that the IAT and the EUB understood the incentive for PPA owners to withhold PPA capacity to increase the profits of merchant capacity and the role of the MSA in considering whether, and when, withholding of PPA controlled capacity by the PPA owner would be permissible.[365]

Exclusionary or predatory conduct

499. Church submitted that TransAlta engaged in exclusionary conduct by considering the impact of the timing of its discretionary outages on its market power.[366] According to Church, TransAlta timed its discretionary outages to increase the effect of the exclusion of the PPA buyers on its market power, and the price impacts found by the MSA are a measure of the market power created.[367]

Harm

500. The *Assessment of Price Impact*[368] submitted by Ayres follows the methodology that Church outlined to determine the effect on pool prices of the timing of the discretionary outages,[369] and includes estimates of the potential transfers between consumers and suppliers and static efficiency loss.[370] According to Ayres, the potential transfers were in excess of a hundred

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361 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, pages 4-5, paragraph 13.

362 *Ibid.*, page 4, paragraph 13.

363 *Ibid.*, pages 4-5, paragraph 13.

364 Exhibit 3110-X0174, Reply Argument of the Market Surveillance Administrator, February 19, 2015, page 20, paragraph 76.

365 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, page 2, paragraph 6.

366 *Ibid.*, page 5, paragraph 17.

367 *Ibid.*, page 6, paragraph 17.

368 Exhibit 14.09 MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014.

369 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, page 33, paragraph 94.

370 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, pages 9-10. Dr. Ayres' estimates of harm are obtained by multiplying the price impact by the amount of load impacted. Dr. Ayres explained his estimation of static efficiency losses as follows: "There are two components to this. Firstly, a productive efficiency loss, associated with the actual timing of the outages incurring greater production costs than in the counterfactual. Secondly, an allocative efficiency loss associated with price responsive loads consuming less than would have been the case as a result of the higher prices that resulted due to the timing of the outage." See section 2.2.4.2 in Exhibit 14.09, MSA Application, Appendix 7,

million dollars, depending on the scenarios and assumptions used,[371] and the static efficiency losses were estimated to be from one half to one million dollars.[372] The report also considers whether the timing of outages had an impact on the prices of forward contracts, and finds evidence of significant price impacts of the December and February outages on forward contracts for the following three months.[373]

501. Church stated that dynamic efficiency exists in the long run if investment and entry is sufficient to discipline the exercise of market power such that generators earn only competitive rates of return and not monopoly profits.[374] Church submitted that entry that relies for its viability on the continuation of conduct that creates, enhances, or maintains market power is inefficient.[375] Church indicated that, if there are factors that limit entry, including economies of scale, such conduct could result in higher than necessary long run average costs and prices, harming consumers and reducing benefits to firms.[376] Church testified:[377]

> [i]f you're worried about dynamic efficiency, suppose I start with a dynamic efficient outcome. I create market power. Is entry going to come in which disciplines that market power, or is entry going to come in which is dynamically efficient?
>
> The answer is going to be no because that capacity is going to duplicate capacity that I already have which isn't being used because TransAlta is withholding it when it's doing its timing of discretionary outages...

4.6.2 Views of TransAlta

502. TransAlta submitted that under a proper interpretation of the *Fair, Efficient and Open Competition Regulation* that is consistent with traditional antitrust analysis of unilateral behaviour, the MSA must demonstrate that TransAlta engaged in an exclusionary, predatory or disciplinary act that impaired or impeded the ability of a competitor to respond to TransAlta's conduct with a competitive response. It argued that the MSA has not alleged that TransAlta engaged in any such act.[378] TransAlta stated that it did not create any barriers to entry, nor

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Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, page 10.

371 Dr. Ayres indicated that since the amount of load impacted depends on forward market contracts and hedges, and since the MSA does not have an accurate estimate of load impacted by the outage conduct, he presented a range of harm estimates corresponding to different levels of pool price exposure. See Table 2.5 in section 2.2.4.1 in Exhibit 14.09, MSA Application, Appendix 7, prepa Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, page 10.

372 Exhibit 14.09, MSA Application, Appendix 7, Expert report prepared by Dr. Ayres: *Assessment of Price Impact, Comparison of actual and counterfactual timing of outages between November 2010 and February 2011*, March 6, 2014, page 1.

373 *Ibid.*, page 1.

374 Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, pages 19-20, paragraph 58.

375 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, page 7, paragraph 21.

376 *Ibid.*, pages 7-8, paragraph 22-24.

377 Tr. Vol. 3, page 613, lines 3-11.

378 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 101, paragraph 313.

engaged in any targeted exclusionary or predatory behaviour that handicapped the ability of the PPA Buyer to compete.[379]

503. TransAlta submitted that Church's framework is not supported by the *Electric Utilities Act* or the *Fair, Efficient and Open Competition Regulation*, and it is a departure from the traditional principles of competition policy governing unilateral behaviour. TransAlta indicated that the MSA's approach appears to have simply inferred the existence of market power from the existence of a transitory price increase, and that this approach is fundamentally problematic, since it infers the existence of a disease from a transitory symptom.

Market power

504. TransAlta submitted that the MSA failed to demonstrate that TransAlta had market power at the time of the relevant outage events.[380] According to TransAlta, the MSA did not perform any analysis in respect of the definition of the market, concentration levels or other indicators of market power.[381] TransAlta stated that an analysis of market power, by definition, entails an exercise of defining the relevant market in both product and geographic dimensions, and assessing concentration levels as well as the ability of the Market Participant to sustain a SSNIP above the competitive level for a sustained period of time.[382] TransAlta submitted that the MSA's application and Church's report were limited to considering price increases that were highly transitory[383] and that based on the evidence of this proceeding, there is a good reason to question whether TransAlta had market power to raise prices over a competitive level for a sustained period of time.[384]

505. NERA submitted that it is impossible to demonstrate creation, enhancement or maintenance of market power through short-run price increases.[385] NERA stated that any short-run increases in price, in a market with free entry, will induce enough entry to drop the average price back to entry level,[386] and that to be durable, market power must be conjoined with some ability to limit entry.[387] NERA submitted that neither the MSA nor Church has suggested that entry is in any way deterred by TransAlta's actions.[388]

506. TransAlta also stated that it objects to the assertions that impacting residual demand elasticity is necessarily anticompetitive,[389] explaining that price increases are not anticompetitive

379 *Ibid.*, page 102, paragraph 316.
380 *Ibid.*, page 99, paragraph 308.
381 *Ibid.*, page 99, paragraph 309.
382 *Ibid.*, page 99, paragraph 308.
383 *Ibid.*, page 100, paragraph 311.
384 *Ibid.*, page 100, paragraph 310.
385 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 11, paragraph 29.
386 *Ibid.*, page 12, paragraph 32.
387 *Ibid.*, page 11, paragraph 30.
388 *Ibid.*
389 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 136, paragraph 424.

if the overall level of price is too low to induce entry,[390] and that "... many perfectly legitimate and legally compliant competitive acts raise the residual demand elasticity of customers."[391]

Are PPA buyers competitors?

507. NERA defined a competitor as someone who can take a specific action to change supply in the market in a way that constrains other suppliers, adding that when the PPA plant has not generated, the PPA buyer has no decisions to make.[392] NERA submitted that the PPA buyers' rights give them control of electricity only at such times as the PPA owner chooses to make it available to them.[393] According to NERA, when the PPA buyer does not have electricity, it is not a competitor, and the PPA contract does not give it the right to force TransAlta to produce electricity at any particular time.[394]

508. TransAlta argued that in a Protocol Agreement dated February 2, 2011 between TransAlta and TransCanada, the PPA buyer disclaimed that it is a competitor of a PPA owner. TransAlta concluded that a PPA buyer is a downstream purchaser of electricity, rather than a competitor.[395]

Exclusionary or predatory conduct

509. TransAlta submitted that under a proper interpretation of the *Fair, Efficient and Open Competition Regulation* that is consistent with traditional antitrust analysis of unilateral behaviour, the MSA must demonstrate that TransAlta engaged in an exclusionary, predatory or disciplinary act that impaired or impeded the ability of a competitor to respond to TransAlta's conduct with a competitive response, but that the MSA has not alleged that TransAlta engaged in any such act.[396] TransAlta stated that Church only focused on one form of alleged anticompetitive conduct; namely, the impact of TransAlta's outages on the residual demand elasticity of the PPA Owner.[397] According to TransAlta, this does not constitute a form of anticompetitive conduct for the reasons that the PPA buyer is not a competitor,[398] that TransAlta did not create any barriers to entry, nor engaged in any targeted exclusionary or predatory behaviour that handicapped the ability of the PPA Buyer to compete,[399] and that the impact of TransAlta's outages on the residual demand elasticity of the PPA Owner is not exclusionary, predatory or disciplinary in any way.[400]

510. TransAlta stated that it did not prohibit a competitive response since the PPA buyer does not own the capacity of the PPA units, the buyer cannot bid power into the pool during an outage, the buyer and owner are not competitors vis-à-vis the PPA and the buyer would have taken the same actions as TransAlta if they owned the units.

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390 *Ibid.*
391 *Ibid.*, page 136, paragraph 426.
392 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 16, paragraphs 49-50.
393 *Ibid.*, page 23, paragraph 73.
394 *Ibid.*, page 15, paragraph 44.
395 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 102, paragraph 315.
396 *Ibid.*, page 101, paragraph 313.
397 *Ibid.*, page 101, paragraph 314.
398 *Ibid.*, page 102, paragraph 315.
399 *Ibid.*, page 102, paragraph 316.
400 *Ibid.*, page 102, paragraph 317.

511. NERA submitted that not giving electricity to a PPA buyer cannot be the exclusion of a competitor, since the PPA buyers' rights give them control of electricity only at such times as the PPA owner chooses to make it available to them.[401]

512. NERA stated that the PPA plan was intended to transition the incumbent generators to market price exposure while limiting to acceptable levels, their incentive to exercise market power unilaterally. NERA submitted "...the level of PPAs, and their structure, was *chosen* to allow the level of unilateral exercise which remains."[402]

513. NERA indicated that the PPA contracts reduce but do not completely eliminate, the incentive to exercise economic withholding unilaterally or to shift discretionary outages from off peak to peak.[403] NERA submitted that TransAlta's incentives are delineated by the terms of that PPA contract and its conduct was entirely in line with those foreseeable unilateral incentives.[404]

Harm

514. TransAlta submitted that in addition to demonstrating anticompetitive conduct, the MSA must prove anticompetitive harm in order to establish an offence under sections 2(h) and 2(j) of the *Fair, Efficient and Open Competition Regulation*,[405] but that the MSA failed to establish market harm.[406] TransAlta indicated the following reasons for why the MSA's assessment fails to demonstrate harm:

- Ayres lacks the independence and impartiality the law requires of expert witnesses.[407]
- MSA did not follow its own framework to establish harm, which involved a two-step process of (1) measuring price impacts through a "but for" analysis using reliable counterfactuals; and (2) estimating the harm caused to the market by various recognized economic methodologies.[408]
- Profits earned by TransAlta through its Portfolio Bidding Strategy are wholly irrelevant to whether the MSA has proven that this strategy harmed the market.[409]
- Pool price impacts cannot be relied on as estimates of harm; rather, they are transfers between market participants in the context of a dynamic wholesale electricity market. Furthermore, there is no way to know what the market participant conduct would have been and thus no credible way to determine the appropriate "but for" price given that, following the OBEG and the consequent changes in market participant offer

401 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 23, paragraph 73.
402 *Ibid.*, page 13, paragraph 33.
403 *Ibid.*, page 13, paragraphs 34-35.
404 *Ibid.*, page 3, paragraph 3.
405 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 104, paragraph 321.
406 *Ibid.*, page 110, paragraph 338.
407 *Ibid.*, page 104, paragraph 321.
408 *Ibid.*, page 110, paragraphs 339-340.
409 *Ibid.*, page 111, paragraph 343.

behaviour, it is not straightforward and may be impossible to estimate a counterfactual competitive price.[410]

- Ayres' pool price impact analysis is driven by an assumption regarding the timing of the counterfactual outages.[411] Some of the counterfactuals relied on by Ayres are completely unreliable in light of the technical evidence, rendering the corresponding pool price impact analysis meaningless.[412] Moreover, due to the use of "...various counterfactual scenarios and his percentage exposure alternatives, the harm estimate proffered by Dr. Ayres is susceptible to such a wide range that it is unhelpful and of questionable reliability."[413]

- The counterfactual timing suggested for the outages is unreasonable.[414] Historical data shows that TransAlta typically takes its units down to repair boiler tube leaks within 24 hours of detection of the leak, and that it is rare for TransAlta to postpone such forced outages by three or more days.[415]

- The forward price impact analysis in the Ayres Report is nothing more than an observation of a price trend for a period of time following an event.[416] Ayres did not utilize an event study or any other acceptable econometric analysis to test his hypotheses.[417] In contrast, LEI conducted an econometric-based analysis of forward market trends, which showed that the outage events had no material impact on forward market prices in view of other contemporaneous factors.[418]

515. With respect to static efficiency losses, LEI submitted that their presence is not itself prima facie evidence of harm given the energy only market design and that the MSA has repeatedly noted that static efficiency losses, especially trivial amounts such as those estimated by Ayres, are not a concern if there are dynamic efficiency gains in the long run.[419] LEI stated in its report that no evidence has been suggested by the MSA or Ayres that the timing of the outages undermined in any way motivations for new entry and dynamic efficiency in the long run.[420]

516. NERA submitted that "[t]he harms, if any, of short-run market power exercise can only be judged relative to the dynamic gains from spurring entry,"[421] and that "dynamic efficiency gains ought to be allowed to offset static efficiency losses."[422] NERA indicated that since PPA

410 *Ibid.*, page 111-112, paragraphs 344, 346.
411 *Ibid.*, page 112, paragraph 348.
412 *Ibid.*, page 113, paragraph 350.
413 *Ibid.*, page 113, paragraph 354.
414 *Ibid.*, page 114, paragraph 355.
415 *Ibid.*, page 115, paragraph 357.
416 *Ibid.*, page 126, paragraph 392.
417 *Ibid.*, page 126, paragraph 393.
418 *Ibid.*, page 127, paragraph 394.
419 Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014, pages 41-42.
420 *Ibid.*, page 42.
421 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 11, paragraph 29.
422 *Ibid.*, page 12, paragraph 32.

buyers in the Alberta market have expanded their capacity, the market test for harm to competition is rejected.[423]

4.6.3 Commission findings

517. Important factors in the Commission's assessment of whether TransAlta's conduct restricted or prevented competition or a competitive response are the nature of the commodity being exchanged, and the nature of the market in which that exchange takes place.

518. In his evidence, Church explained some of the factors that influence the degree to which consumers of electricity in Alberta can switch or substitute to other products or suppliers.[424] Those factors include:

- Lack of real time pricing for most consumers
- Electricity cannot be economically stored
- Supply from generators may be relatively inelastic due to rapidly increasing marginal costs or capacity constraints.

519. The Commission agrees with Church in that limitations on the possibilities for substitution allow for a greater ability to exercise market power,[425] and considers that because of the listed factors influencing consumers' abilities to switch or substitute to other products or suppliers, Alberta's deregulated electricity market maintains an environment that is potentially advantageous to market participants wishing to exercise market power.

520. The ability to exercise market power in the Alberta electricity market is also influenced by the structure of the market itself. The Alberta Legislature chose reallocation of generating capacity through the PPAs in order to reduce the market power enjoyed by the incumbents and to stimulate competition. A by-product of this choice was an information imbalance between the PPA owners, who are responsible for the operation and maintenance of the PPA units, and the PPA buyers, who effectively purchased the output of the PPA units. When operational conditions at a PPA unit dictate the need for a derate or an outage, the PPA owner will have private, and potentially valuable, information about the need, nature and extent of the outage, as well as the timing of the outage. Neither the PPA buyer, nor any other market participant, will have access to this information for a certain period of time.

521. As noted previously, such circumstances were contemplated when the PPAs were first proposed. At that time, the IAT, the EUB and market participants all recognized that, while the AIPs could discourage PPA owners from using the information imbalance to its advantage, other tools outside of the PPA would be available should the AIPs be insufficient to prevent outage "gaming." The tools contemplated at that time included the application of the *Competition Act*, the development of government policy, or the development of new provincial legislation

[423] *Ibid.*, page 18, paragraph 55.
[424] Exhibit 14.06, MSA Application, Appendix 4, Expert report prepared by Dr. Church: *The Competitive Effects of TransAlta's Timing of Discretionary Outages*, March 18, 2014, pages 13-15, paragraphs 38-42.
[425] *Ibid.*, page 12, paragraph 32.

specifically targeting the unique Alberta market. The last option was used in 2009 when the *Fair, Efficient and Open Competition Regulation* came into force.

522. It is within this context that the Commission interpreted and applied Section 2(h) to the circumstances at hand. As noted in Section 4.1, a breach of Section 2(h) will occur when a market participant engages in conduct whose purpose is to restrict or prevent competition, a competitive response or market entry by another person.

TransAlta deliberately engaged in conduct that restricted or prevented a competitive response

523. The Commission first addresses TransAlta's and NERA's proposition that PPA buyers and PPA owners compete only when the PPA buyer has access to the electricity it purchased through the PPA. The Commission finds this proposition to be without merit because it ignores the structure of the market, the purpose and intent of the PPAs and of the overall statutory scheme.

524. The deregulation process was embarked upon to reduce market power and stimulate competition by reallocating generation capacity in the Alberta market. One goal of the PPAs was to ensure that the PPA owners no longer had the ability to influence prices that emanate from controlling the PPA capacity. It follows, therefore, that PPA capacity cannot be considered available to a PPA owner for its deliberate use to increase its market power and thereby influence prices. Otherwise, the PPA mechanism would be stripped of its very purpose. Consequently, the Commission considers the electricity from the PPA units that could have been offered had TransAlta not strategically timed its outages, to be part of a competitor's supply. The Commission finds that TransAlta and the PPA buyers were competitors at all material times, both as that term is understood generally, and in the context of the statutory scheme.

525. There is little dispute between TransAlta and the MSA as to what occurred. On four separate occasions, TransAlta deliberately timed outages at its PPA units to benefit its overall portfolio position. The Commission finds that, by timing the outages at its coal-fired units subject to PPAs based on market conditions, rather than on operational conditions (i.e., to safeguard life, property or the environment), TransAlta unfairly exercised its outage timing discretion under the PPAs for its own advantage and made its own portfolio benefits paramount to the competitive operation of the market. The Commission finds that TransAlta engaged in this conduct for an anticompetitive purpose and that the conduct had a negative effect on its competitors by restricting or preventing them from providing competitive responses. This conduct was contrary to the purpose, spirit and intent of the statutory scheme and undermined the fair, efficient and openly competitive operation of the electricity market.

526. It is no defence to suggest, as TransAlta did, that the PPA buyers would have engaged in the same conduct had the units in question been their own merchant capacity. The evidence filed in the proceeding is to the opposite effect. For example, ENMAX's evidence regarding the December 13, 2010 outage was as follows:

> The KH1 [Keephills One] outage had the effect of removing from the EEC portfolio approximately 360MW of load for a single unit (383 MW of Committed Capacity reduced by line losses) during peak. Notification of the outage was received only 3 hours and 7 minutes before the effective time, and occurred in close proximity to when two other coal fired units had gone offline making it impossible for EEC to replace the

generation, therefore as a consequence EEC was exposed to pool price for approximately 360 MW of load for a single unit (383 MW of Committed Capacity reduced by line losses) less the Availability Incentive Payment that would apply during the outage.[426]

527. ENMAX described the effects of the February 16, 2011, outage as follows:

> The Wednesday, February 16, 2011 discretionary unit outage had the effect of removing from the EEC portfolio approximately 360 MW of load for a single Unit (383 MW of Committed Capacity reduced by line losses) during peak periods. The event was scheduled to commence at a time when the AESO Supply Adequacy Report identified a supply forecast condition as being "1 = not enough supply to maintain 7% reserves requirements", which means the market was very tight. EEC made numerous clear requests of TransAlta for the outage to simply be delayed only a few hours, and notified KH2 operator of the supply shortage, yet TransAlta stuck to the schedule making it impossible for EEC to replace the generation, therefore as a consequence EEC was exposed to pool price for approximately 360 MW of load for a single Unit (383 MW of Committed Capacity reduced by line losses) less the Availability Incentive Payment that would apply during the outage. EEC was in complete reliance upon TransAlta's declaration about the operating status of KH2 at the time.[427]

528. Capital Power's evidence regarding the impacts of the outages was similar to ENMAX's.

> The harm to Capital Power from TransAlta's changes to its PPA outage scheduling was immediate and significant. During, and as a result of the prolonged outages of Sundance 5 and 6 in November and December, 2010, pool prices in Alberta were significantly higher and Capital Power was required to buy very expensive replacement power. Capital Power has estimated that its overall excess cost of replacement power from those outages alone was between $9.3 and $9.8 million. In Capital Power's view, most, if not all, of that cost could have been avoided had TransAlta handled those outages in a manner consistent with both its own practice prior to November 2010, and the established and ongoing practice of other PPA owners.
>
> Capital Power no longer assumed that the Committed Capacity from Sundance 5 and 6 would consistently be available during peak periods when doing its portfolio planning. Steps were taken to carry excess capacity into the spot market in place of those units. As a consequence Capital Power sold less power forward, and this reduced the amount of transactions in the forward market.[428]

529. Notwithstanding the Commission's conclusion that Section 2(h) is a per se offence, the Commission finds that the MSA has demonstrated that since PPA capacity offered by a buyer is part of a competitive market's supply curve, any outage at a PPA unit, and its subsequent removal of megawatts from market supply, has the potential to enhance TransAlta's ability to move the price away from its competitive level, everything else being equal. Of course, the degree to which a price can be distorted is also a function of other market conditions, some of which relate to demand and supply conditions. For example, when high market demand is

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426 Exhibit 14.08, MSA Application, Appendix 6, Questions and Answers of Christopher D. Joy on behalf of ENMAX Energy Corporation, March 7, 2014, pages 9-10, paragraph 43.

427 *Ibid.*, page 10, paragraph 47.

428 Exhibit 14.07, MSA Application, Appendix 5, Witness Statement of Bryan DeNeve / Capital Power Corporation, March 19, 2014, page 7.

coupled with relatively few alternative sources of supply, TransAlta's ability to move the price away from its competitive level is enhanced. The price effects described in Section 4.4 confirm that TransAlta's actions increased its ability to move the price away from competitive levels when compared to its ability to move price under outages that were timed differently. TransAlta's actions were particularly effective because of prevailing market conditions.

530. While this conduct took place over a matter of hours, the Commission is satisfied that the strategy could have been repeated whenever the opportunity presented itself, as explained below. The key elements to implement the Portfolio Bidding Strategy successfully, which are identified by TransAlta, are as follows:

> a. Long corporate position from un-hedged length or ability to buy undervalued forward position.
>
> b. Tight market fundaments [sic] where unit outages and aggressively bidding will move price.[429]

531. The first element is a function of prevailing forward prices, among other things. In the Commission's view, TransAlta, through its ability to schedule discretionary outages at PPA units, would have an advantage in assessing whether the energy is undervalued in the forwards market or not. This is because TransAlta, at the time of trading, knows whether it will schedule discretionary outages to benefit its portfolio during that term or not. If, in each period, TransAlta were to build a long portfolio and schedule discretionary outages to benefit its portfolio position, TransAlta's strategy would become known to all market participants, thereby removing any discrepancies between forward and spot prices that would have arisen as a result of the initial execution of the strategy. However, if the forward prices are sufficiently high, which could be a result of TransAlta's conduct regarding discretionary outages, TransAlta may "sell into this strength in the forward curve"[430] and take a shorter position. In a portfolio bidding update, Kaiser stated the following:

> Coming into March we are short corporately. Sandwiched between a strong February and a bullish view on April, March traded up to the high $60s, more than $20 above where we see it settling. For March then we are set up to portfolio bid in the other direction and try to settle the market soft against our shorts. This will be the first time we've tried this so I'll provide a more detailed update in the weeks to come.[431] [emphasis added.]

532. At the time forward trades take place, it is only TransAlta who knows whether it is going to implement the Portfolio Bidding Strategy (i.e., it is building a long net position and will schedule discretionary outages to benefit its portfolio) for the particular term it is trading. This is not to say that TransAlta knows with certainty that there is going to be an opportunity to take a discretionary outage. This uncertainty is virtually the same across all market participants. What is different at the time trades take place is that TransAlta is able to take into account in its

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429 Exhibit 14.10, MSA Application, Tab 3, Alberta Portfolio Strategy Bidding Strategy Review, December 17, 2010, PDF page 11.

430 Exhibit 14.10, MSA Application, Tab 1, Alberta Portfolio Strategy Bidding Business Case Executive Summary, October 21, 2010, PDF page 1.

431 Exhibit 14.24, MSA Application, Tab 146, email from Nathan Kaiser, *Portfolio Bidding Update – Feb 23*, February 24, 2011, PDF page 20.

evaluation of the prevailing forward price, whether it intends to employ the Portfolio Bidding Strategy or not. Other parties on the other hand, will only have a probabilistic view. This asymmetric private information that TransAlta possesses and exploits at the time of trading, gives TransAlta an advantage vis-à-vis its competitors. In summary, while the market learns and adjusts its expectations, TransAlta will always have that piece of information relating to discretionary outages that it can exploit in the forwards market in an ongoing manner.

533. TransAlta's ability to repeat the strategy is also a function of the market fundamentals and will be curbed to the extent that market fundamentals can be altered by responses from demand and supply. The fact that responses from supply and demand in real time are not sufficient to offset fully the increase in price due to the discretionary outages, is evidenced by the pool price impact analysis in Section 4.4. In the longer term, new technologies or investments could change market fundamentals but due to the time it takes to develop and connect new generation, it is highly unlikely that such changes would be at a level to offset fully the increase in pool price caused by TransAlta's conduct within a reasonable time period.

534. Finally, TransAlta was able to implement its strategy multiple times over a period of four months and did so successfully as outlined in its Portfolio Bidding Reports.[432] There is no indication in evidence to suggest that the Portfolio Bidding Strategy was contemplated by TransAlta as a short term plan nor that the competitive market response eliminated the potential benefits associated with this strategy; to the contrary, the evidence is that TransAlta stopped the conduct because the MSA advised TransAlta to do so. TransAlta submitted:

> Regarding the MSA's allegations of anti-competitive conduct, TransAlta acted openly and on the express permission of the MSA to time forced outages at PPA units. TransAlta stopped engaging in this activity after the MSA subsequently advised that its view on the permissibility of this activity had changed. In any event, TransAlta maintains that the timing of forced outages at PPA units to benefit a market participant's portfolio is entirely consistent with the EUA, FEOC Regulation and the MSA's own Offer Behaviour Enforcement Guidelines ("OBEG").[433]

535. As stated previously, the Commission is of the view that Section 2(h) is a per se offence, which does not require an assessment of the economic effects resulting from the impugned conduct. Notwithstanding this finding, the Commission finds for the reasons that follow that TransAlta's conduct resulted in harm.

536. TransAlta and the MSA had differing views as to whether transfers between consumers and suppliers constituted harm. While it is not necessary to determine precisely the extent of harm caused by TransAlta's conduct in this phase of the proceeding, it is important to specify

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[432] For example, exhibit 14.15, MSA Application, Tab 58, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 19*, November 20, 2010, PDF page 23; exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 23*, November 24, 2010, PDF page 12; exhibit 14.18, MSA Application, Tab 84, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 14*, December 15, 2010, PDF page 11-12; exhibit 14.22, MSA Application, Tab 124, email from James O'Connor, *Portfolio Bidding Update – Mar 23*, March 24, 2011, PDF page 14.

[433] Exhibit 73.02, Written Submissions of TransAlta, September 22, 2014,, pages 1-2, paragraph 3.

what constitutes harm. In reaching its determination below, the Commission takes guidance from the Hansard where Dr. West stated:[434]

> Its [Electric Utilities Amendment Act] purpose is to advance the process started with the Electric Utilities Act of 1995 by setting a course that will lead to full deregulation of the electrical generation market, introducing competition in the retail sector and ensuring a level playing field for all market participants. We are making these changes so that all Albertans can realize the full benefits of restructuring. The introduction of competition in the generation and retail markets will drive suppliers to become more efficient, reduce prices, and offer higher quality services to customers.

537. The Commission interprets lower prices and increases in the quality of services as being part of the intended benefits and the purposes of restructuring, along with efficiency. Accordingly, in the Commission's view, it is possible for transfers between consumers and suppliers, arising from conduct that restricts or prevents competition or a competitive response, to be included as part of the measure of harm.

538. Therefore, based on the finding in Section 4.4 of this decision that there was an increase in average pool prices due to the specific outage timings chosen by TransAlta, the Commission finds that the impugned conduct resulted in harm both as a result of the wealth transfer and the static efficiency losses that accompanied it.

539. TransAlta and the MSA also had differing views regarding whether there could be dynamic efficiency gains in the long run arising from new entry prompted by the increased prices. These gains, TransAlta argued, "ought to be allowed to offset static efficiency losses."[435] In reply, Church submitted that "[i]n the context of the scope for entry to discipline the effect on market power from potentially anticompetitive conduct, the analysis should consider not only if it is timely, but also if it is sufficient."[436] Referencing the Competition Bureau's *Merger Enforcement Guidelines*, Church explained that the sufficiency of entry refers to its ability to effectively discipline conduct that would otherwise be anticompetitive.[437] Church further submitted and the Commission agrees that for entry to be profitable, the conduct would need to continue, implying that entry does not discipline the conduct.[438] The Commission holds this view because any new investment that takes place as a response to TransAlta's conduct (but would not otherwise) is deemed profitable only due to the expectation of a sustained increase in the price. While prices may decrease following new investments, they are unlikely to go back to the levels that existed prior to the conduct, holding other market fundamentals constant. Further, due to the fact that the profitability of the new entry did not arise from a need to meet additional demand or make up for lost generation capacity, such entry would be wasteful of capital.[439]

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434 Alberta, Legislative Assembly, *Hansard* 24th Leg, 2nd Sess (16 March 1998), page 920, available online at: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_24/session_2/19980316_2000_01_han.pdf.

435 Exhibit 73.03, Expert report prepared by NERA: *An Economic Assessment of the Competitive Effects of the Timing of TransAlta's Forced Outages*, September 22, 2014, page 12, paragraph 32.

436 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, pages 7-8, paragraph 20.

437 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, page 8, paragraph 20.

438 Tr. Vol. 3, page 564, lines 1-2.

439 Exhibit 83.03, Reply Expert Report prepared by Dr. Church, October 15, 2014, pages 7-8, paragraph 22.

540. Section 2(h) of the *Fair, Efficient and Open Competition Regulation* does not require the Commission to weigh static efficiency losses against potential dynamic efficiency gains that may be associated with conduct that restricts or prevents competition, a competitive response or market entry. However, if such was a requirement under the section, the Commission is of the view that, given the circumstances presented in this proceeding, there would be no dynamic efficiency gains associated with the price increase caused by TransAlta's conduct that could offset the static efficiency losses caused by it.

4.7 Did the timing of the outages manipulate market prices away from a competitive outcome

4.7.1 Commission findings

541. The Commission found in Section 4.1.3 of the decision that, to establish a breach under Section 2(j), the MSA must demonstrate:

a) that a person 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; and

c) what the competitive market outcome would have been but for the manipulative conduct.

TransAlta engaged in manipulative conduct

542. In Section 4.3 of this decision, the Commission found that TransAlta could have deferred each of the above described outages to off peak hours but chose instead to take them during peak or super-peak hours to maximize the benefit to its own portfolio of generating assets. The Commission is satisfied that TransAlta's conduct in this regard was unquestionably deliberate and designed to move market prices away from a competitive market outcome by timing the outages at its coal-fired units subject to PPAs at times of high demand and/or constrained supply.

543. TransAlta itself did not dispute this conclusion. At the hearing, the MSA asked Schaefer, TransAlta's Vice President of Commercial Operations and Development, the following question: "So there's no issue in this proceeding that TransAlta timed outages at PPA units to benefit its overall portfolio; correct?"[440] Schaefer's answer was unequivocal: "[t]hat's correct."[441]

544. The Commission is also satisfied that the means employed by TransAlta to move market prices were means that impaired the operation of competitive market forces and distorted the fair, efficient and openly competitive operation of the market.

545. As described elsewhere in this decision, one of the primary purposes of the PPAs was to address market power issues that previously existed in the Alberta market. This is reflected in the

[440] Tr. Vol. 6, December 9, 2014, page 1301, lines 20-22.
[441] *Ibid.*, line 23.

Alberta Hansard related to the *Electric Utilities Act* amendments proposed in 1999 when the Minister of Energy (Dr. West) explained:

> The power purchase agreements will remove control over around 7,500 megawatts, and that's about what we have in the system today. It will remove control over around that much generation from the utilities and transfer them to new players. This will definitely address the market power concerns.[442]

546. Although the PPAs were implemented to mitigate market power, in this instance, TransAlta contrived to use the PPAs to the opposite effect. The Commission finds that, in each instance, TransAlta interrupted the provision of Generation Services under the PPAs based on market considerations unrelated to the need to safeguard life, property or the environment. By timing the outages at its coal-fired units subject to PPAs based on market conditions rather than operational conditions, TransAlta unfairly exercised its outage timing discretion under the PPAs for its own advantage and made its own portfolio benefits paramount to the competitive operation of the market.

547. In the Commission's view, this is the type of conduct addressed by Section 5(c) of the *Electric Utilities Act* which states that one of the purposes of the act is: "to provide rules so that an efficient market for electricity based on fair and open competition can develop in which neither the market nor the structure of the Alberta electric industry is distorted by unfair advantages of government-owned participants or any other participant." [emphasis added]

548. As the PPA owner and the operator of its plants, TransAlta enjoyed informational advantages regarding the timing of discretionary outages that the PPA buyer did not have. Section 5(c) makes it clear that one of the purposes of the act is to preclude such advantages from being used unfairly to distort the market or the structure of the electricity industry. The Commission concludes that this is exactly what occurred in each of the four outage events that lie at the heart of the MSA's allegations under Section 2(j); i.e., TransAlta used its informational advantages to time the outages to benefit its position at the expense of the positions of its competitors.

TransAlta's manipulative conduct moved market prices away from a competitive market outcome

549. The test set out above requires an interpretation of the meaning of competitive outcome. Church submitted that in the case of electricity supply, it is more useful to define a competitive intertemporal price distribution rather than a competitive price. According to Church, the competitive intertemporal price distribution is one that results in revenues such that marginal suppliers can earn a competitive return.[443] In its critique of Ayres' estimates of counterfactual pool prices, LEI submitted that since the advent of the OBEG, it is not straightforward, and given

[442] Alberta, Legislative Assembly, *Hansard* 24th Leg, 2nd Sess (12 May 1999), page 1659, available online at: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_24/session_3/19990512_1330_01_han.pdf.

[443] Exhibit 43.04, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 28-33, July 31, 2014, page 18.

data limitations, maybe impossible, to estimate a counterfactual "competitive price."[444] While the Commission recognizes the difficulty associated with determining precisely what the counterfactual outcome may be, it does not consider it to be an impossible endeavor. In fact, an inability to estimate a counterfactual competitive price leads to an absurd outcome where one could never find a contravention of Section 2(j).

550. In the Commission's view, the meaning of "a competitive market outcome" must be interpreted in the context of the market model as specified in the 2003 *Electric Utilities Act*. That model was premised upon a fair and openly competitive market that is free from distortions arising from unfair advantages of any participant. In these circumstances, the Commission is of the view that a competitive market outcome is the outcome that would have resulted but for the manipulative conduct. If the competitive market outcome differs from the outcome that followed or resulted from the manipulative conduct, then the test under subsection 2(j) is met.

551. Both Ayres and LEI assessed what the market outcome would have been had TransAlta taken its outages at off peak hours. While each came to a different conclusion as to what that outcome would be, both agreed that the outcome would have been different from what actually occurred. The differences between the competitive market outcomes and the observed outcomes were summarized in Table 2 of this decision.

552. Having regard to the foregoing, the Commission finds that the MSA has provided clear, convincing and cogent evidence that demonstrates, on a balance of probabilities, that TransAlta manipulated market prices away from a competitive market outcome. In other words, the MSA has established that by breaching Section 2(j) of the *Fair, Efficient and Open Competition Regulation*, TransAlta engaged in conduct that does not support the fair, efficient and openly competitive operation of the market.

4.8 TransAlta's defences to the outage allegations

553. In this section, the Commission considers and decides upon TransAlta's assertion of a due diligence defence and its request for a stay of proceeding based on the doctrines of officially induced error and abuse of process. TransAlta's due diligence defence and its requests for a stay of proceeding are predicated on events that took place during the MSA's consultation on the OBEG conducted in 2010.

554. In the sections that follow, the Commission sets out the legal tests applicable for due diligence, officially induced error and abuse of process, summarizes the relevant evidence, reviews the views of the parties and makes its findings.

4.8.1 The legal tests for due diligence, officially induced error and abuse of process

4.8.1.1 Due diligence

555. The defence of due diligence emerged from the Supreme Court of Canada's decision in *R. v Sault St. Marie*. As Chief Justice Dickson stated, the "defence will be available if the

[444] Exhibit 73.04, Expert report prepared by LEI: *Independent Review & Analysis of Dr. Ayres Report*, September 22, 2014, page 15.

accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."[445]

556. In Bulletin 2010-17, the Commission endorsed the application of the following principles when deciding if the defence of due diligence had been met.

a) The due diligence defence relates to the standard of reasonable care, as expressed in tort law, with respect to the offence alleged. It asks whether the accused (or, as here, respondent) has taken all steps that were reasonable in the circumstances to prevent the breach.

b) The first consideration is foreseeability: the respondent cannot be expected to have taken steps to prevent an event that was not reasonably foreseeable. Thus if the event was not reasonably foreseeable, the defence is made out without further inquiry.

c) Defining what it is that is foreseeable or not is important. The issue is whether the respondent could have foreseen an event of the type that occurred, as opposed to the exact event in all of its particularity.

d) Generally speaking, human error is foreseeable. Thus a respondent must guard against the effects of human error on its operations.

e) The degree of care to be taken, or, put another way, the extent of the measures the respondent is expected to take, depends on a number of factors, including:

   i) The gravity of the potential harm.

   ii) The likelihood of harm.

   iii) The alternatives that are available to the respondent.

f) Where possible, the respondent must put procedures in place that address foreseeable breaches of laws, regulations and applicable rules.[446]

557. In *R. v Payne*, Justice Gorman of the Provincial Court of Newfoundland and Labrador recently provided an effective summary of the principles that apply to the defence of due diligence.[447] While some of the principles cited are repetitive of those above, it is worth repeating the list compiled by Justice Gorman:

1. the onus of establishing the defence rests with the accused;

2. the applicable standard of proof is one of a balance of probabilities;

3. the accused must establish that she or he took all reasonable care to avoid committing the actus reus of the offence;

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445 *R. v Sault Ste. Marie*, 1978, 2 SCR 1299, 1978 CanLII 11 (SCC), page 1326.

446 AUC Bulletin 2010-17, Consultation on Market Surveillance Administrator Proceedings before the Alberta Utilities Commission, April 23, 2010, paragraph 39.

447 Justice Gorman's summary is included in its entirety in Libman, R, *Libman on Regulatory Offences in Canada*, Volume 1 (Earlscourt Legal Press Inc., 2002, Update 24, July 2014) at pages 7-8 and 7-9.

4. an objective standard is applied in which the acts or conduct of the accused are assessed against that of a reasonable person in similar circumstances;

5. the acts or conduct said to illustrate due diligence must relate to the external elements of the specific offence that is charged. Acting reasonably in the abstract or taking care in a general sense will not suffice;

6. due diligence does not require "superhuman efforts" or exposing oneself to unreasonable danger. The defence requires "a high standard of awareness and decisive, prompt, and continuing action"; and

7. the Court must be careful not to set a standard of care in the context of a particular offence so high so as to effectively create an absolute liability offence or to effectively prohibit individuals from participating in the regulated activity.[448]

4.8.1.2 Officially induced error

558. The defence of officially induced error is a limited exception to the general principle that ignorance of the law is no excuse. The defence was first recognized by the Supreme Court in the concurring reasons of Chief Justice Lamer in *R. v Jorgensen*.[449] Justice Lamer identified six elements to the defence

(1) that an error of law or of mixed law and fact was made;

(2) that the person who committed the act considered the legal consequences of his or her actions;

(3) that the advice obtained came from an appropriate official;

(4) that the advice was reasonable;

(5) that the advice was erroneous; and

(6) that the person relied on the advice in committing the act.[450]

559. The Supreme Court endorsed Justice Lamer's formulation of the test for officially induced error in *Lévis (City) v Tétreault*.[451] The court noted Chief Justice Lamer's comments in Jorgensen that the defence has an effect that is similar to entrapment and stated:

> The wrongfulness of the act is established. However, because of the circumstances leading up to the act, the person who committed it is not held liable for the act in criminal law. The accused is thus entitled to a stay of proceedings rather than an acquittal.[452]

560. The court also provided the following clarification regarding the elements that must be shown to establish the defence:

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448 *R. v Payne*, 2013 CanLII 6434 (NL PC), paragraph 38.
449 *R. v Jorgensen*, 1995, 4 SCR 55, CanLII 85 (SCC).
450 *Ibid.*, paragraphs 28-35.
451 *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc.*, [2006] 1 SCR 420, 2006 SCC 12 (CanLII).
452 *Ibid.*, paragraph 25.

> It should be noted, as the Ontario Court of Appeal has done, that it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice (*R. v Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295; *Cranbrook Swine*). Various factors will be taken into consideration in the course of this assessment, including the efforts made by the accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion (*Cancoil Thermal*, at p. 303). It is not sufficient in such cases to conduct a purely subjective analysis of the reasonableness of the information. This aspect of the question must be considered from the perspective of a reasonable person in a situation similar to that of the accused.[453]

4.8.1.3 Abuse of process

561. In *R. v O'Connor*,[454] Justice L'Heureux-Dube, writing for the majority of the Supreme Court of Canada, described the legal test for abuse of process as follows:

> ... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive and vexatious proceedings.[455]

562. In *Blencoe v British Columbia (Human Rights Commission)*,[456] the Supreme Court explained how the doctrine applies in the context of administrative proceedings.

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.[457]

4.8.2 Summary of relevant evidence

563. On February 8, 2010, the MSA issued a notice to market participants and stakeholders that it would be hosting a roundtable discussion on market participant offer behaviour on February 18, 2010. In its meeting agenda, the MSA stated that the purpose of the meeting was to: (a) obtain advice on the particular aspects of offer behaviour the MSA should address, and the form and level of detail of a final communication by the MSA on the topic; and (b) to shape the MSA's Stakeholder Consultation Process. The MSA notice advised that the process would

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453 *Ibid.*, paragraph 27.
454 *R. v O'Connor*, 1995, 1995 CanLII 51 (SCC), S.C.R. 411.
455 *Ibid.*, paragraph 59.
456 *Blencoe v British Columbia (Human Rights Commission)*, 2000, 2 SCR 307, SCC 44 (CanLII).
457 *Ibid.*, paragraph 120.

largely be shaped by the MSA's Stakeholder Principles and Framework, which outlined the principles it would use to consult on public projects.[458] The framework was composed of a series of standardized stages: a) initiate, b) develop, c) draft, d) debate and e) decide.[459]

564. Following the roundtable meeting, the MSA prepared and issued two discussion papers. The first paper, entitled *Foundational Elements Shaping The Market Surveillance Administrator's Approach to Bids and Offers,* was issued on April 27, 2010. The second paper, entitled *Analytical Framework for the Monitoring of Bids, Offers and Market Health,* was issued on June 17, 2010.

565. On June 29, 2010, the MSA announced the start of its formal stakeholder consultation process on market participant offer behaviour. The MSA stated that it was suggested at the roundtable that clarity might be enhanced if the draft guideline considered hypothetical examples, and the MSA agreed that this may be a practical approach where it is not possible to construct 'bright lines.' At the same time, it sought written comments on the discussion papers and requested stakeholders to propose example behaviours that they believed would be helpful in adding clarity to the guideline.[460]

566. On August 4, 2010, the MSA issued a notice to market participants and advised that the consultation process was currently in the 'develop' stage of its consultation framework. The MSA further advised that it was considering the written comments it had received, and was working with participants to develop examples with analysis and commentary. This work was anticipated to last through to the end of September, with a draft guideline contemplated for the end of October.[461]

567. On September 10, 2010, the MSA published a number of illustrative examples intended to provide more clarity for market participants on the MSA's two recent discussion papers. In this document, the MSA stated:

> As drafts to stimulate discussion in a stakeholder workshop they should not be held as a binding statement of MSA enforcement policy. We are hopeful that the workshop and stakeholder comments will lead to further refinement to be reflected in a final document providing guidance to market participants.[462]

568. On September 30, 2010, TransAlta wrote to the MSA and sought guidance on nine hypothetical, illustrative scenarios. The only reference to PPA units in TransAlta's scenarios was in scenario 7. The second scenario (Scenario 2), which is central to this proceeding, read as follows:

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458 Exhibit 108.02, *Notice Re: Roundtable Discussion on Market Participant Offer Behaviour*, February 8, 2010, page 1; and Exhibit 108.04, *MSA Issue Identification Roundtable: Energy Market Offer Behaviour*, February 10, 2010, page 2.

459 Exhibit 108.21, *Priniciples for Stakeholder Engagement, and a Common Framework, for MSA Public Projects*, January 15, 2008, pages 13-15.

460 Exhibit 14.13, MSA Application, Tab 38, *Notice re: Market Participant Offer Behavior - Stakeholder Consultation*, June 29, 2010.

461 Exhibit 14.13, MSA Application, Tab 39, *Notice re: Stakeholder Comments on Market Participant Behaviour*, August 4, 2010, page 1.

462 Exhibit 14.14, MSA Application, Tab 40, *Notice to Market Participants and Stakeholders Re: Market Participant Offer Behavious: Illustrative Examples*, September 10, 2010, page 1.

> SCENARIO "2" – DISCRETIONARY OUTAGE
>
> Wednesday afternoon Participant A finds it has a unit with a boiler leak. The leak is such that a 48 hour forced outage will be required within the next 72 hours but is not required immediately.
>
> Based on the **long** corporate position, Participant A decides to take the unit off at the top of the hour. With the unit coming offline, the estimated price impact is $100 for 4 hours in the evening and $20 to the flat pool price the next day. The portfolio impact is favourable to taking the unit off immediately.[463] [emphasis in original]

569. TransAlta's witnesses were asked at the hearing to explain why its scenarios 1-3 did not make reference to PPA owners or buyers. Schaefer's response was as follows:

> ... I'll just explain why that was. First of all, it was abundantly clear, I think, that we -- most of the generation we owned at that time was subject to PPA.
>
> And, secondly, we understood -- because we understood these would be made public, we've felt it appropriate -- and I believe the MSA agreed -- that they be made somewhat generic -- "generisized," if you like.
>
> And so if we made a whole bunch of references to PPAs, then it would be pretty obvious who it was coming from.
>
> And, finally, again we were looking for guidance whether we were talking about a unit subject to the PPA or a unit -- merchant unit. And we didn't see a distinction at that time. We still don't see a distinction. The MSA didn't see a distinction. And so that's why we put forward these fact patterns as they were.[464]

570. TransAlta invited the MSA to meet privately with it on October 8, 2010 to discuss the additional illustrative examples. The October 8, 2010 meeting was attended by Chandler and Ayres for the MSA and by Luciuk, Kaiser, Mr. Blain van Melle (van Melle), Connelly, O'Connor, Mr. Cairns Price, Ms. Jacqueline O'Driscoll, Ms. Thanh Nguyen, Ms. Marcy Cochlan (Cochlan) and Koch, on behalf of TransAlta.

571. Chandler prepared some notes in advance of the meeting. The notes did not address Scenario 2.[465] Chandler did not have notes from the meeting itself.[466]

572. In an information request, TransAlta asked the MSA to "[c]larify whether the MSA advised TransAlta at the meeting that the timing of a discretionary outage to benefit a participant's portfolio position is acceptable conduct at PPA units." The MSA's response reads in part, as follows:

> TransAlta's scenarios 1-3 did not suggest that the thermal units described were subject to a PPA and as a result the MSA did not take that into consideration in preparing for the

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463 Exhibit 14.14, MSA Application, Tab 41, *Notice to Market Participants and Stakeholders Re: Offer Behaviour Examples #2*, October 29, 2010, page 3.
464 Tr. Vol. 6, December 9, 2014, page 1362, lines 3-21.
465 Exhibit 49.01, MSA Response to TransAlta, meeting notes from October 8, 2010, PDF page 26.
466 Tr. Vol. 1, December 1, 2014, page 157, lines 19-20.

> meeting on October 8, 2010 nor subsequently when it published its draft responses (described at paragraphs 122-124 in the Application).
>
> Neither Mr. Chandler nor Mr. Ayres specifically recall being asked whether "...the timing of a discretionary outage to benefit a participant's portfolio position is acceptable conduct at PPA units" or similar questions. Their recollection was that the discussion of scenarios 1-3 was at a high level. Certainly they do not remember the TransAlta representatives expanding on the detail of fact patterns or probing them about the special nature of PPAs, the impact of PPA provisions on outage decisions or why an enactment designed to mitigate the PPA owner's market power would not cause the MSA to be concerned about actions to benefit an owner's portfolio position.[467]

573. At the hearing, Chandler was asked by TransAlta if he or anyone else at the MSA ever considered how TransAlta's scenarios applied in the case of a PPA unit. Chandler's response was:

> No. We didn't consider that. Let's remember that this was part of a consultative exercise. The meeting and the fact patterns were not an occasion for the MSA to provide private advice to TransAlta. That would have been highly inappropriate.
>
> So we took the questions as written, applied our principles, and went to the meeting and discussed how we would apply the principle.[468]

574. TransAlta pressed Chandler on the issue in the following exchanges:

> Q. So, sir, you received these fact patterns on TransAlta letterhead, a company -- every coal-fired plant it operates is subject to a PPA, and it never occurred to you to discuss as between yourselves how these would apply to PPA units?
>
> A. MR. CHANDLER: That's correct. I suppose that TransAlta, had they wished to have some guidance on the issue of PPA units, could have put that in the scenarios, but they did not.[469]

and

> Q. All right. So, sir, you're in a meeting with TransAlta, the largest owner and operator of coal-fired units in Alberta, who don't operate any plants that aren't subject to a PPA, and you're telling me in the course of this meeting it never came up about how these two scenarios would apply to PPA units?
>
> A. MR. CHANDLER: Correct.[470]

575. In cross-examination, TransAlta asked Chandler about the discussion that took place at the October 8 meeting:

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[467] Exhibit 44.09, Responses of the Market Surveillance Administrator to the Information Requests of TransAlta 45 and 47, July 31, 2014, page 2.
[468] Tr. Vol. 1, December 1, 2014, page 152, lines 7-14.
[469] Tr. Vol. 1, December 1, 2014, page 153, lines 2-10.
[470] Tr. Vol. 1, December 1, 2014, page 158, lines 13-19.

Q. Sir, TransAlta will have witnesses later in this proceeding who were at this meeting. They will testify in no uncertain terms that they specifically recall discussing whether these two scenarios would apply to PPA units as well as other units and that you specifically stated you did not see a distinction between the two.

You don't recall that happening?

A. MR. CHANDLER: No, I don't.

Q. And are you saying it didn't happen, or you simply have no recollection of that happening?

A. MR. CHANDLER: I don't recall it.[471]

576. Ayres gave similar evidence on behalf of the MSA:

Q. Dr. Ayres, do you remember if PPA units were discussed at the meeting?

A. DR. AYRES: I have no recollection of that.

Q. But you don't know it didn't happen. You simply have no recollection; correct?

A. DR. AYRES: That's what no recollection means. Yes.[472]

577. TransAlta also asked Chandler if he made a representation at the October 8 meeting that if the MSA changed its views on whether a particular conduct was permissible or not permissible changed, the MSA would not retroactively apply its position. Chandler's response was "yes."[473]

578. Two TransAlta witnesses, Luciuk and van Melle, as well as Connelly, all provided evidence with respect to their recollection of the October 8, 2010 meeting. Luciuk's evidence in his witness statement was:

> We reviewed the nine hypothetical fact patterns and asked Mr. Chandler and Mr. Ayres additional questions regarding financial transactions and outages. Mr. Chandler stated that he had no concerns with any of our fact patterns as long as the offer behaviour was unilateral. Mr. Chandler also stated the MSA would not distinguish between PPA and non-PPA units. It was evident that our fact patterns pertained to TransAlta's PPA units which made up over 80 percent of our coal-fired units.
>
> ...
>
> I also asked Mr. Chandler to confirm that any changes made to the MSA's guidance would not be retroactively enforced against a market participant. Mr. Chandler confirmed this was the case.[474]

579. Luciuk's evidence at the hearing was consistent with his witness statement:

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[471] Tr. Vol. 1, December 1, 2014, page 159, lines 6-17.
[472] Tr. Vol. 1, December 1, 2014, page 160, lines 12-18.
[473] Tr. Vol. 1, December 1, 2014, page 167, lines 5-13.
[474] Exhibit 154.01, Witness Statement of Dean Luciuk, December 5, 2014, pages 8-9, paragraph 30 and 32.

> And then last comment -- it wasn't a question I asked, but I recall it being asked -- was, did the MSA see a distinction between PPA and non-PPA units in regarding some of these fact patterns, and the answer was no.[475]

580. van Melle's evidence in his witness statement was:

> During the meeting, Mr. Chandler and Mr. Ayres commented on each fact pattern. I understood that a variety of strategies were allowed so long as there was no evidence of collusion. For example, there was some discussion regarding timing an outage of a merchant unit for the benefit of a portfolio. I recall someone asking whether the same would apply to a PPA unit. Mr. Chandler stated they saw no difference.[476]

581. Connelly stated as follows in his witness statement:

> Although I do not recall all of the details of the discussion, I do recall that the MSA was supportive of and in agreement with the positions expressed by TransAlta. I specifically recall that the MSA indicated that it saw no distinction between merchant units and PPA units with respect to the issues raised in the fact scenarios presented by TransAlta.[477]

582. On October 29, 2010, the MSA published TransAlta's nine new scenarios and its comments on those scenarios in a notice to market participants and stakeholders, noting that the MSA's responses accept the facts as stated. In response to Scenario 2, the MSA stated as follows:

> Taken alone and assuming that Participant A complies with the relevant ISO rules and the FEOC Regulation, this action would not be seen by the MSA as a potential breach of the fair, efficient and openly competitive standard, including subsection 2(j) of the FEOC Regulation ('manipulating'). However, it may be catalogued and reported upon (on a no names basis) as part of our responsibilities to explain market outcomes. It would probably be identified as a Pool price change caused by a forced outage. We may make routine inquiries with the AESO to understand its perspective on the event. Participant A would have an opportunity to review and comment on the MSA description prior to publication.[478] [emphasis in original]

583. Luciuk proposed TransAlta's portfoilio bidding strategy to senior TransAlta officers, including its Chief Operating Officer, Farrell, in a memo dated November 16, 2010. The memo read in part as follows:

> Current guidance from the Alberta Market Surveillance Administrator (MSA) and TransAlta Regulatory indicate that "Portfolio Bidding" is not offside with market rules. While not formally stated as of yet by the Alberta MSA, consultation on both a bilateral and multi-stakeholder basis indicate that "Portfolio Bidding" can be considered an acceptable management strategy for generating assets in the AESO.

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475 Tr. Vol. 6, December 9, 2014, page 1361.
476 Exhibit 153.01, Witness statement of Blain van Melle, December 5, 2014, page 7, paragraph 33.
477 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 12, paragraph 83.
478 Exhibit 14.14, MSA Application, Tab 41, MSA Notice to Market Participants and Stakeholders, October 29, 2010, PDF page 7.

> In addition, the MSA has given guidance that rules may be adjusted to limit market imperfections that are uncovered on a go-forward basis, but penalties associated with such behaviors and activities would be administered on a prospective basis. Formal guidance is expected by the end of December 2010.[479]

584. On the morning of November 26, 2010, the MSA met with a number of officers from ENMAX Energy. In a letter dated December 17, 2010, ENMAX stated that the November 26 discussion related to Fact Pattern B, which was TransAlta's Scenario 2, and its application to the conduct of PPA owners.[480]

585. On November 26, 2010, the MSA released its draft *Offer Behaviour Enforcement Guidelines* with a request for comments by December 17, 2010. In a cover letter that accompanied the draft OBEG, the MSA directed stakeholders to have particular regard to section 4.7 of the draft OBEG and stated:

> First, while the MSA looks forward to comments on all aspects of the draft guidelines we draw stakeholders' attention particularly to Section 4.7 and ask for input whether the proposed approach to discretionary outages should equally apply to units subject to Power Purchase Arrangements.[481]

586. Section 4.7 of the draft OBEG addressed outage scheduling. Section 4.7.1 set out Fact Pattern B, which was identical to TransAlta's Scenario 2. In section 4.7.2 entitled MSA Comments, the MSA stated:

> The MSA recognizes that additional considerations under the *fair, efficient and openly competitive* standard may apply in Fact Patterns A and B if Participant A is a PPA Owner and the unit is subject to a PPA. The MSA is still considering the application of these examples to units subject to a PPA. The MSA seeks market participants' input on this issue.[482]

587. TransAlta asked Chandler why the MSA included the above passage in the draft OBEG. Chandler's response was:

> A. MR. CHANDLER: It was brought to our attention that the fact patterns and our responses that we published on October 29th could be interpreted -- at least our responses could be interpreted as applying to PPA units, and that was not what we intended because we understood those questions were essentially about merchant coal plants.

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479 Exhibit 14.10, MSA Application, Tab 2, *Portfolio Bidding in Alberta Power Market (AESO)* memo from Dean Luciuk to TransAlta executives, November 16, 2010, PDF page 6.

480 Exhibit 14.14, MSA Application, Tab 45, letter from ENMAX to Matt Ayres, December 17, 2010, PDF page 68.

481 Exhibit 14.14, MSA Application, Tab 42, *Notice to Market Participants and Stakeholders Re: Market Participant Offer Behaviour: Draft Guidelines*, November 26, 2010, PDF page 20.

482 *Ibid.*, PDF page 50.

> So I felt it was important to bring that to the attention of the stakeholder community that there was an issue here and we wanted to have feedback on the implications that these may -- or what would be the appropriate application of our principle to PPA units.[483]

588. Schaefer, provided his views on the draft OBEG in his witness statement:

> The draft OBEG did not alter TransAlta's reliance upon the MSA's earlier guidance. In the draft OBEG, the MSA indicated for the first time that additional considerations may apply in the case of units subject to a PPA and the MSA was seeking feedback from market participants. This clause did not change the guidance TransAlta received from the MSA.[484]

589. On November 29, Cochlan, TransAlta's Manager of Regulatory Affairs, sent an email to a number of TransAlta staff including Luciuk, Kaiser and Connelly. The email advised that the draft OBEG had been published. The email also included the MSA's comments on Fact Pattern B as set out above.

590. TransAlta provided its response to the draft OBEG in a letter to the MSA dated December 10, 2010. TransAlta's comments on Section 4.7 were as follows:

> Outage Scheduling is an issue between PPA Buyers and PPA Owners. There is a dispute mechanism in place under the PPA for dealing with such issues.
>
> There should be no difference to the conclusions formed in Fact Pattern A and B if the units were under PPA contracts. The PPA provides the Owner the exclusive right to determine when to take outages and the Owner bears the risk of facility damage as a result of this decision. The only right the Buyer has relates to yearly planned outage periods. The Buyer may propose timing changes for consideration by the Owner. However, the Owner is not obligated to accept these proposed changes. Under the PPA, unplanned outages are always at the Owner's discretion.[485]

591. ENMAX also provided comments on the draft OBEG. And stated as follows in reference to Fact Pattern B:

> ENMAX Energy notes that while neither the example nor the MSA's comments specifically mentioned units covered by PPAs, the general wording of the example appears to indicate that there would be no distinction between PPA-covered plants and merchant plants. This interpretation was confirmed in discussions between ENMAX Energy and the MSA, prior to the addition of the qualifying note for PPAs within the MSA's comments upon Fact Pattern B that appears in paragraph 4.7.2 of the draft Offer Behaviour Enforcement Guideline.[486]

592. The MSA issued the final OBEG on January 14, 2011. In a notice accompanying the Draft OBEG, the MSA stated:

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[483] Tr. Vol. 1, December 1, 2014, pages 174-175, lines 16-2.
[484] Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, page 7, paragraph 40.
[485] Exhibit 108.42, TransAlta comments on Draft OBEG, December 17, 2010, PDF page 3.
[486] Exhibit 108.37, ENMAX comments on Draft OBEG, December 17, 2010, PDF page 2.

> Effective today the MSA is releasing its finalized *Offer Behaviour Enforcement Guidelines* (OBEGs). This notice includes stakeholder comments received on the draft guidelines, the MSA responses to those comments and note of where changes have been made to the draft Guidelines. In one area, concerning discretionary outages at units covered by a Power Purchase Arrangement (PPA) the MSA has decided that the issue merits further and detailed consideration outside the guideline making process. Therefore, the Guidelines provide no view from the MSA on the timing of discretionary outages at PPA units. Stakeholders should expect to see a paper outlining the MSA's views in the area of discretionary outages in the next few weeks. An opportunity will be provided for further stakeholder comment at that time.[487]

593. Section 4.7.1 of the final OBEG included Fact Pattern B, which continued to be identical to TransAlta's Scenario 2. The MSA's comments in relation to Fact Pattern B were:

> The MSA recognizes that additional consideration under the *fair, efficient and openly competitive* standard may apply in the above Fact Patterns A and B if Participant A is a PPA Owner and the unit is subject to a PPA. The MSA is still considering the application of these examples to units subject to a PPA and at this time offers no guidance on outage timing at PPA units. Once the MSA is in a position to provide such guidance this section of the guideline will be revised.[488] [emphasis in original]

594. Luciuk commented on the effect of the final OBEG on TransAlta's Portfolio Bidding Strategy in his witness statement.

> My view remained unchanged with the release of the final OBEG. The MSA stated that no guidance would be provided regarding the distinction between PPA and non-PPA units. However, I did not view that as changing the earlier guidance from the MSA, particularly given the MSA's statements that it would not seek to retroactively penalize market participants.[489]

4.8.3 Views of TransAlta

Due diligence

595. TransAlta submitted that the issue to be determined when considering its due diligence defence is whether, by obtaining and relying on the advice from the MSA regarding the timing of outages, it took all reasonable care to avoid a breach of sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* and Section 6 of the *Electric Utilities Act*. TransAlta also reviewed the AUC's discussion of due diligence in Bulletin 2010-17.

596. TransAlta stated that it took reasonable and timely steps to seek the MSA's advice on the scenarios it provided to the MSA prior to their October 8, 2010 meeting. It stated that the MSA provided unequivocal guidance regarding the timing of outages at PPA units. Specifically, it argued that the evidence in the proceeding does not support the MSA's position that its advice

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487 Exhibit 14.14, MSA Application, Tab 47, *Notice to Market Participants and Stakeholders Re: Final Offer Behaviour Enforcement Guildlines and stakeholder comments on the draft*, January 14, 2011, PDF page 115.

488 Exhibit 14.14 , MSA Application, Tab 46, *MSA Offer Behaviour Enforcement Guidelines*, January 14, 2011, PDF page 105.

489 Exhibit 154.01, Witness Statement of Dean Luciuk, December 5, 2014, page 10, paragraph 38.

related to merchant units only. TransAlta further submitted that it is clear that it relied upon the guidance of the MSA when it implemented its Portfolio Bidding Strategy.

597. Regarding foreseeability, TransAlta argued that the test the Commission must apply is whether a reasonable market participant would have foreseen a potential source of danger when embarking upon the Portfolio Bidding Strategy. TransAlta submitted that it was reasonable for it to continue to rely upon the guidance provided to it by the MSA at the October 8, 2010, meeting, notwithstanding the concerns expressed by the MSA regarding the application of Fact Pattern B to PPA units in the draft OBEG and the final OBEG.

598. With regard to the degree of care it should have taken, TransAlta noted that Bulletin 2010-17 stated that the alternatives available to the respondent and the gravity and likelihood of harm caused by the breach are factors to consider. TransAlta submitted that, given the circumstances, it had no reasonable alternative at the time but to continue with its Portfolio Bidding Strategy. TransAlta concluded that "[c]easing or suspending a profitable corporate strategy based on "no guidance" in the final OBEG was not a reasonable alternative for a business operating in what the MSA has consistently described as a competitive market."[490]

599. TransAlta contended that the gravity of harm to Alberta's electricity market caused by its outages at PPA units was *de minimis*. It stated that extensive evidence on harm had been filed in the proceeding and that the Commission should prefer the evidence of Ms. Frayer. TransAlta further stated that opportunities to time outages for portfolio benefit are infrequent, a factor that goes to the gravity of the offence. It submitted that the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation* are designed to protect an efficient market and the potential harm arising from the outages in question does not put that at risk.

Officially induced error

600. TransAlta submitted that it relied on advice provided by the MSA when it implemented its Portfolio Bidding Strategy and is now having to defend itself for the very conduct that it alleges the MSA communicated as being permissible.

601. TransAlta submitted that if the Commission determines that TransAlta's decision to time outages at PPA units to benefit its portfolio position violated the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation,* then its reliance on the MSA's guidance constitutes an error of law. It stated that the evidence shows that TransAlta considered the legal consequences of implementing the Portfolio Bidding strategy and actively participated in the OBEG consultation. TransAlta acknowledged that it was aware that the timing of forced outages at PPA units could be "problematic" and sought clarity on the issue from the MSA.[491] TransAlta submitted that its own internal memoranda demonstrate that it carefully considered the implementation of the Portfolio Bidding Strategy.

602. TransAlta submitted that its evidence regarding what the MSA said at the October 8, 2010 meeting should be preferred over the MSA's evidence. It submitted that several of its witnesses specifically recalled Chandler stating that no distinction would be made between PPA

[490] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 156, paragraph 490.
[491] *Ibid.*, page 160, paragraph 503.

and non-PPA units whereas neither Chandler nor Ayres could recall making such a statement. It observed that this advice came from Chandler, the Market Surveillance Administrator himself, and that no other official was better suited to providing such guidance.

603. TransAlta argued that the advice it received from the MSA was reasonable given the context of the OBEG consultation process and contemporaneous comments by the MSA regarding the permissibility of economic withholding. It submitted that "[a]n objective Market Participant would have been aware that the economic impacts of outages at PPA and non-PPA units on the pool price and consumers are indistinguishable."[492]

604. TransAlta stated that its reliance on the MSA's advice is manifest from the evidence. It noted that its internal memoranda specifically referenced the MSA's guidance following the OBEG consultation process.

Abuse of Process

605. TransAlta submitted that a stay of proceedings for abuse of process is warranted in this case based on Chandler's representation that if the MSA changed its position regarding the permissibility of conduct, it would not apply that position retroactively. TransAlta argued that this retroactive application is a direct violation of the principle of adequate notice being provided regarding what a law entails.

606. TransAlta also submitted that fairness is a major consideration in assessing whether legislation should be applied retroactively. It argued that it was unfair for the MSA to provide guidance and then change that guidance to the detriment of TransAlta who relied on the guidance. TransAlta asserted that the publication of the draft or final OBEG did not reflect an express change in the guidance provided to TransAlta at the October 8, 2010 meeting.

607. TransAlta submitted that it was not provided with fair notice of the law during the relevant time period. It stated that it acted on the best available information, advice from the MSA, and was under the impression that its acts were legal. TransAlta argued that the regulatory landscape was uncertain at the time, with respect to how Section 6 of the *Electric Utilities Act* and the *Fair, Efficient and Open Competition Regulation* would be applied. TransAlta asserted that it acted within the rules as it understood them, based on its communications with the MSA.

608. TransAlta concluded that the lack of clarity surrounding the timing of forced outages at PPA units cannot be remedied by a finding of liability in these circumstances. It stated that the effect of such a finding would be the punishment of a company that acted in good faith by relying on regulatory guidance.

4.8.4 Views of the MSA

Due diligence and officially induced error

609. The MSA submitted that TransAlta's defences are all premised upon its claim that the MSA advised TransAlta that its conduct was permissible and that TransAlta relied on that advice. The MSA argued that TransAlta's defences based on due diligence and officially induced

[492] *Ibid.*, page 162, paragraph 509.

error are essentially identical because each is based upon TransAlta's reliance on advice alleged to have been provided by the MSA on the permissibility of timing outages at PPA units.

610. The MSA argued that these defences rely on "recollections brought forth in the eleventh hour, four years after the fact, of a single statement allegedly made at a private meeting requested by TransAlta."[493] The MSA further observed that "[n]ot one contemporaneous record, note or other corroborative document memorializing the discussion has ever emerged, which seems unusual given that the entire Portfolio Bidding Strategy is alleged to have been approved on the basis of that one statement."[494]

611. The MSA submitted that TransAlta bears the burden of establishing due diligence and officially induced error on a balance pf probabilities. It submitted that regardless of what took place at the October 8, 2010 meeting, TransAlta cannot rely on that meeting to show that it took all reasonable steps to avoid a breach. The MSA asserted that the meeting was a single step in an ongoing consultation process and that nothing was finalized in the meeting.

612. The MSA observed that the Supreme Court of Canada has stated that a defence based on officially induced error will only succeed in the clearest of cases. It noted that TransAlta was a sophisticated entity with an in-house regulatory compliance department. It submitted that it should have sought direction from its compliance department, rather than taking direction from the MSA, as a result of a short meeting called for a different purpose.[495]

613. The MSA argued that it was unreasonable for TransAlta to have relied on any statement made by the MSA while the OBEG consultation was ongoing and before other market participants had an opportunity to weigh in on the fact patterns proposed by TransAlta.

614. The MSA pointed out that the fact pattern relied upon by TransAlta, made no reference to PPA units and that its related comments did not indicate that withholding at PPA units would be acceptable. The MSA also noted that in the notice issued with the draft OBEG, it advised market participants that additional considerations may apply if the unit was subject to a PPA.

615. The MSA observed that internal TransAlta communications from October and November 2010, reflected that the MSA had yet to provide formal guidance on the fact patterns submitted. It also observed that TransAlta had never informed it of its proposed strategy. The MSA stated that it was open to TransAlta to await the conclusion of the OBEG consultation process or to seek guidance from the MSA on the specifics of what it intended to do, but TransAlta chose to do neither.

616. The MSA stated that it had no factual understanding of TransAlta's Portfolio Bidding Strategy when it was presented with Scenario 2. It submitted that the officially induced error defence requires "very cogent and clear evidence that the official's mind and attention were specifically adverted to a situation in which he was being relied upon for a legal ruling or interpretation with full and candid disclosure to the official of all relevant surrounding factual

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493 Exhibit 3110-X0174, Reply Argument of the Market Surveillance Administrator, February 19, 2015, page 37, paragraph 145.

494 *Ibid.*

495 *Ibid.*, page 39, paragraph 156.

considerations."[496] It concluded that the record does not support TransAlta's defence of officially induced error or due diligence.

Abuse of process

617. The MSA submitted that TransAlta's assertions regarding abuse of process are premised on the same grounds as TransAlta's arguments on due diligence. The MSA emphasized that because the alleged misrepresentation occurred within the context of ongoing consultation, no error or reliance was possible. The MSA agreed that it told TransAlta that if it changed its position, it would not retroactively apply its new position but pointed out that it never provided a position on the conduct TransAlta engaged in because TransAlta never explained what it intended to do.

618. The MSA submitted that Section 6 of the *Electric Utilities Act* and the *Fair, Efficient and open Competition Regulation* were in force at the time and well known to TransAlta. It submitted that these laws were not being retroactively applied because they were in force when the impugned conduct took place.

4.8.5 Commission findings

Due diligence

619. TransAlta's due diligence defence rests upon its assertion that it took all reasonable care to ensure that its conduct supported the fair, efficient and openly competitive operation of the electricity market in Alberta by seeking and obtaining clear, unequivocal and binding advice from the MSA with respect to the timing of outages at PPA units. It submited that this advice was provided by the MSA at their October 8, 2010 meeting. TransAlta stated that it relied on this advice and that it was reasonable to rely upon it because it was given by the MSA himself. TransAlta further reported that the MSA stated that if the MSA changed its position on whether a particular conduct was permissible or impermissible, it would not retroactively apply the new position.

620. The MSA had a much different recollection of the October 8 meeting. The MSA recalled that its discussions with TransAlta were at a high level and that they understood that TransAlta's Scenario 2, or Fact Pattern B, applied to a merchant plant. The MSA maintained that its discussions at the October 8 meeting and its comments on the scenario were predicated on that assumption. The MSA stated that it did not consider that Scenario 2 could also be interpreted as applying to PPA units until it was pointed out to it by ENMAX at a meeting on November 26, 2010. The MSA confirmed that it told TransAlta that it would not retroactively apply any changes in position but disagreed that it provided advice to TransAlta on the timing of outages at PPA units at the October 8 meeting. It was the MSA's position that it could not have provided any guidance at that time because it was still in the process of consultation.

621. The evidence available to the Commission on this point is the differing recollections of five of the meeting participants more than four years after the meeting took place. There are no contemporaneous notes or memos arising from the meeting to reflect what was said. The fact

[496] *Ibid.*, page 43, paragraph 171.

scenarios discussed by TransAlta and the MSA at the October 8 meeting do not assist in resolving this issue. TransAlta's Scenario 2 did not specify that the unit in question was a PPA unit. However, another scenario presented by TransAlta, Scenario 7, expressly stated that it applied to PPA owners and buyers. The MSA's subsequent comments on Scenario 2 are silent on their application to PPA units.

622. In the Commission's view, the evidence does not support TransAlta's assertion that the MSA provided it with clear, unequivocal and binding advice that condoned the timing of outages at PPA units to benefit TransAlta's portfolio position at the October 8 meeting. The Commission finds that Scenario 2, as written, was ambiguous and lacked the detail necessary for the MSA to determine if it applied to a merchant unit, a PPA unit or both. If TransAlta's intention was to solicit advice from the MSA on the acceptability of its Portfolio Bidding Strategy, including the intentional timing of discretionary outages during peak and super-peak for its PPA units, it was incumbent upon TransAlta to present that strategy fully and frankly to the MSA in sufficient detail for the MSA to appreciate the potential consequences. A critical factor in that assessment was whether or not the unit was subject to a PPA. In the Commission's view, the ambiguity in the drafting of Scenario 2 contributed to the confusion regarding the interpretation of Scenario 2.

623. The Commission also finds that the MSA's conduct following the October 8 meeting is consistent with its evidence that it initially understood that Scenario 2 applied to a merchant plant. Specifically, when ENMAX suggested to the MSA on November 26, 2010, that Scenario 2 could be read as applying to a PPA unit, the MSA immediately alerted market participants that "additional considerations under the *fair, efficient and openly competitive* standard may apply in Fact Patterns A and B if Participant A is a PPA Owner and the unit is subject to a PPA." If the MSA had previously understood that Scenario 2 related to PPA units, the Commission considers that it is unlikely that the comment would have been made.

624. Additionally, TransAlta itself acknowledged in an internal communication, dated November 16, 2010 that the MSA had not formally endorsed the Portfolio Bidding Strategy, as an acceptable management strategy for generating assets in Alberta.[497]

625. In Bulletin 2010-017, the Commission indicated that the degree of care to be taken by a respondent, or, the extent of the measures that a respondent is expected to take, will depend on a number of factors, including: i) the gravity of potential harm, ii) the likelihood of harm, and iii) the alternatives that are available to the respondent.

626. In the current circumstances, the Commission finds that the gravity of potential harm resulting from TransAlta's conduct was considerable as was the likelihood of harm. In these circumstances, the gravity of harm included, but was not limited to, the direct price impacts experienced as a result of the conduct. Equally important, in this context, was the effect of the conduct on the market itself. TransAlta's conduct undermined the competitive operation of the Alberta market leading to concerns about the effectiveness of the market model for consumers and other market participants. In a market premised on fair, efficient and open competition, such conduct has the potential for dire consequences in terms of future investment in generation assets.

[497] Exhibit 14.10, MSA Application, Tab 2, *Portfolio Bidding in Alberta Power Market (AESO)* memo from Dean Luciuk to TransAlta executives, November 16, 2010, PDF page 6.

627. The Commission cannot accept TransAlta's assertion that it had no other reasonable alternatives available to it. To the contrary, the alternative that ought to have presented itself to TransAlta was the frank disclosure of its intended conduct. In other words, a reasonable alternative would have been to set out, in no uncertain terms, what TransAlta intended to do, i.e., time discretionary outages at its PPA units to benefit its own portfolio.

628. Having regard to the gravity and likelihood of harm and the alternatives available to TransAlta, the Commission finds that the degree of care that it ought to have exercised was considerable.

629. The Commission finds that TransAlta has not demonstrated, on a balance of probabilities, that it took all reasonable steps to avoid a breach of the *Fair, Efficient and Open Competition Regulation.* TransAlta's decision to time discretionary outages at PPA units during peak and super peak periods and, where possible, to stack those outages to benefit its overall portfolio was a significant departure from its previous practice. Luciuk acknowledged this in emails dated November 16[498] and 23,[499] 2010. In his November 23 email to TransAlta's Operational Vice Presidents, Luciuk stated "[f]or the last week we have begun a strategy of portfolio bidding the corporate power portfolio in the AESO. This may sound odd and you may have assumed we always did this. We did not."[500]

630. Although the implementation of the Portfolio Bidding Strategy marked a significant change in strategy for TransAlta, the only step it took to ensure that the strategy was lawful was its discussion with the MSA on its draft scenarios during the ongoing consultation process for the OBEG. As stated above, Scenario 2 and the MSA's comments thereon were, at best, ambiguous. TransAlta did not follow up with the MSA or seek to confirm its understanding of the MSA's advice in writing. Finally, even though TransAlta knew that the OBEG would not be finalized until December 2010, at the earliest, it chose to implement the Portfolio Bidding Strategy in November 2010.

631. The Commission finds that a reasonable person in TransAlta's position, would have, at a minimum, sought confirmation from the MSA to ensure that TransAlta's understanding of the October 8 discussion was accurate so that the MSA's advice regarding the conduct proposed by TransAlta was based on a mutual understanding of the relevant facts. This is especially so given the ambiguity of the scenario and the MSA's comments thereon and the consultative context in which the MSA's comments were provided. It is important to note that the MSA expressly informed market participants that the hypothetical scenarios it published were "drafts to stimulate discussion in a stakeholder workshop," that "they should not be held as a binding statement of MSA enforcement policy" and that the purpose of their publication was to "lead to further refinement to be reflected in a final document providing guidance to market participants."[501] In the Commission's view, a reasonable person in similar circumstances, would have sought express confirmation from the MSA before engaging in the conduct in question. It is

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498 Exhibit 14.10, MSA Application, Tab 2, *Portfolio Bidding in Alberta Power Market (AESO)* memo from Dean Luciuk to TransAlta executives, November 16, 2010, PDF page 6.

499 Exhibit 14.16, MSA Application, Tab 69, email from Dean Luciuk, November 23, 2010, PDF pages 29-30.

500 *Ibid.*, PDF page 29.

501 Exhibit 14.14, Tab 40, *Notice to Market Participants Re: Market Participant Offer Behaviour: Illustrative Examples*, September 10, 2010, PDF page 2.

also noteworthy that TransAlta embarked on this major bidding strategy without taking any written notes at the time or confirming in writing after the meeting with the MSA.

632. TransAlta's need to seek confirmation from the MSA that its proposed conduct was lawful should have become even more apparent to TransAlta with the issuance of the Draft OBEG on November 26, 2010, and the final OBEG on January 14, 2011. In the draft OBEG, the MSA signaled to market participants that additional considerations could apply in Scenario 2 if the generating unit was subject to a PPA. In the final OBEG, the MSA went further and stated that it was still considering the application of Scenario 2 to units subject to a PPA and was offering no guidance on outage timing at PPA units at that time.

633. The Commission finds that, a reasonable person in similar circumstances, would not have embarked upon such a strategy without first seeking express confirmation from the MSA that the conduct in question was lawful. The Commission further finds that a reasonable person would not have persisted in the strategy after receiving conflicting information from the MSA without seeking further confirmation from the MSA that the conduct in question was lawful. This, TransAlta did not do. In the Commission's view, not only was TransAlta's initial decision to embark on the Portfolio Bidding Strategy based on the meeting of October 8, 2010 unreasonable but its decision to proceed with the Portfolio Bidding Strategy in the face of the MSA's warning comments in the draft and final OBEG was also unreasonable.

634. The MSA's representation to TransAlta that it would not retroactively enforce a new position on offer behaviour conduct does not assist TransAlta or demonstrate that it took all reasonable steps to ensure its conduct supported the fair, efficient and openly competitive market. In the Commission's view, the MSA comments on Scenario 2 cannot reasonably be interpreted as representing a position of the MSA that it later abandoned. First, as found above, the advice sought by TransAlta and the comments provided by the MSA related to an ambiguous scenario that lacked sufficient particularity to alert the MSA to the potential market consequences of its implementation. Second, the MSA's comments on Scenario 2 were provided within the "draft" phase of the MSA's consultation framework and were provided in the context of ongoing consultation. The MSA expressly told market participants that its comments were not to be regarded as a binding statement of enforcement policy. Further, TransAlta was aware that the MSA intended to publish and seek stakeholder feedback on the scenarios and its comments and that the MSA's guidance would not be finalized until the OBEG were published.

635. Having regard to the foregoing, the Commission concludes that TransAlta has failed to demonstrate on a balance of probabilities, that it took all reasonable steps to ensure that its conduct supported the fair, efficient and openly competitive operation of the market. Accordingly, TransAlta has failed to establish the defence of due diligence.

Officially induced error

636. To successfully assert the doctrine of officially induced error, TransAlta must demonstrate that: (1) it made an error of law or of mixed law and fact; (2) it considered the legal consequences of its actions; (3) the advice obtained came from an appropriate official; (4) that the advice was reasonable; (5) the advice was erroneous; and (6) it relied on the advice when it committed the acts.

637. As noted above, in *Levis(City) v Tétreault*, the Supreme Court explained that "it is necessary to establish the objective reasonableness not only of the advice, but also of the reliance on the advice."[502] The Commission finds, for the reasons that follow, that it was unreasonable for TransAlta to rely upon the MSA's comments on Scenario 2 provided at the October 8 meeting and later published on October 29, 2010.

638. The context in which the MSA's advice was provided is important. The MSA was in the midst of a consultation process on offer behaviour. To generate discussion, it published hypothetical scenarios with comments to stimulate discussion. The MSA expressly warned market participants that the scenarios and its comments "should not be held as a binding statement of MSA enforcement policy." It also advised that a final document would be issued following the consultation to provide guidance to market participants In these circumstances, the Commission finds that it was unreasonable for TransAlta to rely upon the qualified advice provided by the MSA with respect to Scenario 2. TransAlta knew, or ought reasonably to have known, that the MSA's comments on TransAlta's additional scenarios were elements of the ongoing consultation and not binding statements of enforcement policy.

639. The Commission also finds that it was unreasonable for TransAlta to rely on the information provided by the MSA with respect to Scenario 2 because there was a fundamental disconnect between the conduct upon which TransAlta sought the MSA's advice and the conduct that it actually engaged in.

640. As stated previously, if TransAlta intended to rely upon advice from the MSA on the acceptability of timing outages at its PPA units to benefit its own portfolio, it was incumbent upon TransAlta to fully and frankly present that strategy to the MSA in sufficient detail for the MSA to appreciate the potential consequences of its application. TransAlta could easily have drafted Scenario 2 in such a way so as to accurately convey to the MSA the specific conduct that it was seeking advice on. TransAlta chose not to do so and instead sought advice on a generic scenario that omitted a crucial piece of information: whether or not the unit in question was subject to a PPA. Accordingly, the doctrine of officially induced error cannot apply in these circumstances because the conduct that TransAlta sought and received advice on was not the conduct that TransAlta engaged in.

641. The unreasonableness of TransAlta's reliance upon the MSA's advice with respect to Scenario 2 was magnified by the issuance of the draft and final OBEG. In each of these documents, the MSA alerted market participants that different considerations could apply to Scenario 2 if it was a PPA unit.

642. Having regard to the foregoing, the Commission finds that TransAlta has not demonstrated, on a balance of probabilities, that the doctrine of officially induced error applies in the circumstances.

Abuse of process

[502] *Lévis (City) v Tétreault; Lévis (City) v 2629-4470 Québec inc.*, 2006, 1 SCR 420, 2006 SCC 12 (CanLII), paragraph 27.

643. The Commission finds that TransAlta's abuse of process defence fails for many of the same reasons that its defences of due diligence and officially induced error did not succeed.

644. As stated above, TransAlta failed to take reasonable steps to ensure that the implementation of its proposed strategy was lawful. Its discussion with the MSA on October 8, 2010, in the midst of ongoing consultation, yielded ambiguous non-binding comments that it chose to interpret as approving its proposed strategy. It took no further steps to confirm the lawfulness of its conduct even when faced with warnings to the contrary from the MSA in the draft and final OBEG.

645. In the Commission's view, it appears that TransAlta was prepared to gamble on its unfounded interpretation of the MSA's initial comments regarding Scenario 2 based on its understanding that the MSA would not enforce retroactively a new position on offer behaviour conduct. While the stakes were high for events 1 and 2, they became even higher for events 3 and 4 when TransAlta apparently ignored the clear signals in the draft and final OBEG that PPA units could be subject to different considerations.

646. The evidence does not support TransAlta's assertion that the MSA changed its position on timing outages at PPA units midstream. As noted above, the MSA's comments were made within the context of a consultative process and it notified market participants that such comments were for discussion purposes and were not binding. Further, the conduct engaged in by TransAlta was inconsistent with the conduct described in Scenario 2.

647. The evidence in the proceeding clearly reflected that the implementation of the Portfolio Bidding Strategy was a significant departure from TransAlta's previous offer behaviour. TransAlta acknowledged in its argument that it was aware at the time of the strategy's implementation that the proposed conduct could be "problematic."[503] The Commission presumes that TransAlta considered this to be potentially problematic because it was aware at the time of its positive obligation to support the fair, efficient and openly competitive electric market and of the types of conduct prohibited by Section 2 of the *Fair, Efficient and Open Competition Regulation*.

648. In the *Blencoe* decision, the Supreme Court emphasized that an abuse of process argument in an administrative proceeding will only succeed in the clearest of cases where a proceeding was unfair to the point that it was contrary to the interests of justice.[504] For the reasons provided above, TransAlta has failed to demonstrate that the circumstances supporting a stay of proceeding for abuse of process are present in this case.

4.8.6 Conclusion: the outage allegations

649. In summary, the Commission finds that TransAlta breached sections 2(h) and (j) of the *Fair, Efficient and Open Competition Regulation* and, therefore Section 6 of the *Electric Utilities Act*. The Commission concludes that for each of the four events, TransAlta restricted or prevented the respective PPA buyers from providing a competitive response contrary to Section 2(h). Likewise, the Commission is satisfied that, for each of the four events, TransAlta

[503] Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 160, paragraph 503.
[504] *Blencoe v British Columbia (Human Rights Commission)*, 2000, 2 SCR 307, SCC 44 (CanLII), paragraph 120.

manipulated market prices away from a competitive market outcome. The Commission finds that TransAlta has not made out the defences of due diligence or officially induced error. Further, TransAlta has not demonstrated that the MSA's investigation and enforcement was an abuse of process.

5 The trading allegations involving Kaiser, Connelly and TransAlta

5.1 Introduction

650. The MSA alleges that TransAlta and its employees Kaiser and Connelly are market participants who, directly or indirectly, used non-public outage records to trade. The MSA submits that this was conduct that did not support the fair, efficient and openly competitive operation of the market and was contrary to their obligations as market participants, as set out in Section 6 of the *Electric Utilities Act,* and the prohibition against such trading set out in Section 4 of the *Fair, Efficient and Open Competition Regulation.*

651. The trading allegations focused on three emails: one dated December 3, 2010, and two dated January 6, 2011. The first email was from a TransAlta employee to Kaiser and another employee seeking analysis of the potential impacts of outages of varying duration (55, 160 and 343 days) at the Sundance 2 unit. The second email was sent from Kaiser to Connelly and others on January 6, 2011 at 9:47 AM; the email's contents were two sentences extracted from a Calgary Herald article. The sentences related to the potential duration of outages at Sundance 1 and 2 and were reproduced in bold type. The third email was sent by Kaiser to Connelly and van Melle on January 6, 2011, at 10:49 AM in which Kaiser asked them to purchase "100 MW of Feb at market to cover the January balance of month and February."[505]

652. The MSA submitted that the first and second emails were non-public "outage records" as that phrase is defined in the *Fair, Efficient and Open Competition Regulation.* It alleged that Kaiser, with the knowledge of TransAlta, used these non-public outage records to trade, directly or indirectly, on January 6 and 7, 2011, and that Connelly used these outage records to trade, directly or indirectly, between the dates of January 6 and 21, 2011.[506]

653. The respondents contested the MSA's allegations. Kaiser and Connelly each submitted that they are not market participants. All of the respondents argued that the emails in question are not outage records, both as a matter of fact and as a matter of law. Kaiser and Connelly each submit that they did not use the records to trade. In addition, all of the respondents have asserted the defence of due diligence/reasonable mistake of fact. Kaiser and Connelly also challenged the fairness of the MSA's investigation into their conduct.

654. In the sections that follow, the Commission first considers the nature and elements of the alleged offence under section 4 of the *Fair, Efficient and Open Competition Regulation.* Next, it considers whether each of the respondents was a market participant. It then addresses whether the respondents had non-public outage records and, if so, used them to trade. Finally, it considers the defences asserted by the respondents.

[505] Exhibit 14.27, MSA Application, Tab 179, email from Nathan Kaiser, January 6, 2011, PDF page 25.
[506] Exhibit 14.02, MSA Application, March 21, 2014, paragraphs 404 and 406.

5.2 Nature and elements of the offence under Section 4 of the *Fair, Efficient and Open Competition Regulation*

655. The allegations against TransAlta, Kaiser and Connelly are made under Section 4(1) of the *Fair, Efficient and Open Competition Regulation*, which prohibits market participants from using non-public outage records to trade, subject to any exemptions granted by the AESO.

656. The parties concurred that Section 4 establishes a strict liability offence.

657. Having regard to its analysis in this decision, the Commission agrees. Section 4 is regulatory in nature. Its goal is to promote the public welfare by supporting the fair, efficient and openly competitive electricity market. It does this by prohibiting trading on certain types of records until they are made public. There are no words in the provision that suggest the drafters intended to make this a *mens rea* offence. The penalties and stigma associated with proof of these allegations is consistent with other regulatory offences. Because it is a strict liability offence, the defence of due diligence is available to the respondents.

658. The Commission finds that there are three distinct elements to an offence under Section 4. First, the subject of the allegation must be a "market participant." Second, the existence of a non-public outage record must be established. Third, it must be shown that the market participant used the outage record, directly or indirectly, to trade.

5.3 Summary of relevant evidence

659. In 2009, TransAlta retained expert assistance to understand corrosion fatigue issues identified in Sundance A (Sundance 1 and 2).[507] In the spring of 2010, a third party expert raised concerns in relation to corrosion fatigue in both units. As a result, TransAlta took a number of steps, including a review of an upcoming 55-day outage at Sundance 2 planned to begin on April 11, 2011.[508]

660. In the fall of 2010, TransAlta's Technical Services Group and its Asset Planning Group began to analyze different operation and maintenance scenarios related to corrosion fatigue at Sundance 2.[509] Inquiries were made to equipment manufacturers and quotes were provided for repairs based on two options.[510] It was the evidence of TransAlta's Chief Engineer, Emmott, that the exact nature of corrosion fatigue issues in Sundance 2 was unknown at the time. In his witness statement, Emmott stated:

> At the time there was no certainty as to which scenario would become reality. The scenarios being considered were exploratory in nature, as we did not know if there was a real issue with corrosion fatigue, which could only be determined by inspection during the planned outage in April 2011. As a result, the scenarios covered a broad range of possibilities – from no widespread issue to a comprehensive corrosion fatigue issue (worst case scenario). Indeed, I considered the probability to be very low of a worst case scenario outcome; however, as the ***consequences*** of a worst case event would be severe,

[507] Exhibit 73.06, Witness Statement of Robert (Bob) Emmott, September 22, 2014, pages 23-24, paragraphs 87 and 90.
[508] *Ibid.*, page 24, paragraphs 90-91.
[509] *Ibid.*, page 24, paragraph 93.
[510] *Ibid.*, page 25, paragraph 96.

> it was diligent and responsible to perform the appropriate assessment and contingency evaluation of that scenario. Having a Unit out of service for many months could cost millions of dollars in penalties under the respective PPA.[511] [emphasis in the original]

661. Emmott stated that TransAlta developed four hypothetical fact scenarios for the April 11, 2011 planned outage at Sundance 2. Those scenarios were

> (a) The status quo 55-day outage;
>
> (b) The status quo 55-day outage and, if widespread damage was found, the Unit being run derated for the rest of the PPA life;
>
> (c) A proactive plan with a pre-order of boiler tube materials: order the materials in advance of the outage which would push the outage out several months (August 11, 2011-January 18, 2012); and
>
> (d) A reactive plan without a pre-order of materials: if widespread damage was found, the materials would be ordered at that time with the result being a very long outage (April 11, 2011 – March 20, 2012).[512]

662. On December 3, 2010, Mr. Paul Black (Black), a commercial analyst with TransAlta, sent an email to O'Connor, another asset optimizer and Kaiser. The subject line read: "TransAlta Portfolio Impact for Sun 2 Option Analysis." The email stated:

> Hi James
>
> As we discussed this afternoon. Could you or Nate [Kaiser] run your model on Monday to show the impact to TransAlta's portfolio for Option 1 & 2 listed below? Please let me know if you require additional information to run your model. We are attempting to show the incremental impact of the options compared to Budget.
>
> Budget: 55 Day Outage (April 11, 2011 to Jun 4, 2011)
>
> Option1: 160 Day Outage (Aug 11, 2011 to Jan 18, 2012)
>
> Option2: 343 Day Outage (April 11, 2011 to March 20, 2012)[513]

663. Black worked for Mr. Kelvin Koay (Koay), whose title at the time was Commercial Manager, thermal. In that role, Koay was responsible for the Sundance 1, 2, 3 and 4 PPAs. Koay explained the purpose of the analysis requested in the December 3 email in his witness statement:

> In the fall of 2010, I was involved, along with the technical team, in producing a business case on how we should manage the upcoming Sun 2 planned outage, in light of some technical concerns that were raised. As noted in paragraph 54, Sun 2 had a planned outage from April 15 to June 9, 2011 (55 days). The concern being addressed by the technical team related to finding boiler corrosion issues that required a broader scope of

[511] *Ibid.*, page 25, paragraph 101.
[512] *Ibid.*, page 26, paragraph 102.
[513] Exhibit 14.26, MSA Application, Tab 162, email from Paul Black, December 3, 2010, PDF page 6.

> repairs than had been previously planned. One of the options was to ensure we had the necessary materials to conduct additional repairs if the condition of the boiler required such additional repairs to be made. Otherwise, if we started the outage without the materials we could risk a prolonged outage. I recall that the materials for repairs, as far as the assessment at the time indicated, were estimated to cost approximately $8 million dollars and it was an unbudgeted capital spend.
>
> In order for the team to prepare a business case for the company to purchase these unbudgeted materials, it was necessary to lay out some possible scenarios and the business impact of those scenarios. This required understanding the revenue impacts of the various scenarios in order for management to make an informed decision.[514]

664. It was Koay's evidence that he did not "believe that any scenario was more likely than the others at the time that they were being developed and assessed."[515]

665. Schaefer also gave direct evidence about the requested analysis at the hearing:

> So what they were doing was building the case to pre-order materials so they wouldn't have a protracted outage.
>
> Now what they couldn't know was how long that would be based on what they found when they got into the boiler, but they were building business case.
>
> So clearly they wanted to show the risk of, if they got in and had an extended outage, what the cost of that would be, by being out an extended period of time. And so they were trying to build the case for it would be prudent to pre-order materials and run the risk of not using them but then having them so you could keep the outage short. That's what was happening.[516]

666. After receiving the email from Black on December 3, Kaiser emailed O'Connor, and stated:

> James [O'Connor], let's talk Monday about this. I mean, holy crap - this isn't an outage move. Its taking a unit out of service.

667. O'Connor responded to Kaiser on December 4, 2010, and stated:

> For sure, I would like to get a better idea if this [is] a legitimate risk or them exploring options and gauging impact.[517]

668. On December 7, 2010, Kaiser provided the requested scenario analysis to Koay.[518]

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514 Exhibit 152.01, Witness statement of Kelvin Koay, December 5, 2014, page 13, paragraphs 68-69.
515 *Ibid.*, page 14, paragraph 72.
516 Tr. Vol. 6, December 9, 2014, page 1504, lines 10-22.
517 Exhibit 170.01, Witness Statement of Nathan Kaiser, Tab 6, PDF page 58.
518 *Ibid.*, Tab 11, PDF page 73.

669. One week later, on December 10, 2010, Kaiser sent an email to Schaefer, which read as follows:

> Sorry to disturb you on your holidays but an issue has come to our attention that will have a material impact on our plans for next year. Last week I was approached by the commercial managers regarding the possibility of a six-month or twelve-month outage at Sundance 2 due to boiler corrosion. Jason [Politylo][519] and I were asked to work out the impact on our corporate position for the balance of 2011 and into 2012. At this time, the commercial managers are looking at the magnitude of the impact; however, I anticipate they will come back to us for some scenario analysis around specific dates and outage duration.
>
> While I am sure you have been involved in these discussions with Gary [Kline][520] and his team, Dean [Luciuk] does not know about these scenarios. I have not told him anything about it as, in his capacity as head trader, he would be prevented from taking any action with the rest of the Alberta team on 2011 positions. As well, upon receipt of this information, I am now essentially out of the market for my 2011 positions. In my case it is more important to be aware of, and help manage the risks around, our positions rather than to be selling length knowing the potential risk to our positions.
>
> The loss of 280 MW of unit availability, for what could be 8 months of 2011, would make a significant impact to the assumptions around budget commitments, price forecasts, my trading strategies and those of the trade floor. The concern that Jason and I have discussed was that as we close out the year and move into next, an outage of this size and duration will have an impact on some of the commitments that TAO is making to senior management.
>
> Jason and I would like to meet with you early next week to discuss this issue, next steps, and protocols for managing this kind of information in the future.[521]

670. In his witness statement, Kaiser explained his rationale for "blacking himself out" from trading and seeking Schaefer's advice:

> My decision to seek clarification from Schaefer was based on three factors. First, although the scenarios were hypothetical at this point, if there was a chance that the scenarios might become real possibilities at some point in the future, I wanted to err on the side of caution. Second, if there were any chance that the planned outage date for Sundance unit 2 might change, my plans to manage the [asset position] could also change. Third, I had some concern about the manner by which this information was communicated to me; namely, by Black, who at the time was a junior Commercial Analyst. Thus, I decided not to instruct trades until I received guidance from Schaefer.[522]

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519 Exhibit 14.02, MSA Application, March 21, 2015, paragraph 308, Jason Politylo was TransAlta's Technical Director of Hedging and he reported to Luciuk (see Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, PDF page 3).

520 Gary Kline was TransAlta's Director of Commercial Management (see Exhibit 161.01, TransAlta letter to TransCanada and the Balancing Pool, January 4, 2011).

521 Exhibit 14.26, MSA Application, Tab 164, email from Nathan Kaiser, December 10, 2010, PDF page 10.

522 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 9, paragraph 58, as corrected by Kaiser at the hearing, Tr. Vol. 8, December 15, 2014, pages 1661 and 1662.

671. It was Kaiser's evidence at the hearing that, when he wrote the December 10 email to Schaefer, he believed that he was prohibited from trading because of the information conveyed to him in the December 3 email.

> Q. But you seem to have thought that you couldn't instruct trades on that information; correct?
>
> A. When I received the email, that's right. I, you know, wanted again to be cautious about what I could do and what I couldn't do, and the easiest way to exercise that caution and make sure you don't make a mistake is to take the step of blacking yourself out and then -- and in this case, because I wasn't sure, I went to seek clarification from Mr. Schaefer.[523]

672. It was Schaefer's evidence at the hearing that Kaiser was mistaken in his belief that he was prohibited from trading based on the December 3 email.

> No. Mr. Kaiser sought my advice on whether this was something to be black[ed] out [sic] on. I talked to the commercial managers -- I can't remember if that was Mr. Klein [sic] or Mr. Koay.
>
> I learned that what they were doing was building a business case to preorder material around the already scheduled outage. Not the outage that ultimately happened but the already scheduled outage on Sundance 2.
>
> I wasn't concerned that was an outage record, and he didn't need to cease trading on that basis.
>
> When -- what later happened was an entirely separate affair.[524]

673. In his witness statement, Kaiser stated that his meeting with Schaefer took place on December 15, 2010, and that Schaefer confirmed that he did not have non-public outage records.[525] Kaiser's evidence at the hearing about that meeting was also consistent with Schaefer's:

> A. So I had met with Mr. Schaefer and Mr. Politylo and, you know, we talked about what this was. And he said, "I'll take this away and figure it out." And then came back and said that, "No, you don't have nonpublic outage records, you're okay."
>
> Q. That's what Mr. Schaefer said to you?
>
> A. I don't recall the specific words of that, but I'm saying the result of the meeting was that he gave us the all-clear.[526]

674. At 7:49 a.m. on December 16, Kaiser sent an email to Schaefer with the subject line: "Sun 2 Outage." The email related to a meeting with Luciuk and Farrell, TransAlta's Chief Operating Officer, and stated:

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[523] Tr. Vol. 8, December 15, 2014, page 1720, lines 13-21.
[524] Tr. Vol. 6, December 9, 2014, page 1503, lines 7-19.
[525] Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 10, paragraph 66.
[526] Tr. Vol. 8, December 15, 2014, pages 1729-1730, lines 19-2.

> I spoke with Marianne [Wilkins] about a meeting with Dean [Luciuk] today to discuss Sun 2 but understand that you are in the 8x8 meeting all day. Can I propose that we meet 10-15 minutes before our 7 am meeting with Dawn [Farrell] tomorrow to brief Dean? We can give him a quick overview so that we can answer any questions that Dawn might have and then follow up either later in the day or next week, with a more thorough briefing as to how this will impact the floor's activities for 2011.[527]

675. Schaefer's response was: "You go ahead and meet with him. I gave him a heads up last night."[528]

676. When Kaiser was asked about why they were meeting with Farrell, he stated:

> I believe the meeting with Ms. Farrell was regarding the -- just a review of portfolio bidding. It had been one month since we had begun that, and so I think we had scheduled in there a review of strategy.[529]

677. At around the same time, TransAlta staff became aware of a boiler leak at Sundance 1. Emmott, TransAlta's Chief Engineer, described the discovery of the leak and subsequent events as follows:

> On December 14, 2010, my team became aware of a Sundance 1 boiler tube with cracking above critical size in what was considered to be a low risk part of the boiler that we could not explain.
>
> When my team approached me with the information on the boiler tube crack, I was compelled to recommend the Unit be shut down for inspection, which I did on December16, 2010. Given the similarities in Sundance 1 and 2's design, operation, and age, we assessed that there was a high risk that Sundance 2 may also have dangerous levels of cracking in its boiler tubes. My technical team then recommended that Sundance 2 be shut down for inspection as well. The decision to take Sundance 2 offline was made on December 19, 2010.[530]

678. In his witness statement, Schaefer explained how he learned that Sundance 1 would be coming offline on December 16, 2010.

> On the evening of December 16, 2010, I became aware through a briefing with the TransAlta executive team (which excluded anyone reporting to me, such as the traders or asset optimizers), that Sundance 1 would be taken down that evening because of boiler issues. The time required to assess the scope of the boiler issues was very uncertain. Therefore, and out of an abundance of caution, I directed Mr. Luciuk to issue an indefinite black-out order to the Alberta traders.[531]

679. It was also Schaefer's evidence that new information regarding the conditions at Sundance 1 became available on December 16, 2010. His testimony at the hearing on this issue was as follows:

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527 Exhibit 14.26, MSA Application, Tab 168, email from Nathan Kaiser, dated December 16, 2010, PDF page 19.
528 Exhibit 14.26, MSA Application, Tab 169, email from Rob Schaefer, dated December 16, 2010, PDF page 21.
529 Tr. Vol. 8, December 15, 2014, page 1732, lines 3-6.
530 Exhibit 73.06, Witness Statement of Robert (Bob) Emmott, September 22, 2014, page 27, paragraphs 111-112.
531 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, page 10, paragraph 53.

> What we were faced with at the time was we had a completely new set of information that became available to us on or around December 16th. And I remember it quite clearly because when I first became aware of it we were at our Christmas dinner, you know, the leadership team.
>
> And the new information was that the Sundance 1 boiler -- we became aware of some corrosion issues in places in the boiler that we hadn't previously seen, and I don't think the industry had previously seen. So that put us in a situation.
>
> So the first decision was we had to take the unit down. We don't know how long it would have to come down for because and I think -- hopefully the Commission is aware of some of this so I won't go into all the detail.
>
> But we had to do a fair bit of investigation to figure out if we could return the unit to service or not.
>
> So the concern I had when faced with this was I didn't know if it was going to be out for two days or two weeks or how long it would be. So out of an abundance of caution, I felt the best -- sorry. There was one other thing.
>
> I knew it was -- it seemed like a fairly big deal at the time partly because it was -- we had seen this -- this was new, and it was quite unusual. And it was highly uncertain as to what would happen.
>
> So I took the step, and it was unprecedented to black out all Alberta traders out of an abundance of caution because I was concerned that we might be second guessed after the fact that we had all this information and that somehow somebody was trading on it. So I blacked the whole floor out.
>
> I -- once we had done that work through the course of December and made a clear decision that we needed to be out until the middle of February, we made that information public, and at that time I lifted the blackout.[532]

680. On December 17, 2010, Luciuk sent an email to Connelly, Shaffer and van Melle, stating "[a]ll Alberta trading authorities are removed effective immediately and until further notice."[533]

681. In his witness statement, Schaefer explained how he learned that Sundance 2 would be coming offline on December 19, 2010.

> I became aware of the outage at Sundance 2 shortly before the restatement notice was issued on December 19, 2010 that the unit was coming down. Before the notice was issued, I was aware there were potential boiler issues relating to Sundance 2, though the scope of the issues remained uncertain.[534]

[532] Tr. Vol. 6, December 9, 2014, pages 1467-1468, lines 1-14.
[533] Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, PDF page 64.
[534] *Ibid.*, page 10, paragraph 55.

682. On December 23, 2010, Kaiser sent an email to van Melle and Connelly advising "[n]o change to the orders – I am out of everything."[535]

683. Kaiser explained in his witness statement that he sent the email prior to going on Christmas holidays. He stated that he wanted to make sure that if authority to trade was reinstated while he was away, the traders knew that he had no outstanding orders.

684. On December 22, 2010, Luciuk and Schaefer traded emails regarding the duration of the trading blackout. Luciuk told Schaefer that he was "worried about our feb position." Schaefer responded: "looks like it'll be into next week. [M]aybe give me a call tonight and we can discuss if we turn them back on."[536]

685. Luciuk and Schaefer resumed their email discussion on December 28, 2010. Luciuk again asked about the duration of the trading blackout. Schaefer indicated that he wanted "[S]terling [Koch][537] in the loop" before making a decision.[538]

686. On December 29, Schaefer sent the following email to Luciuk under the subject "Aeso":

> Talked to sterling [Koch] a[nd] doug [Jackson].
>
> As soon as notice hits public site will reopen desk for next 6 months.
>
> Expect around 2ish today[.][539]

687. On December 29, 2010, the Sundance 1 and 2 outage information was provided to the PPA Buyer and the AESO updated the outage graphs to reflect end dates of February 15, 2011 for the outages.[540]

688. On December 29, 2010, Luciuk sent an email to van Melle, Schaffer, Connelly, Kaiser and O'Connor with the subject line: Trading Authorities –AESO. The email stated:

> Team,
>
> I am restating your AESO trading authorities up to and including July 31, 2011 effective immediately.
>
> Prior limits for trading beyond July 31st remain in effect.[541]

689. In his witness statement, Kaiser stated that he sought additional confirmation from Schaefer that he could instruct trades after receiving the December 29 email. He stated that

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535 Exhibit 14.27, MSA Application, Tab 173, email from Nathan Kaiser, December 23, 2010, PDF page 8.
536 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, PDF page 66.
537 Sterling Koch was TransAlta's Vice President of Regulatory and Legal Affairs.
538 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, PDF page 67.
539 *Ibid.*, PDF page 68.
540 *Ibid.*, PDF page 10, paragraph 57.
541 *Ibid.*, PDF page 69.

"Schaefer confirmed that I did not have any non-public information and I was clear to manage the Net Asset Position."[542]

690. On December 30, 2010, Mr. Ross Fortune (Fortune), TransAlta's Senior Western Market Analyst, sent an email to Luciuk, van Melle, O'Connor, Kaiser, Shaffer and Connelly, with a subject line that read: "Sundance #1 and Sundance #2 Scenario Analysis" and an importance level of high.[543] One of Fortune's assumptions was that Sundance 1 and 2 would be offline until February 15, 2011. His forecast was:

> The price forecast is bullish for January and February 2011. The last 10 days of January and the first 15 days of February are forecast to be particularly strong, with 3 major coal units offline for that period and a high risk of additional units going offline for forced outages in that window. In addition to the outages winter demand and fluctuations in wind generation which are driving volatility in the price model. The new base case for January is currently C$80.73/MWh and the new base case for February is C$86.82/MWh. The introduction of portfolio bidding in Scenario #1 and #2 increases the base prices for both months over C$100/MWh. The current forward market is trading C$67.00/MWh for January and C$70.50/ MWh for February.[544]

691. On January 4, 2011, TransAlta wrote to TransCanada Energy Ltd., the PPA buyer for Sundance 1 and 2, to give notice of an event of *force majeure* at Sundance 1 and 2. In its letter, TransAlta stated:

> Corrosion assisted cracking found recently in the boilers required S1 to be removed from service on December 16, 2010 and S2 to be removed from Service on December 19, 2010. ABSA [the Alberta Boiler Safety Association] has directed these units may not be returned to service until they are repaired by TransAlta and inspected by ABSA and if found satisfactory, ABSA issues Certificates of Inspection. TransAlta estimates this inspection to occur on or about February 15, 2011. TransAlta expects the event of Force Majeure to extend at least until February 15, 2011.[545]

692. TransAlta also issued a news release on January 4, 2011. In that news release, it stated:

> TransAlta Corporation...today declared force majeur for its Sundance 1 and 2 coal-fired generation units related to boiler tube conditions above design limits.
>
> All 560 megawatts (MW) from Sundance 1 and 2 will be unavailable up to February 15, as the units will be offline for inspection to determine the scope of repairs that may be needed...
>
> The Alberta Boiler Safety Association (ABSA) indicated immediate shut down of the units was appropriate action consistent with industry safety standards. The units cannot be restarted without ABSA inspection and approval.[546]

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542 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 12, paragraph 80.
543 Exhibit 145.01, emailed price forecast from Ross Fortune, December 30, 2010.
544 *Ibid.*, PDF page 1.
545 Exhibit 161.01, letter from TransAlta to TransCanada and the Balancing Pool, January 4, 2011.
546 Exhibit 14.27, MSA Application, Tab 174, TransAlta news release, January 4, 2011, PDF pages 12-13.

693. Farrell, TransAlta's COO, sent an email to all TransAlta employees on January 4, 2011, with the subject line: "Sundance 1 and 2 Announcement from Dawn Farrell." In the email, Farrell stated:

> I wanted to let you know that today we have announced that Sundance 1 and 2 will be offline until Valentine's Day due to conditions observed in the boilers at both units.
>
> An inspection of the boilers will be done during this period to ensure that the units can be operated safely upon their return to service. Comparable conditions have not been observed at our other coal-generation units.[547]

694. On January 5, 2011, RBC Capital markets issued a "Price Target Revision" for TransAlta Corporation based on the *force majeure* announcement. The report read in part, as follows:

> **Boiler Tube Issues.** TransAlta declared force majeur under its Power Purchase Arrangement (PPA) for Sundance units 1 and 2 (total 560 MW). "Corrosion fatigue" in the boiler tubes caused both units to be shut down.
>
> **This Could Be a Long Outage (Memories of Wab 4).** Although the press release states that the units will not be available until February 15, 2011 the outage is only to complete the inspection to determine what repairs may be needed. If major repairs are required, the outage could extend well beyond February 15. TransAlta claimed force majeur for Wabamun 4 for extensive repairs to the boiler and tubing which lasted about 10 months...[548]

695. Cannacord Genuity also commented on TransAlta's *force majeure* announcement in its January 5, 2011 Daily Letter:

> Summary
>
> TransAlta announced that it declared force majeure for its 560 MW Sundance 1 and 2 coal-fired facilities due to boiler tube issues...
>
> Sundance Unit 1 went down on December 16 and Unit 2 went down on December 19, 2010. Inspection on the units is expected to be completed by February 15, 2011, and they could well be down for several additional months for repairs depending on the scope of the repair that may be required...[549]

696. On January 6, 2011, the Calgary Herald published an article commenting on TransAlta's *force majeure* announcement:

> Bids then slipped down to about $49.50 per MWh for March, indicating confidence in some quarters boiler tube issues in Sundance units 1 and 2 will be resolved by then, said Bob Hesson of Chase Energy. "The market's telling us it should be over sometime in February, and shouldn't affect March," Hesson said.
>
> ...

[547] Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, PDF page 43.
[548] Exhibit 140.01, Analyst Report issued by RBC Capital Markets, January 5, 2011, page 1.
[549] Exhibit 141.01, Analyst Report issued by Canaccord Genuity, January 5, 2011, page 2.

> The company said the units would be off-line until at least February 15 after which a repair plan would be determined. TransAlta obviously has no clear picture of when the units will be back in service, noted Friess. A decade ago TransAlta's now-retired Wabamum 4 unit was shut down for nine months due to similar issues with corrosion.[550]

697. At 09:39 a.m. on January 6, 2011, Fortune, a TransAlta analyst, sent an email with the subject line "Outages to support Alberta power prices." The email had a link to the Calgary Herald article and was sent to Connelly, Kaiser and other TransAlta traders and analysts.[551]

698. At 09:47 a.m., Kaiser emailed an extract of the Calgary Herald article to the same people:

> **"TransAlta obviously has no clear picture of when the units will be back in service, noted Friess. A decade ago TransAlta's now-retired Wabamum 4 unit was shut down for nine months due to similar issues with corrosion."**[552]
>
> [bold in original]

699. In his witness statement, Kaiser provided the following explanation for sending the Herald extract:

> I sent the excerpt from the article to the Traders because I thought that it was important to bring to their attention the market perception of the risk of extension. As far as I knew, they had only been sent the Internet link by Fortune.[553]

700. At the hearing, the MSA asked Kaiser about his rationale for sending the Herald extract to the Alberta traders:

> Q. But really, Mr. Kaiser, isn't this the kind of thing you're doing on January 6 with your 9:47 extract email? You're just bringing it home in a subtle way that this outage is going to be a long one, just like Wabamun was?
>
> A. Absolutely not. The email is a Calgary Herald article, and I want to draw their attention to the contents of that article. [554]

701. The MSA pressed Kaiser on this issue but Kaiser's answers were consistent with those provided in his witness statement:

> Q. And you knew the other traders already have this link. They have the same article that you have. You're trying to give them something new and different?
>
> A. That is not the case. Mr. Fortune sent out -- but just the link. I thought -- first of all, I didn't know that anyone would click and read it. The traders are -- you know, might not read everything. And so I want -- and especially if they open it up and saw a full page. I thought, oh, I want to pull out the parts that are relevant to the discussion we were having. And so pulled out this quote and sent it back to them.

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550 Exhibit 14.27, MSA Application, Tab 176, Calgary Herald article, January 6, 2011, PDF page 18.
551 Exhibit 14.27, MSA Application, Tab 177, email from Ross Fortune, January 6, 2011, PDF page 21.
552 Exhibit 14.27, MSA Application, Tab 177, email from Nathan Kaiser, January 6, 2011, PDF page 21.
553 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 15, paragraph 93.
554 Tr. Vol. 8, December 15, 2014, page 1684.

...

> My -- I sent it because I wanted to highlight the fact that the market saw that there was some risk to the outages being extended.[555]

702. Connelly's evidence was that he rarely opened emails during the period of the day in which he engaged in trading.[556] It was also Connelly's evidence that "Kaiser often emailed links to, or excerpts of, news articles to the traders in an effort to be helpful."[557] Connelly went on to state:

> Although I appreciated Kaiser's efforts to circulate news articles to the traders, I rarely paid any attention to these emails since the information contained in the articles he sent was stale in comparison to the detailed, near real-time analysis of the markets the traders received from the analysts. By the time Kaiser sent his email of 9:47 AM with an excerpt of the Herald Article, the information was "old news", particularly since we had likely discussed it at the morning meeting over two hours earlier. The fact that Kaiser sent this email suggests to me that he was not present at our morning meeting that day and was therefore unaware that we would have already discussed this development.
>
> Moreover, given that by 9:47 AM I was already a few hours into my trading day and thus fully occupied with monitoring the markets, it is very likely that I did not open or read Kaiser's email forwarding the quotation from the Herald Article.[558]

703. At 10:12 a.m., Farris, another TransAlta analyst, emailed van Melle a "base case with Sun 1 and 2 off all year," which van Melle then forwarded to Kaiser at 10:51.[559]

704. At 10:49 a.m., Kaiser emailed Connelly and van Melle. The email stated :

> Given that there is no activity on the balance of month, I am looking to buy 100 MW of Feb at market to cover the January balance of month and February. I believe there is some risk to the outages at Sun 1/2 being extended which would increase our short position in both January and February. Based on Funda[m]entals – colder temps and 3 units off in last 10 days of Jan and first 2 week[s] of Feb, the conditions exist for a very tight market.[560]

705. Connelly could not recall when he read the 10:49 a.m. email.[561]

706. Connelly purchased a total of 155 MW of February flat contract on January 6, 2011: 50 MW prior to the 9:47 a.m. email, 100 MW between the 9:47 a.m. email and the 10:49 a.m. email and 5 MW after the 10:49 a.m. email.[562]

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555 Tr. Vol. 8, December 15, 2014, page 1687-1688, see also pages 1689 – 1691.
556 Tr. Vol. 8, December 15, 2014, pages 1858-1859.
557 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 20, paragraph 149.
558 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 20, paragraphs 150-151.
559 Exhibit 14.27, MSA Application, Tab 178, emails from Brendan Farris and Blain van Melle, January 6, 2011, PDF page 23.
560 Exhibit 14.27, MSA Application, Tab 179, email from Nathan Kaiser, January 6, 2011, PDF page 25.
561 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 21, paragraph 162.
562 *Ibid.*, page 22, paragraph 164.

707. The MSA asked Connelly about his trading on January 6, 2011, at the hearing:

> Q. Yes. Did he [Nathan Kaiser] phone you or talk to you and say "get me 100 megawatts," which would explain why in the next 15 minutes you get 100 megawatts?
>
> A. Oh, it's possible. I mean, I think what likely happened is I was trading the February contract, and Mr. van Melle would be trading other contracts, and what I think probably happened is he said "Nate needs 100 megawatts." Again, he was sitting right beside me at arm's-length, and he said "Nate needs 100 megawatts for February." Subsequently an hour after that, he sent another email and said I need another 25 megawatts for March. So I assume we should have had a conversation about that, because we needed to figure out who was going to transact those megawatts, and so it would have been a discussion.[563]

708. When questioned by the MSA on whether he had also given Connelly verbal instructions to purchase the 100 megawatts, Kaiser stated "I don't remember a verbal instruction."[564]

709. On January 7, 2011, Kaiser gave verbal instructions to the Alberta traders for the purchase of a further 50 megawatts of February flat contract.[565] Kaiser confirmed in his witness statement that Connelly had purchased the additional 50 MW on his behalf.[566] Connelly's evidence in his witness statement was that he also believed that Kaiser's order for the additional 50 MW was made verbally.[567]

5.4 Are the respondents market participants?

5.4.1 Views of the parties

710. TransAlta conceded that it is a market participant whereas Kaiser and Connelly opposed that designation being applied to them.

711. The MSA submitted that there are two essential components to being a market participant. First, one must be a person, as that term is defined. Second, one must engage in the conduct described in the definition. It submitted that, based upon the plain and ordinary wording of the phrase, "traded, exchanged, purchased or sold electricity, electric energy, energy services or ancillary services," Kaiser and Connelly are market participants.[568]

712. Kaiser and Connelly argued that it would be inconsistent with the statutory scheme to consider an employee of a market participant to be a market participant as well. Kaiser and Connelly submitted that the legislature could have expressly included employees of market participants in the definition of market participant but chose not to do so. They each highlighted

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563 Tr. Vol. 9, December 16, 2014, page 1890, line 23 to page 1891, line 13.
564 Tr. Vol. 8, December 15, 2014, page 1691, lines 20-21.
565 *Ibid.*, page 1691, line 25 to page 1692, line 1.
566 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 17, paragraph 106.
567 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 22, paragraph 170.
568 Exhibit 3110-X0003, MSA Argument part 2, January 20, 2015, page 132, paragraphs 533 and 534.

provisions of the statutory scheme in which the legislature distinguished between an entity and its employees.[569]

713. For example, both Kaiser and Connelly pointed to Section 46(1)(b) of the *Alberta Utilities Commission Act*, which permits the MSA to make reasonable inquiries of an employee or former employee of a market participant. They argued that if the definition of market participant includes employees of market participants, Section 46(1)(b) would be unnecessary.[570]

714. Connelly observed that Section 4(2) of the *Fair, Efficient and Open Competition Regulation* requires market participants to file outage records with the AESO in the form required by the AESO. Connelly submitted that the term market participant in that section cannot refer to individual employees as the ISO rules do not require such employees to file outage records.

715. Similarly, Kaiser submitted that many provisions of the *Fair, Efficient and Open Competition Regulation* would be rendered absurd if "market participant" was defined to include employees of a market participant. For example, he noted that Section 4(4) requires the ISO to "aggregate outage records received from market participants relating to generating units and market participant capability to consume electric energy..." Kaiser observed that employees do not have "capability to consume electric energy." Kaiser submitted that similar examples are found in Sections 2(b) of the *Fair, Efficient and Open Competition Regulation* and Section 6(4)(a)(ii) of the *Market Surveillance Regulation*.

716. Kaiser also noted that an earlier version of the *Electric Utilities Act* expressly provided for joint and several liability of directors and officers of a market participant that is a corporation. He submitted that the repeal of that provision reflects the legislature's intention to remove personal liability from the scope of the *Alberta Utilities Commission Act*.[571]

5.4.2 Commission findings

717. Whether Kaiser and Connelly are market participants is a question of statutory interpretation. As stated earlier, the Commission approaches statutory interpretation in accordance with Driedger's modern principle. Specifically, the Commission must consider the words of the provision in their grammatical and ordinary meaning having regard for the scheme and object of the act and the intention of the drafters.

718. Section 1(1)(ee) of the *Electric Utilities Act* states:

> "market participant" means
>
> (i) any person that supplies, generates, transmits, distributes, trades, exchanges, purchases or sells electricity, electric energy, electricity services or ancillary services, or

[569] Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, page 22, starting at paragraph 95; Exhibit 3110-X0155, Closing Argument of Nathan Kaiser, February 10, 2015, pages 38-39, paragraphs 172-175.

[570] Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, pages 23-24, paragraphs 102-103, Exhibit 3110-X0155, Closing Argument of Nathan Kaiser, February 10, 2015, page 39, paragraphs176-177.

[571] *Ibid.*, page 42, paragraphs 190-191.

(ii) any broker, brokerage or forward exchange that trades or facilitates the trading of electricity, electric energy, electricity services or ancillary services;

719. "Person" is defined in Section 1(1)(kk) of the *Electric Utilities Act*:

"person" includes an individual, unincorporated entity, partnership, association, corporation, trustee, executor, administrator or legal representative;

720. When the definition of "person" is incorporated into the definition of "market participant" the result is:

(ee) "market participant" means

(i) any ~~person~~ (individual, unincorporated entity, partnership, association, corporation, trustee, executor, administrator or legal representative) that supplies, generates, transmits, distributes, trades, exchanges, purchases or sells electricity, electric energy, electricity services or ancillary services, or

(ii) any broker, brokerage or forward exchange that trades or facilitates the trading of electricity, electric energy, electricity services or ancillary services;

721. The grammatical and ordinary meaning of the provision is that individuals, business entities, agents or representatives who engage in one or more of the types of conduct catalogued in the definition are market participants. The provision does not differentiate between a business entity and employees of business entities.

722. The Commission finds that the phrase market participant was defined in the broadest possible terms to capture the wide variety of circumstances in which individuals and business entities transact in the regulated electricity industry.

723. Support for this interpretation is drawn from the frequent use of the phrase market participant(s) throughout the statutory scheme. The phrase is used 37 times in the *Electric Utilities Act*, 20 times in the *Alberta Utilities Commission Act*, 41 times in the *Fair, Efficient and Open Competition Regulation*, and 29 times in the *Market Surveillance Regulation*.

724. While market participant is a defined phrase, each provision in which the phrase is used provides context for its interpretation in that provision.

725. In some cases, the wording of the provision restricts its application to certain classes of market participants. For example, Section 1(1)(yy) of the *Electric Utilities Act* defines the phrase "system access service" as "the service obtained by market participants through a connection to the transmission system, and includes access to exchange electric energy and ancillary services." In this context, the phrase market participants is limited to those market participants who obtain system access service. This necessarily excludes some classes of market participants from the operation or application of the provision. Similar in effect is the use of market participants in sections 24.1, 29, 31, 32 and 35 of the *Electric Utilities Act*.

726. In other cases, the context in which the phrase is used signifies that it applies to all classes of market participants. Sections 6 and 17 of the *Electric Utilities Act* are examples of such provisions.

727. Contrary to the assertions of Kaiser and Connelly, the fact that the phrase market participants applies only to a limited set or class of market participants in some provisions of the statutory scheme but applies to all classes of market participants in other provisions does not result in a definition of market participant that is absurd. Context is everything.

728. The Commission also finds support for its broad interpretation of market participant in the legislature's use of a more expansive definition of the term "person" than that which is found in the *Interpretation Act*. The latter states: " 'person' includes a corporation and the heirs, executors, administrators or other legal representatives of a person."[572] The use of an expanded definition in the *Electric Utilities Act* suggests to the Commission that the legislature intended to "cast the net widely" when defining a market participant. The 2008 amendment to the definition, which added "brokers, brokerages and forward exchanges" to the definition likewise supports the broadest possible interpretation of the phrase. It also makes clear that individual brokers as well as brokerages are market participants. This is consistent with a definition of market participant that would include an individual trader who is employed by a market participant.

729. The Commission further finds this broad interpretation of the phrase to be consistent with one of the primary objectives of the statutory scheme: the fostering of an electricity market that is fair, efficient and openly competitive. Interpreting the phrase as excluding employees of market participants could undermine that objective and lead to an absurd result. For example, it could potentially allow "rogue" traders and their employers to avoid enforcement. Take the scenario where a trader uses non-public outage records to trade contrary to the instructions and policies of his employer. Enforcement against the rogue would be unavailable if the restricted interpretation of market participant was adopted and enforcement against the employer could be avoided on the basis of a due diligence defence. In the Commission's view, such a result would be inconsistent with one of the underlying objectives of the statutory scheme and could undermine the integrity of the market.

Conclusion: Kaiser and Connelly are market participants

730. Connelly was TransAlta's head trader when the alleged trading contraventions occurred, and "Shaffer, van Melle, and I [Connelly] were the only TransAlta traders with the authority to trade in the Alberta forward financial markets ("Alberta Traders")."[573] The Commission finds that at the material times, Connelly was a market participant because he was an individual who traded, exchanged, purchased or sold electricity or electric energy.

731. The Commission finds that, at the material times, Kaiser was a market participant because he was an individual who traded. The Commission makes this finding notwithstanding the fact that Kaiser traded, exchanged, purchased or sold electricity or electric energy through intermediaries.

732. Kaiser's evidence at the hearing was that he instructed TransAlta's traders to make trades and that those trades were then made on his behalf.[574] The evidence of Schaefer and Connelly

[572] *Interpretation Act*, RSA 2000, c. I-8, Section 28(1)(nn).
[573] Exhibit 169.01, Witness Statement of Scott Connelly, December 12, 2014, page 2, paragraph 10.
[574] Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, pages 3-4, paragraphs 23-25, and paragraph 61.

was consistent with Kaiser's. Schaefer explained the role played by TransAlta's asset optimizers in his witness statement:

> The asset optimizers' role is to maximize profits from physical assets. They do so by assessing the market fundamentals, deciding on offer strategies for generation assets, and deciding to place or remove forward hedges on assets. These strategies are executed by setting real-time price-volume offers and advising traders to place forward trades as required. During the relevant period, the asset optimizers did not have authority to execute trades (they could only place trades with the traders who would execute them on their behalf).[575] [emphasis added]

733. Connelly's evidence in his witness statement confirmed this practice:

> Traders did not have authority, without instructions, to execute trades to or from the asset books. All trading instructions for the asset books came from the "Asset Optimizers", and the traders were required to execute trades in accordance with these instructions to the extent possible in the market.[576] [emphasis added]

734. Having concluded that Kaiser and Connelly were market participants, the Commission moves now to the second element of the offence: were the December 3 and January 6 emails outage records?

5.5 Did Kaiser and Connelly use non-public outage records to trade?

5.5.1 Views of the MSA

735. The MSA submitted that the definition of "outage record" is purposely broad. It stated that Section 4 of the *Fair, Efficient and Open Competition Regulation* "unequivocally prohibits a market participant from trading using information that relates to the capacity of a generating unit unless permitted by section 4."[577] The MSA observed that in Decision 2014-135, the Commission accepted that the phrase "relates to" contained words that implied the "widest possible scope."

736. The MSA submitted that the information provided to Kaiser in the December 3 email from Black was an outage record because it was information relating to the capacity of a generating unit. The MSA submitted that Kaiser understood this immediately and argued that Kaiser's decision to black himself out from trading confirmed that.

737. The MSA questioned Koay's evidence that each of the three outage scenarios described in the December 3 email was equally likely based on the following statement from Koay's witness statement: "The concern being addressed by the technical team related to finding boiler corrosion issues that required a broader scope of repairs than had been previously planned."[578] However, the MSA argued that even if all three scenarios were equally likely, this was still information that Kaiser was prohibited from using for trading.

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575 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, page 3, paragraph 14.
576 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 6, paragraph 36.
577 Exhibit 3110-X0003, MSA Argument part 2, January 20, 2015, page 136, paragraph 554.
578 Exhibit 152.01, Witness statement of Kelvin Koay, December 5, 2014, page 13, paragraph 68.

738. The MSA argued that nothing changed between December 3, 2010 and January 6, 2011 that would allow Kaiser to instruct trades given the information he had. It asserted that on January 6, 2011, Kaiser was aware of the two extended outage scenarios for Sundance 2 and that an extended outage after February 15 remained a distinct possibility. It stated that this was information that others did not have and that this information gave Kaiser a significant advantage in the market.[579]

739. The MSA contended that Kaiser's decision to send the Herald extract to the other traders on January 6, 2011 is obvious, additional proof that the information he had about Sundance 2 remained an outage record. It stated that there was no other reason for Kaiser to send the email.

740. The MSA concluded that the December 3, 2010 email conveyed to Kaiser the prospect that the outages at Sundance 1 and 2 would be extended beyond the February 15, 2011 date known to the public. Similarly, the MSA concluded that, through his January 6, 2011 emails, Kaiser conveyed to Connelly the same information.[580]

5.5.2 Views of the respondents

741. The respondents argued that Section 4(1) does not apply to outage records that are not required to be provided to the AESO. They observed that this principle was reflected in a bulletin issued by the MSA in March 2012, which included the following sentence:

> The restriction on trading in section 4 does not apply to outage records that are not required to be provided to the AESO under applicable ISO rules.[581]

742. The respondents submitted that the MSA failed to demonstrate that the December 3 and January 6 emails that are the focus of the trading allegations were outage records. They noted that the MSA conceded under cross-examination that TransAlta was not obliged to file those emails with the AESO.

743. Both Kaiser and Connelly observed that the MSA's application did not address ISO rule 5, which provided direction to market participants regarding the filing of outage records. They each submitted that a review of the current ISO rule governing the filing of outage records (ISO rules Section 306.5), which they assert is substantially similar to ISO rule 5, makes it clear that the impugned emails were not required to be filed with the AESO.[582]

744. The respondents each argued that the January 6, 2011, emails did not contain any non-public information. They noted that the MSA had previously recognized that non-public outage records may become public before publication by the AESO. The respondents referenced a feedback letter from the MSA to market participants that was issued on November 23, 2012. In that letter, the MSA stated that there is no issue with using public information from "public or trade sources such as news, public press releases, stakeholder consultations or industry

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579 Exhibit 3110-X0003, MSA Argument part 2, January 20, 2015, page 138, paragraph 564.

580 Exhibit 14.02, MSA Application, March 21, 2013, page 113, paragraph 405 and page 115, paragraph 407; Exhibit 3110-X0003, MSA Argument part 2, January 20, 2015, page 154, paragraph 617.

581 Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, page 46, paragraph 190, quoting from Exhibit 135.04, MSA Letter: Feedback – Public Information and Trading, November 23, 2012.

582 Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, page 48, paragraphs 195 and 196, Exhibit 3110-X0155, Closing Argument of Nathan Kaiser, February 10, 2015, page 58, paragraph 266-268.

publications" to trade providing that a market participant meets its related obligations/restrictions.[583]

745. TransAlta and Connelly asserted that the information upon which the MSA's allegations rest was public information at the time when the trades were made. Connelly noted that, in response to an information request regarding what specific outage records he was alleged to have used, the MSA responded as follows:

> The Outage Records not available to the public were those pertaining to the prospect of outages at Sundance A extending beyond February 15, 2011...[584]

746. TransAlta and Connelly submitted that this information had already been made public before Connelly executed the impugned trades through TransAlta's press release, industry comment and the Calgary Herald article.

747. TransAlta and Kaiser argued that a determination that the December 3, 2010 email was an outage record would result in an unworkable system. They submitted that this would create an obligation upon market participants to file hypothetical outage scenarios with the AESO which, in turn, would introduce confusion in the market.

748. Kaiser argued that, to be an outage record, the information in question must relate to an outage and must be reasonably certain. He pointed out that, in a notice to market participants issued by the MSA in 2009 regarding the effect of the *Fair, Efficient and Open Competition Regulation* on trading practices, the MSA stated that "at a minimum, once an outage (availability) has a reasonable degree of probability attached to it, once it is known with reasonable certainty, it must be disclosed."[585]

749. Kaiser argued that there must be some minimum level of materiality before information about the capability of a generating unit is considered an outage record. It observed that the MSA previously recognized a level of materiality in its Trading Practices and Guidelines which stated:

> Market participants must not trade on the basis of known but not public information about the status of supply, load or transmission assets that can reasonably be expected to have a material impact on market price. Trading shall be understood to include any type of financial or physical transaction or operational strategy designed to extract value from known but not public information about the status of supply, load or transmission assets.[586] [emphasis in Kaiser's submission]

5.5.3 Commission findings

5.5.3.1 The statutory framework

750. Section 4 of the *Fair, Efficient and Open Competition Regulation* reads as follows:

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583 Exhibit 135.04, MSA Letter: Feedback – Public Information and Trading, November 23, 2012.

584 Exhibit 3110-X0007, Final Argument of Scott Connelly, February 10, 2015, page 51, paragraph 204, quoting from Exhibit 57.01, MSA response to information requests, August 15, 2014, PDF page 22.

585 Exhibit 3110-X0155, Closing Argument of Nathan Kaiser, February 10, 2015, page 52, paragraph 238, quoting from Exhibit 135.10, MSA Notice to Market Participants, July 23, 2009, page 2.

586 Exhibit 3110-X0155, Closing Argument of Nathan Kaiser, February 10, 2015, page 54, paragraph 248, quoting from Exhibit 3110-X0158, Tab 21, MSA *Trading Practices Guideline*, February 18, 2004, page 1.

4(1) A market participant shall not, directly or indirectly, use outage records to trade unless permitted to do so under this section.

(2) Subject to subsection (6), market participants shall provide outage records to the ISO as soon as reasonably practicable, in a form and manner and containing the content required by the ISO.

(3) The ISO shall make outage records received from market participants available to the public

(a) by category, including

(i) generating unit fuel type,

(ii) transmission facility,

(iii) electric distribution system, and

(iv) market participant capability to consume electric energy,

(b) through outage reports that include the effective date and time of the most recent outage records received from market participants in each report, and

(c) on its website, or through any other means, as soon as reasonably practicable.

(4) The ISO shall, to the extent practicable, aggregate outage records received from market participants relating to generating units and market participant capability to consume electric energy when including those records in outage reports.

(5) A market participant may use an outage record to trade after the outage record has been made available to the public by the ISO.

(6) The ISO may exempt a market participant from the requirement to provide outage records under subsection (2) where, in the ISO's opinion,

(a) the records would not reasonably be expected to have a material impact on market prices, and

(b) the records are not necessary to carry out the ISO's duties under the *Electric Utilities Act.*

(7) The ISO shall request and have regard for the views of the MSA relating to subsection (6)(a) before determining whether to exempt a market participant from the requirement to provide outage records under subsection (2).

(8) Subsections (1) and (3) do not apply to outage records that are not required to be provided to the ISO pursuant to subsection (2) or (6).

751. Section 1(1)(e)(i) of the *Fair, Efficient and Open Competition Regulation* defines the phrase "outage records" as records that "relate to the capability of a generating unit connected to the interconnected electric system to produce electric energy."

752. Section 2(r) states that the word "record" has the meaning given to it in the *Electric Utilities Act*. "Record" is defined in Section 1(1)(rr) of that act as follows:

> (rr) "record" includes
>
> (i) information or data regardless of its physical form or characteristics;
>
> (ii) information or data in a form that can produce sound, with or without a visual form;
>
> (iii) information or data in electronic, magnetic or mechanical storage;
>
> (iv) electronic data transmission signals;
>
> (v) any other thing that is capable of being represented or reproduced visually or by sound, or both;
>
> (vi) anything in which information or data is stored, including software and any mechanism or device that produces the information or data;

753. The Commission finds that Section 4 has three objectives. First, it establishes a general prohibition against trading on non-public outage records that are not subject to an express exemption issued by the AESO (subsections (1), (5) and (8)). Second, it establishes an obligation on market participants to file outage records with the AESO (subsection (2)). Third, it directs the AESO as to when and how it should make outage records public and on the process for granting an exemption against the prohibition against trading on non-public outage records (subsections (2), (4), (6) and (7)).

754. The effect of Section 4 on trading is that market participants are prohibited from using information regarding the capability of a generating unit to produce electric energy for trading, subject to two exceptions: a) outage records that have been made public by the AESO and b) outage records that the AESO has expressly exempted from this requirement. If an outage record is not public and not exempt, it cannot be used to trade.

755. The first question the Commission must answer is whether Kaiser or Connelly had information, in any form, that related to the capability of a generating unit to produce electric energy on January 6, 2011, when the impugned trading began. This, in turn, requires the Commission to determine what is meant by the phrase "capability of a generating unit to produce electric energy." In particular, the Commission must interpret the meaning of "capability" in the provision.

756. "Capability" is not defined in the legislative framework. It is defined in the Concise Oxford Dictionary as: "power or an ability to do something."[587] It is similarly defined in the Merriam-Webster on-line dictionary.[588]

[587] Concise Oxford Dictionary, Tenth Edition, Oxford University Press, 2001.
[588] http://www.merriam-webster.com/dictionary/capability.

757. The Commission finds that the plain and ordinary meaning of "outage record" is information of any kind that relates to the ability of a generating unit to produce electric energy. This encompasses whether or not the generating unit can produce electricity at a particular time and the amount of electricity the generating unit can produce at a particular time.

758. In the Commission's view, the intent of the prohibition against trading on non-public outage records is to preclude unfair advantages that may lead to market distortion, and promote fair and open completion and market efficiency. Such conduct would be contrary to one of the express purposes of the *Electric Utilities Act*.

759. The issue of the level or degree of certainty that is necessary for information relating to the capability of a generating unit to produce electric energy to rise to the level of an outage record was identified by the respondents. This is a valid issue. The respondents submitted that the AESO's rule regarding outage record reporting is instructive with respect to the kind of information that market participants should not use to trade under Section 4(1). The AESO rule at the time of the impugned trades was ISO rule 5.2.2, which stated, in part, the following:

> 5.2.2 Specific Scheduled Generator Outage and Forced Outage Reporting Requirements
>
> (1) Subject to subsection (2), each designated pool participant must use the outage scheduling entry in the Energy Trading System to provide to the ISO the dates, times, durations, and impact to MW capability for any scheduled generator outage and the specific nature of the scheduled generator outage work to be done as well as designate the outage as "Derate-Planned" or "Outage-Planned."
>
> (2) The designated **pool participant** must comply with the following specific requirements when submitting either **forced outage** or **scheduled generator outage** information to the **ISO**:
>
> (a) by the first (1st) **day** of every month subsequent to the date of **commissioning**, submit **scheduled generator outages** that are planned to occur at any time within the next twenty four (24) months after that **day**, with any subsequent revisions to the plans submitted to the **ISO** as soon as reasonably practical after the decision is made by the **owner** of the **generating unit** to change the plans, but in any event no later than three (3) months prior to the first **day** the **scheduled generator outage** is planned to commence;
>
> (b) for **scheduled generator outages** that are planned to be required within the next three (3) months after the first (1st) day of a month, submit the plan as soon as reasonably practical after that planning decision is made by the **owner** of the **generating unit** if the plan is different from the one referred to in Subsection (2) (a) above, which submission must include a statement setting out the reasons that any new plan for the **scheduled generator outage** was not included in, or must vary from, the original Subsection (2) (a) submission;
>
> (c) for a forced outage:
>
> (i) inform the **system controller** on a telephone line designated by the **ISO** which will contain a voice recording system; and

> (ii) use the outage scheduling entry in the **Energy Trading System** to provide to the **ISO** the dates, times, durations, and impact to **MW** capability for the **forced outage** and designate the outage as "Derate-Forced" or "Outage-Forced." [underlining added, bolding in the original][589]

760. The Commission finds that reliance on the standard set out in Rule 5.2.2 for outage reporting as the threshold for the level of certainty necessary to trigger the trading prohibition would not satisfy the intent of the trading prohibition in every circumstance. The following hypothetical scenario illustrates the concern.

761. The owner of a generating unit has a planned 90-day outage scheduled for June in an upcoming year. The outage is reported to the AESO in accordance with the rule. Six months before the outage is scheduled to commence, the owner determines that the outage will have to start sooner but could commence in either April or May. In the time period before the owner makes its business decision regarding the April or May start time, it knows that the unit will be down in May regardless of the business decision. In this situation, the owner knows the unit will be down in May but that decision is not yet reportable to the AESO because the final business decision on timing has yet to be made. In these circumstances, the owner would be prohibited by Section 4(1) from trading on the information, notwithstanding that it would not be required to file the information with the ISO under Rule 5.2.2 until the business decision was final.

762. In the Commission's view, for information to be subject to the trading prohibition, it must be information that could reasonably be expected to have a material impact on market prices and conveys an advantage to those who possessed the information over those who did not. This approach is consistent with the wording of Section 4(6) of the *Fair, Efficient and Open Competition Regulation*, which allows the AESO to exempt market participants from the requirement to file outage records that would not reasonably be expected to have a material impact on market prices. The corollary being that outage records that could reasonably be expected to have a material impact on market prices cannot be subject to an exemption, must be filed with the ISO and cannot be traded upon until they are made public.

763. This approach is also consistent with the MSA Trading Practice Guideline that was in force prior to the enactment of the *Fair, Efficient and Open Competition Regulation*. The trading guideline stated:

> Market Participants must not trade on the basis of known but not public information about the status of supply, load or transmission assets that can reasonably be expected to have a material impact on market price.[590]

764. The Commission observes that TransAlta witnesses endorsed such an approach in their testimony at the hearing. For example, Schaefer stated:

> What's crystal clear is that outage information that is to be posted to the AESO or provided through the buyer to the AESO is an outage record. There are times when

[589] Exhibit 3110-X0158, Closing Argument of Nathan Kaiser, Tab 22, AESO Rule 5 *Reliability Assessment and Scheduled Generator Outage Cancellation*, PDF page 18.

[590] Exhibit 3110-X0158, Closing Argument of Nathan Kaiser, Tab 21, MSA *Trading Practices Guideline*, February 18, 2004, PDF page 4.

> individuals might be dealing with outage information that is close to that but not quite that. So in other words, a decision hasn't been made on an outage.
>
> And so the practice that I encouraged, and that I believe was followed regularly, was when in doubt, err on the side of caution. So in other words, err on the side of blacking yourself out and seek advice from regulatory counsel, from myself.[591]

765. Kaiser's conduct during the events in question was entirely consistent with this approach. Specifically, Kaiser blacked himself out from trading after he received the December 3, 2010, email from Black and expressed concerns that if Luciuk, the Vice President of Trading Asset Optimization, became aware of the information, the entire trading team would also be blacked out from the market. Kaiser expressed these concerns notwithstanding that there was no indication that the information he received had been or would soon be filed with the AESO.

766. How then should the Commission approach whether information regarding the capability of a generating unit to produce electric energy would reasonably be expected to have a material impact on market price? The concept of materiality is important in securities law regarding trading on undisclosed material facts or material changes and provides effective direction on the issue.

767. Under the *Securities Act,*[592] the definition of "material fact" is: "when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities."[593] The definition of "material change" includes "... a change in the business, operations or capital of [a particular] issuer that would reasonably be expected to have a significant effect on the market price or value of a security of the issuer..."[594]

768. In *Re: Stan,*[595] the Alberta Securities Commission reviewed the test for materiality and its application. It stated that materiality is a market-focused concept that is to be determined objectively from the perspective of a reasonable investor. The Securities Commission stated that common sense inferences about materiality can be made by a tribunal with specialized expertise and need not be premised on expert advice.[596]

769. The Securities Commission stated that a materiality assessment is a contextual analysis that must be made in light of all relevant circumstances. It noted that at section 4.2(1) of the Ontario Securities Commission's National Policy 51-201 Disclosure Standards,[597] it states:

> In making materiality judgements, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other

591 Tr. Vol. 6, December 9, 2014, page 1480, line 20 to page 1481, line 6.
592 *Securities Act*, RSA 2000, c.S-4.
593 *Ibid.*, Section 1(gg).
594 *Ibid.*, Section 1(ff).
595 *Stan, Re*, 2013 ABASC 148 (CanLII).
596 *Ibid.*, paragraph 223.
597 https://www.osc.gov.on.ca/en/SecuritiesLaw_pol_20020712_51-201.jsp.

> factors. An event that is "significant" or "major" for a smaller company may not be material to a larger company. Companies should avoid taking an overly technical approach to determining materiality. Under volatile market conditions, apparently insignificant variances between earnings projections and actual results can have a significant impact on share price once released. . . .[598]

770. The Securities Commission went on to state: "[a]s for quantitative and qualitative considerations, 'probability and magnitude are both germane to materiality, and therefore both are considered in determining whether something is material.'"[599]

771. In the Commission's view, an approach consistent with that described above to assessing materiality is fitting in the context of assessing allegations regarding the use of outage records for trading pursuant to Section 4 of the *Fair, Efficient and Open Competition Regulation*.

772. Contrary to the assertions of the respondent, the Commission does not consider that this approach will yield an unworkable result. The Commission does not consider that this interpretation requires market participants to file any outage scenario it develops with the AESO. However, what the interpretation does promote is the adoption of practices that prohibit the sharing of outage planning information with persons who could use such information, directly or indirectly to trade. TransAlta itself has adopted such a policy. TransAlta's policy Document Number 106(a): Power Purchase Arrangement Information Management. In accordance with that document, TransAlta employees are prohibited from sharing "Status Information" or "Planning Information" with traders except during a "Non-Trading Period."[600]

5.5.3.2 Did Kaiser have an outage record on January 6 and 7, 2011?

773. The Commission makes the following findings of fact regarding the information that Kaiser had on January 6 and 7, 2011 regarding the capability of Sundance 1 and 2 to produce electric energy:

- On December 3, 2010, Kaiser became aware that a 55-day outage planned for Sundance 2 scheduled for April 2011 could be extended to six to twelve months.
- Kaiser understood that the issues at Sundance 2 related to boiler corrosion.
- After receiving the information about Sundance 2, Kaiser concluded that he could no longer direct trades.
- On December 15, 2010, Schaefer told Kaiser that the scenario analysis he was asked to conduct for Sundance 2 was related to hypotheticals and was not information that barred him from trading.

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598 *Stan, Re*, 2013 ABASC 148 (CanLII), paragraph 225.
599 *Ibid.*, paragraph 227.
600 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, Tab 3, TransAlta Document Number 106(a): *Power Purchase Arrangement Information Management*, PDF page 38.

- On the morning of December 16, 2010, Kaiser, Luciuk and Schaefer were preparing to brief Farrell, about the impact of the outage at Sundance 2 on the trading floor's activities for 2011.

- Sundance 1 came down on the evening of December 16, 2010.

- On December 17, 2010, TransAlta blacked out all of its traders from the Alberta market.

- Sundance 2 came down on December 19, 2011.

- On December 29, 2010, TransAlta filed its outage record for Sundance 1 and 2 stating that Sundance 1 and 2 would be out until February 15, 2011.

- On December 29, TransAlta removed the trading blackout for the Alberta market allowing Kaiser to once again direct trades.

- After the trading blackout was lifted, Kaiser sought and received additional confirmation from Schaefer that he could direct trades.

- TransAlta claimed *force majeure* on Sundance 1 and 2 on January 4, 2011, for boiler tube conditions with a return to service date of February 15, 2011. It issued a news release explaining its actions.

- On January 5, 2011, two industry newsletters reported on TransAlta's *force majeur* announcement and each hypothesized that the outages at Sundance 1 and 2 could extend beyond February 15, 2011.

- The Calgary Herald published an article on January 6, 2011 in which the author opined that TransAlta did not know how long the outage would be and that a similar outage in 2001 lasted nine months.

774. Based on the evidence, the Commission draws an inference that Kaiser knew that the Sundance 1and 2 were taken offline because of boiler corrosion issues and that the corrosion issues in each unit were similar.

775. In the Commission's view, the hypothetical scenarios reviewed by Kaiser became considerably more significant after Sundance 1 and 2 were taken down on December 16 and 19, respectively, for boiler corrosion.

776. Having regard to the foregoing, the Commission finds that the information that Kaiser had on January 6 and 7, 2011, when he directed the impugned trades of 100 MW and 50 MW, respectively, was that an outage to identify and address boiler corrosion at Sundance 2 could reasonably last between six to twelve months. Kaiser also knew that Sundance 1 had a similar problem with boiler corrosion.

777. The Commission finds that the information that Kaiser had about prospective outages could reasonably be expected to have a material impact on market prices. Kaiser's information was that 560 MW of generating capacity could be removed from the market for up to a year's

time to address boiler corrosion issues. The absence of this amount of generating capacity in Alberta's energy market was of considerable magnitude given that the total generating capacity at the time was approximately 13,000 MW. Further, Kaiser had information that provided valuable insight into the probability of an extended outage at the Sundance units. He was aware that TransAlta had considered the 160 day outage or the 343 day outage to address the boiler corrosion issues, and that neither of these scenarios were more likely than the 55 day outage originally planned.

778. The Commission recognizes that there remained some uncertainty with respect to the information Kaiser had. However, the Commission observes that, in the securities context, a material fact does not require complete certainty. In *Re: Keith*,[601] the Alberta Securities Commission was considering allegations that employees of a company called Berens Energy Ltd. engaged in insider trading. Following some exploratory operations, Berens' directors decided to explore new directions, including the sale of the company, and hired a consultant to assist with what was called the "Process." The Securities Commission found that the launch of the Process was material and stated as follows:

> Even recognizing that the Process was merely an exploration of possible alternatives, with no assurance that any change would result, the plain fact was that Berens management and directors had formally resolved to consider new directions – potentially very dramatic ones – for the company...[602]

779. In the Commission's view, the fact that TransAlta considered that outages of 55, 160 and 343 days to address boiler corrosion in Sundance 2 were equally probable was information that could have a material impact on the market price. Having regard to the foregoing, the Commission finds that the information Kaiser had was an outage record, as that phrase is defined. If Kaiser possessed this information and other market participants did not, Kaiser would have an advantage over those market participants.

780. The MSA strongly asserted that Kaiser's 9:47 email on January 6, 2011 in which he extracted and bolded a passage from the Calgary Herald article, was additional proof that Kaiser was in possession of non-public outage records on January 6, 2011. However, having regard to the evidence before it, the Commission does not consider the 9:47 email to be additional proof that Kaiser was in possession of non-public outage records.

781. The Commission observes that in his subsequent email to Connelly and van Melle at 10:49, Kaiser stated that he believed "there is some risk to the outages at Sun 1/2 being extended ..."[603] This is the very information that the MSA alleged was contained in the Herald extract. In the Commission's view, Kaiser's explicit sharing of his belief that the outages would be extended in the 10:49 email, does not support the MSA's theory that he sent the 9:47 email with the Herald article to furtively provide the same information. The Commission also notes that the question of whether the email was sent to "tip-off" other traders was put to Kaiser and he denied

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601 *Keith, Re*, 2012 ABASC 382 http://www.albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Enforcement/KEITH%20Donald%20A%20W%20DEC%2020120827%204295124v1.pdf.

602 *Ibid.*, paragraph 61.

603 Exhibit 14.27, MSA Application, Tab 179, email from Nathan Kaiser, January 6, 2011, PDF page 25.

it and provided a plausible explanation for his provision of the extract at that time.[604] Further, it was Connelly's evidence that this was consistent with Kaiser's normal practice of emailing links or excerpts of news articles to the traders.[605]

5.5.3.3 Was the outage record public when Kaiser traded?

782. Having determined that Kaiser had an outage record relating to Sundance 1 and 2, the next question the Commission must answer is whether other market participants had this information; i.e., the Commission must consider if the information constituting the outage record had been made public. The Commission finds, for the reasons that follow, that Kaiser had information regarding the capability of Sundance 1 and 2 to produce electricity that other market participants did not and that the information gave Kaiser an advantage over other market participants.

783. The evidence before the Commission was that, on or before January 6, 2011, when Kaiser's impugned trades were made, there was some speculation in the market that the outages at Sundance 1 and 2 could extend beyond the February 15, 2011 date provided to the AESO and stated in TransAlta's news release. This speculation was reflected in the Canaccord Genuity report, the RBC Capital Markets report and the Calgary Herald article (as referred to above). Kaiser's information regarding the durations of outages at Sundance 2 and, by extension Sundance 1 on the other hand, was more informed and less speculative than the market's inferences regarding the duration of the outages. Kaiser had learned, through his communication with personnel in TransAlta's operations group, that an outage related to boiler corrosion at Sundance 2 could reasonably be expected to last, in his words, "six to twelve months," and that the problems at Sundance 2 were similar to those at Sundance 1.

784. When Kaiser emailed his trade instruction to Connelly and van Melle on January 6, 2011, he stated that he believed "there is some risk to the outages at Sun 1/2 being extended." The Commission finds that this belief was considerably enhanced by what he knew about the likely duration of the outages as described in the scenarios he reviewed related to boiler corrosion. This information was material and was never shared with the public, in other words, it was a non-public outage record. As noted earlier, this information became even more material when Sundance 1 and 2 were taken down in mid-December 2010 to address boiler corrosion issues. The Commission further finds that the circumstances had not changed on January 7, 2011, when Kaiser issued his direction to purchase an additional 50 MW.

5.5.3.4 Did Kaiser use the outage record to trade?

785. The parties disagreed on how to establish , on a balance of probabilities, that Kaiser or Connelly used an outage record to trade. The MSA submitted that "trading with knowledge of such information equates to using it."[606] It explained that this is sometimes referred to as the "knowing possession" standard and cited both American and Canadian authorities in support of this proposition. The respondents disagreed and submitted that, based on the plain wording of the provision, the MSA must show, on a balance of probabilities, that the respondents used outage records to trade.

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[604] Tr. Vol. 8, December 15, 2014, page 1684.
[605] Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 20, paragraph 149.
[606] Exhibit 3110-X0003 MSA Argument part 2, January 20, 2015, page 145, paragraph 593.

786. The Commission finds it is unnecessary in these circumstances to decide whether a breach under Section 4(1) can be established by demonstrating that a person traded while in possession of non-public outage records. In these circumstances, the Commission is satisfied that the evidence on the record shows that Kaiser used the information he had, information dealing with the capability of Sundance 1 and 2 to produce electricity, to trade when he instructed the Alberta traders to purchase 100 MW at market price on January 6, 2011 and an additional 50 MW on January 7, 2011.

787. Simply put, Kaiser explained his motivation for the trades in his January 6 email to the Alberta traders. He stated that he believed that there was some risk to the outages being extended. He further stated that this would increase TransAlta's short position. The potential for the Sundance 1 and 2 outages extending beyond February 15, 2011, a matter that Kaiser had material information on that was not available to other market participants, was clearly a factor in Kaiser's decision to purchase the 100 MW. The Commission finds that, based on this email, it is evident that Kaiser directly or indirectly used a non-public outage record to trade.

5.5.3.5 Did Connelly use outage records to trade between January 6 and 21, 2011?

788. The Commission makes the following findings of fact regarding the information that Connelly had on January 6, 2011, regarding the capability of Sundance 1 and 2 to produce electric energy:

- Connelly was aware that Kaiser was, from time to time, in possession of non-public information.[607]
- Sundance 1 came down on the evening of December 16, 2010.
- On December 17, 2010, TransAlta blacked out all of its traders from the Alberta market.
- Sundance 2 came down on December 19, 2011.
- On December 29, 2010, TransAlta filed its outage record for Sundance 1 and 2 stating that Sundance 1 and 2 would be out until February 15, 2011.
- On December 29, TransAlta removed the trading blackout for the Alberta market.
- TransAlta claimed *force majeure* on Sundance 1 and 2 on January 4, 2011, for boiler tube conditions, with a return to service date of February 15, 2011 and issued a news release explaining its actions.
- On January 6, 2011, Connelly learned that Kaiser wanted the traders to purchase 100 MW of February flat contract either through verbal instructions, by email from Kaiser at 10:49 AM or both. In the email, Kaiser stated that he believed that there was some risk to the outages at Sundance 1 and 2 being extended.

[607] Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 14, paragraph 102.

- Earlier that morning, Fortune emailed Connelly a link to a Calgary Herald article in which the author opined that TransAlta did not know how long the outage would be and that a similar outage in 2001 lasted nine months.

- Kaiser emailed Connelly the bolded extract from the Calgary Herald argument at 9:47 AM, eight minutes after the email from Fortune.

- Connelly purchased 155 MW of February flat contract on January 6, 2011: 50 MW prior to the 9:47 a.m. email, 100 MW between the 9:47 a.m. email and the 10:49 a.m. email and 5 MW after the 10:49 a.m. email.

789. Because the general trading blackout was lifted on December 29, 2010, the same day that TransAlta provided its outage records on Sundance 1 and 2 to the AESO and the PPA buyer, the Commission is also prepared to draw the inference that Connelly knew that the trading blackout related to those two generating units.[608]

790. To prove its case against Connelly, it was incumbent upon the MSA to provide clear, convincing and cogent evidence to demonstrate, on a balance of probabilities, that Connelly had non-public information about the capability of Sundance 1 and 2 to produce electric energy that could reasonably be understood to have a material impact on market price and that Connelly used that information to trade.

791. The Commission finds that the MSA has not met its burden with respect to Connelly for the following reasons.

792. First, the Commission finds that the MSA has failed to demonstrate that Connelly had outage records regarding Sundance 1 and 2. Specifically, the Commission finds that the two emails from Kaiser to Connelly (and others) on January 6, 2011, did not contain non-public information about the capability of the two generating units to produce electric energy.

793. The Commission is not satisfied that the 9:47 email from Kaiser in which he extracted and bolded a passage from the Calgary Herald article provided Connelly with material information that would have given him an advantage over others in the market. The context in which the email was received was important. First, it was Mr. Connelly's evidence that it was likely that the article had been discussed earlier that day at the traders' morning meeting.[609] Second, a link to the article had been circulated to Connelly and others eight minutes earlier by Fortune. Third, the email came from Kaiser, who, along with all the other Alberta traders, had been given the go ahead to trade the Alberta market on December 29, 2010, by Luciuk and Schafer. Fourth, and as discussed above, the information found in the Herald extract was similar to the information provided by Kaiser in his subsequent email to Connelly and van Melle at 10:49, i.e., that there was some risk to the outages at Sundance 1 and 2 being extended.[610]

794. The Commission finds that what set the information Kaiser had apart from the industry speculation at the time was his knowledge of the outage scenarios contemplated by TransAlta for

[608] Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 17, paragraph 130.
[609] Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, page 20, paragraph 146.
[610] Exhibit 14.27, MSA Application, Tab 179, email from Nathan Kaiser, January 6, 2011, PDF page 25.

boiler corrosion and the fact that the units were subsequently taken down to address such boiler corrosion. Neither of Kaiser's January 6, 2011, emails conveyed this essential information to Connelly. Absent this data, the information provided by Kaiser in the emails appears to be similar to the speculative information found in the analyst reports and Calgary Herald article. In the Commission's view, the ambiguous information provided in the emails, without more, would not have given Connelly an advantage over other market participants who did not have that information.

795. Even if it was satisfied that Kaiser's January 6 emails included non-public outage records, which it is not, the Commission finds that Connelly's trading activities between January 6 and 21, 2011, were consistent with his historical trading patterns and the price forecast he had been provided with at the time.

796. In *Walton v Alberta Securities Commission,*[611] the Alberta Court of appeal addressed the inferences that may be drawn from a particular pattern of trading and stated:

> It is possible to draw an inference of insider trading from unusual or anomalous trading patterns, particularly "well-timed, highly uncharacteristic, risky and highly profitable trades" (reasons, paras. 467, 569). To decide if the trading pattern of the particular appellant is anomalous, one must obviously have regard to his or her historical trading patterns. If an investor had previously held shares of Eveready, it would not necessarily be remarkable that they traded in those shares during a period where confidential material changes were occurring. Whether any particular trading was unusual would also depend on other events and news concerning the business of Eveready (see *supra*, para. 12), as well as the personal financial circumstances of any particular investor.[612]

797. The Commission finds that Connelly's trading activities on January 6 and between January 7 and 21, 2011 were consistent with his trading activities leading up to that time. The evidence shows that Connelly began building his February flat contract strategy in September 2010 and had accumulated 205 MW by December 16, 2010. Subsequently 25 MW was sold from his strategy so that on January 5, 2011, prior to the impugned trades, his strategy for February was 180 MW. Connelly added an additional 70 MW to his strategy between January 6 and 21 and brought a total of 250 MW into settle.[613]

798. On January 6, Connelly obtained 155 MW. Connelly purchased 50 MW before Kaiser sent the 9:47 AM email to him and others, and only 5 MW after Kaiser sent the 10:49 AM email instructing the traders to purchase 100MW for him. The fact that Connelly obtained 155 MW that day and allocated 100 MW to the asset book is consistent with his evidence that he likely received a verbal request, either from Kaiser himself or through van Melle, to purchase 100 MW for Kaiser.[614]

799. The Commission also finds that Connelly's trading during the period in question was consistent with the market price forecast for January and February that had been circulated by Fortune on December 30, 2010. As noted above, Fortune forecast bullish prices in January and February with the base case for January being C$80.73/MWh and February being C$86.82/MWh

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611 *Walton v Alberta (Securities Commission)*, 2014 ABCA 273 (CanLII).
612 *Ibid.*, paragraph 29.
613 Exhibit 169.01, Witness Statement of Scott Connelly, December 11, 2014, paragraphs 114, 137 and 178.
614 Tr. Vol. 9, December 16, 2014, pages 1890-1891.

with prices over C$100 for both months in certain scenarios in combination with the Portfolio Bidding Strategy.

800. Having regard to the foregoing, the Commission finds that the MSA has failed to demonstrate, on a balance of probabilities, that Connelly had or used non-public outage records to trade between January 6 and 21, 2011 or that Connelly otherwise breached Section 6 of the *Electric Utilities Act*.

5.5.3.6 Did TransAlta use outage records to trade between January 6 and 21, 2011?

801. Having found on a balance of probabilities that Kaiser used outage records to trade on January 6 and 7, 2011, the Commission likewise finds that TransAlta, as Kaiser's employer used outage records to trade.

802. In *R. v Safety-Kleen,*[615] the Ontario Court of Appeal addressed the liability of a corporation for the acts of its employees. In that matter, both Safety-Kleen and one of its employees (Howard) were charged and convicted under the *Environmental Protection Act* for being in possession of waste for which the generator had not completed a manifest. Safety-Kleen appealed its conviction. The Ontario Court of Appeal found as follows:

> Count 1 in the information is a strict liability offence. Mr. Howard pleaded guilty to that charge. The appellant could escape liability only if it could show on the balance of probabilities that it exercised due diligence. The words of Dickson J. in R. v. Sault Ste. Marie, supra, at p. 1331 aptly describe the meaning of due diligence in this context:
>
> > One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. [emphasis added]
>
> As the above passage makes clear, an employer must show that a system was in place to prevent the prohibited act from occurring and that reasonable steps had been taken to ensure the effective operation of that system. The trial judge addressed the question of due diligence in her reasons. She said in part:
>
> > I cannot accept the defence of due diligence on behalf of the company. Certainly the court does not look for perfection, but it is necessary that there appears to be a sense of compliance to the regulations by the company. The company had put their drivers in a position of a self-reporting situation. They had delegated to their drivers a degree of trust to comply with the regulations. Nevertheless, it is still their responsibility to ensure strict compliance. They cannot delegate and

[615] *R. v Safety-Kleen Canada Inc.*, 1997 CanLII 1285 (ON CA).

> then close their eyes to non-compliance. There are not sufficient safety guards within their system to check for this type of irregularity in completion of such an important document.[616]

803. In this instance, Kaiser sought the advice of Schaefer, TransAlta's Vice President of Commercial Operations and Development, on two separate occasions about whether he could direct trades given what had been revealed to him in the December 3, 2010 email regarding the potential for lengthy outages to address boiler corrosion issues. The evidence before the Commission is that when Kaiser first sought Schaefer's advice, both Sundance 1 and 2 were operating and the hypothetical scenarios related to a planned outage to address boiler corrosion at Sundance 2 which was then scheduled to commence in April 2011.

804. Upon learning that Sundance 1 was coming down for boiler corrosion issues, Luciuk, in consultation with Schaefer, decided to blackout the entire trading floor from trading in the Alberta market. Luciuk explained that this decision was taken out of an abundance of caution because he was concerned that TransAlta might be second guessed after the fact that it had inside information and had been trading on it.

805. Luciuk reinstated trading authority for the Alberta Market on December 29, 2010 for all traders, including Kaiser. The evidence before the Commission is that following receipt of the reinstatement email, Kaiser sought further confirmation from Schaefer that he could trade.

806. The Commission finds that at this point, the circumstances had changed considerably since Kaiser first approached Schaefer in early December. By December 29, 2010, both Sundance 1 and 2 had been taken down for similar boiler corrosion issues. While TransAlta had issued notice of Force Majeure on January 4, 2011, the scheduled return date for the units was February 15, 2011.

807. When Kaiser's trading blackout was lifted by Luciuk, and that reinstatement was confirmed by Schaefer, the Commission finds that Schaefer and Luciuk either knew or ought reasonably should have known that Kaiser had non-public information about the capability of Sundance 1 and 2 to produce electricity that could reasonably be expected to have a material impact on market prices and should have maintained his trading blackout on the basis that he had information that its other traders did not. Instead, Schaefer advised Kaiser that he did not have any non-public information and was clear to manage the Net Asset Position.[617] The Commission finds, that, by allowing Kaiser to trade while in possession of a non-public outage record, TransAlta breached Section 4(1) of the *Fair, Efficient and Open Competition Regulation.*

5.6 The defences asserted by Kaiser and TransAlta

5.6.1 The defences asserted by Kaiser

808. Kaiser asserted the defences of due diligence and reasonable belief in mistaken facts. Kaiser also asserted that the MSA breached its own investigation procedures and that the MSA's investigation and enforcement actions were procedurally unfair.

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[616] *Ibid.*, Section V.
[617] Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 12, paragraph 80.

809. The defence of due diligence is available to Kaiser if he can demonstrate that he took all reasonable care to avoid a breach of Section 4(1) of the *Fair, Efficient and Open Competition Regulation*. In the Commission's view, Kaiser met this onus.

810. Kaiser was provided with outage information regarding Sundance 1 and 2 on December 3, 2010. The evidence shows that he was immediately concerned about the nature of this information and later "blacked himself out" from trading in accordance with TransAlta's policies. Kaiser then sought advice from Schaefer. Schaefer consulted with the TransAlta group that had provided Kaiser with the outage information and decided that the information Kaiser then had was not an outage record and that Kaiser could continue trading.

811. Following the first assurance from Schaefer, Sundance 1 and 2 came down for boiler corrosion issues and all of TransAlta's traders were blacked out from trading in the Alberta market. That restriction was not lifted until December 29, 2010, when TransAlta notified the PPA buyer and the AESO that the outages at both units would extend to February 15, 2015. The evidence before the Commission is that after the trading restriction was lifted, Kaiser once again sought and received specific confirmation from Schaefer that he could trade.[618]

812. The Commission finds that Kaiser's conduct in seeking advice from Schaefer was consistent with TransAlta's Code of Conduct at the time, which stated "Anyone who has a concern about what constitutes ethical conduct or whether a certain course of action violates the code of conduct is expected to raise the concern immediately with their manager..."[619]

813. *Re: Kapusta*[620] is a decision of the Alberta Securities Commission on an insider trading case. It was alleged that a number of officers and employees of an oil and gas company purchased shares in that company while in possession of knowledge of an undisclosed material fact or material change. One of the accused employees, Zalantini, bought company shares in three tranches, one at the end of February and two in mid-March. It was Zalantini's evidence, which the Alberta Securities Commission accepted, that before he made the February share purchase, he asked the company's chief executive officer if there was a blackout on trading at that time and was told that there was not. The Alberta Securities Commission found that Zalantini's inquiry founded a due diligence defence with respect to his February share purchases but not to the shares he purchased in March. The Alberta Securities Commission's reasons were as follows:

> However, we accept in the circumstances, and we find, that the trading-blackout exchange between Zelantini (a Canext employee) and Kapusta (Canext's chief executive officer) prior to Zelantini's 29 February 2008 Canext Share purchase, whether in conjunction with looking for an email or by itself, suffices to avail Zelantini of the "due diligence" defence in relation to this purchase. That said, we do not find this exchange to be sufficiently proximate in time to Zelantini's March 2008 purchases, almost two weeks later, to support the claimed "due diligence" defence in relation to these purchases.[621]

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618 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 12, paragraph 80.
619 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, Tab 3, TransAlta Corporate Code of Conduct, PDF page 35.
620 *Kapusta, Re*, 2011 ABASC 322 (CanLII).
621 *Ibid.*, paragraph 378.

814. The Commission finds the circumstances, in relation to Zelantini's February trades, to be analogous to Kaiser's trade direction on January 6, 2011. By that time, Kaiser had been cleared to trade by a senior TransAlta officer on three separate occasions following his receipt of the December 3, 2010 email. While the first time Kaiser was cleared to trade preceded the outages at Sundance 1 and 2 on December 16 and 19, respectively, the second and third clearances he received followed TransAlta's filing of its outage record for those units with the AESO and the PPA buyer. An important consideration here is that Schaefer's final assurance was not given in the abstract, as he knew exactly what information Kaiser had and decided that Kaiser was not precluded from trading.

815. Having regard to all of the circumstances, the Commission finds that Kaiser has demonstrated, on a balance of probabilities, that he took all reasonable steps to avoid a breach of Section 4(1). Therefore, the Commission finds that Kaiser has established the defence of due diligence. Given this finding, the Commission cannot conclude that Kaiser otherwise breached Section 6 of the *Electric Utilities Act*.

816. Having found that Kaiser has established the due diligence defence, it is unnecessary to consider whether he has also established the defence of reasonable mistake of fact. The Commission addresses Kaiser's arguments regarding the fairness of the MSA's investigation process in Section 5.8.

5.6.2 The defences asserted by TransAlta

817. TransAlta also asserted the defence of due diligence with respect to the trading allegations. For the reasons that follow, the Commission finds that TransAlta has failed to demonstrate, on a balance of probabilities, that it took all reasonable steps to avoid a breach of Section 4(1) of the *Fair, Efficient and Open Competition Regulation*.

818. The Commission finds that TransAlta did not comply with its Document Number 106(a): Power Purchase Arrangement Information Management. As the name suggests, that document set out TransAlta's policy for information management for PPA units.

819. The policy defined "planning information" as "information about TAGP's Alberta generating facilities, that are subject to a PPA, which is not status information."[622] It defined "Status Information" as "details of the timing, duration, or cause of outages at any TransAlta generating facility subject to a PPA. Status information may also include information relating to a final outage plan."[623]

820. The policy prohibited the provision of planning information regarding a PPA unit to a trader except in a non-trading period. "Trader" was defined as "any employee of TEM or TEMUS who conducts energy trading through the Power Pool of Alberta or at the Alberta-B.C. Border."[624]

821. "Non-Trading Period" was defined as follows:

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622 Exhibit 155.01, Witness Statement of Robert Schaefer, December 5, 2014, Tab 3, TransAlta Document Number 106(a): *Power Purchase Arrangement Information Management*, PDF page 38.
623 *Ibid.*
624 *Ibid.*

> "Non-Trading Period" when designated by the Managing Director of TEM means a period of time commencing when Status Information has been shared with a trader and terminating when notification of the status information has been given to the PPA Buyer in accordance with the PPA.[625]

822. The policy contemplates that a Non-trading Period will commence when status information has been shared with a trader. In the Commission's view, the December 3, 2010 email was Status Information, as that phrase was defined in the policy, and it was provided to Kaiser, a trader, at a time that was not a non-trading period. In other words, under TransAlta's policy, such information could only have been provided to Kaiser during a non-trading period. The provision of the Status Information to Kaiser on December 3 breached that policy and resulted in Kaiser being in possession of non-public outage information at a time when he was not prohibited from trading.

823. The Commission further finds that TransAlta's evidence does not show that it took all reasonable steps to assess whether Kaiser had outage information that precluded him from instructing trades at the material times. Soon after receiving the December 3 email, Kaiser sought direction on his continued ability to direct trades from Schaefer who was senior TransAlta management. The only evidence before the Commission about the steps taken by Schaefer to satisfy himself that Kaiser could continue to trade was Schaefer's consultation with the Commercial group regarding the outage scenarios described in the email. There is no evidence to suggest that Schaefer consulted with or sought advice from the regulatory group or legal counsel with respect to Kaiser's continued trading at this point.

824. The situation changed soon after Schaefer gave his initial clearance to Kaiser when Sundance 1 and 2 were taken down because of boiler corrosion issues. At this point, TransAlta rescinded all trading authority in the Alberta market. The evidence filed demonstrates that Schaefer had discussions with TransAlta's legal counsel, Koch, regarding when trading authority could generally be reinstated for the Alberta market. However, there is no evidence to show what steps Schaefer, or anyone else at TransAlta, took to become satisfied that Kaiser should be allowed to instruct trades in the Alberta market given his knowledge of the extended outage scenarios relating to bolier corrosion issues and the fact that Sundance 1 and 2 were taken out of service to address boiler corrosion issues.

825. It appears to the Commission that the same concern occurred to Kaiser, which resulted in him approaching Schaefer after the general trading blackout was lifted to seek specific confirmation that he could resume trading. In the Commission's view, a reasonable person in Schaefer's situation, would have sought advice from its regulatory group and/or legal counsel to confirm that Kaiser, given that he then had information that was far more detailed than the information that the other traders had, could start directing trades again.

826. Schaefer's decision to allow Kaiser to trade appears to contradict Schaefer's own description of how he and TransAlta perceived the prohibition against trading to operate when questioned at the hearing:

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[625] *Ibid.*

> What's crystal clear is that outage information that is to be posted to the AESO or provided through the buyer to the AESO is an outage record. There are times when individuals might be dealing with outage information that is close to that but not quite that. So in other words, a decision hasn't been made on an outage. And so the practice that I encouraged, and that I believe was followed regularly, was when in doubt, err on the side of caution. So in other words, err on the side of blacking yourself out and seek advice from regulatory counsel, from myself.[626]

827. TransAlta provided no evidence about what steps, if any, Schaefer took to satisfy himself that Kaiser could begin instructing trades again following Kaiser's second request for confirmation that he could trade. Because TransAlta deviated from its policy of prohibiting the provision of Status Information to Traders during a Non-Trading Period and because TransAlta provided no evidence to demonstrate that Schaefer took reasonable steps to assure himself that Kaiser could resume trading notwithstanding his possession of a non-public outage record, the Commission finds that TransAlta has not met its onus of establishing, on a balance of probabilities, that it took all reasonable steps to avoid a breach of Section 4(1) of the *Fair, Efficient and Open Competition Regulation* when it allowed Kaiser to instruct trades. Accordingly, the defence of due diligence is not made out by TransAlta.

5.7 Conclusion on the trading allegations

828. The Commission's conclusions with respect to Kaiser, are as follows:

- Kaiser was a market participant at all material times.
- On January 6, 2011, Kaiser had an outage record that he was prohibited from trading on by Section 4(1) *Fair, Efficient and Open Competition Regulation*. Specifically, Kaiser had information regarding the capability of Sundance 1 and 2 to produce electricity that could reasonably be expected to have a material impact on market prices that would give him an advantage over market participants who did not have that information.
- On January 6, 2011, Kaiser used outage records to trade.
- Kaiser has established the defence of due diligence based on repeated assurances from senior TransAlta management that he could direct trades notwithstanding his possession of a non-public outage record.

829. The Commission's conclusions with respect to TransAlta are as follows:

- TransAlta was a market participant at all material times.
- On January 6, 2011, TransAlta knew, or should have reasonably known that Kaiser had information regarding the capability of Sundance 1 and 2 to produce electricity that could reasonably be expected to have a material impact on market prices and would give him an advantage over market participants who did not have that information.
- TransAlta allowed Kaiser to use outage records to trade.

[626] Tr. Vol. 6, December 9, 2014, pages 1480-1481.

- The defence of due diligence is not made out by TransAlta because it failed to demonstrate what steps, if any, it took to decide that Kaiser could instruct trades in the Alberta market notwithstanding that he was in possession of non-public outage records relating to Sundance 1 and 2.

- TransAlta breached Section 4(1) of the *Fair, Efficient and Open Competition Regulation* and, therefore, Section 6 of the *Electric Utilities Act*.

830. The Commission's conclusions with respect to Connelly are as follows:

- Connelly was a market participant at all material times.

- The MSA has failed to demonstrate that Connelly had or used non-public outage records to trade during the period between January 6 and 21, 2011.

831. All of the Commission's conclusions with respect to the trading allegations, are made on the civil standard of a balance of probabilities.

5.8 The fairness of the MSA's investigation into Kaiser and Connelly

832. Because the Commission has decided to dismiss the MSA's allegations against Kaiser and Connelly, it is not strictly necessary for it to rule on their allegations that the MSA's investigation into their conduct was improper or unfair. However, given the serious nature of these allegations, and the request by these two respondents for a cost order as against the MSA, the Commission finds it fitting and proper to provide its views on the fairness of the MSA's investigation into Kaiser and Connelly.

833. Connelly and Kaiser argued that the MSA's conduct during the investigation into their alleged contravention of Section 4 of the *Fair, Efficient and Open Competition Regulation* and other conduct in the present proceeding was unfair and contrary to the MSA's statutory duties, the common law and the MSA's investigation procedures.

834. Both respondents submitted that they received no notice from the MSA that it was investigating their trading activities in January 2011 until the MSA provided them with its Facts and Findings on November 29, 2013, and essentially, this was too late for them to comment on the scope of the investigation or meaningfully discuss the matter with the MSA. In particular, they argued that failure to provide proper notice was contrary to sections 5.1 and 5.2 of the MSA's Investigation Procedures.[627]

835. Connelly also argued that the MSA and its staff were not properly trained to conduct an investigation and identified other aspects of the MSA's conduct that Connelly considered unfair.

836. The result of this unfair conduct, Kaiser says, should nullify the proceedings against him. Or at the least, it should persuade the Commission not to give any deference to the MSA or the adverse inferences that the MSA asks the Commission to make. Connelly takes the latter position as well. Connelly and Kaiser have also asked the Commission to pronounce upon proper

[627] Exhibit 37.02, MSA *Investigation Procedures*, August 11, 2010.

investigatory conduct for the benefit of the MSA in future cases and to make a costs order in favour of them as a direct consequence of the improper conduct of the MSA.

837. The MSA took the position that it had complied with its common law and statutory duty to act fairly and responsibly and with its investigation procedures. It submitted that non-conformance with either the statutory provisions or its investigation procedures did not result in prejudice to Connelly and Kaiser and that its investigation procedures are intended as general guidance to market participants. The MSA argued that a variation of these procedures was justified by the nature of the case in which Connelly and Kaiser's improper trading was discovered and documented at a time when it was already well into a more extensive investigation of the activities of TransAlta. Further, the MSA submitted that no case law was cited where a nullity has been declared in circumstances similar to this case.

5.8.1 Commission findings

838. With respect to Kaiser's position, the Commission does not accept his argument that the MSA's conduct in investigating and prosecuting this case was so offensive, unfair and improper that the proceedings should be declared a nullity against him.

839. Further, the Commission does not accept Kaiser's and Connelly's position that because of the MSA's conduct, the Commission should: a) give no deference to the MSA's case against them and especially adverse inferences related to the timing of exculpatory evidence, b) instruct the MSA about the proper way to conduct an investigation in future cases or c) grant a costs order against the MSA in favour of the two respondents.

840. The statutory basis for Connelly and Kaiser's argument is found in sections 33(7) and 40 of the *Alberta Utilities Commission Act* and Section 7 of the *Market Surveillance Regulation*. Section 33(7) of the *Alberta Utilities Commission Act* directs the MSA to act honestly, in good faith and diligently in carrying out its duties, among other requirements. Section 40 reiterates the requirement of fairness, stating that the MSA must "carry out its mandate in a fair and responsible manner." Section 7 of the *Market Surveillance Regulation* directs the MSA to make public its investigation procedures. In this regard, the MSA has issued its Investigation Procedures in which it outlines the approach and steps that it follows in conducting an investigation.[628]

841. The two respondents' basic contention about the MSA's unfair conduct is that the MSA failed to give them a notice of investigation, contrary to Section 5.1 of the Investigation Procedures and also deprived them of the opportunity to discuss the allegations with the MSA and offer any information to the MSA that they thought was relevant, contrary to Section 5.2 of the document. They claim that these omissions amount to investigatory unfairness, contrary to the above mentioned statutory provisions and common law principles. The Commission confirms that public officials such as the MSA, must act fairly in conducting investigations, especially[629] where there are serious consequences to a person's livelihood and reputation. However, the Commission finds for the reasons that follow, that the MSA did in fact act fairly and responsibly in this case. As a consequence of this finding, the Commission declines to determine what

[628] Exhibit 37.02, MSA *Investigation Procedures*, August 11, 2010.
[629] *Ironside v Alberta (Securities Commission)*, 2009 ABCA 134, (CanLII), paragraph 113.

circumstances may indeed constitute a breach of investigatory fairness and the consequences of such a breach in a proceeding before the Commission.

842. Kaiser's position is somewhat different than Connelly's because in May of 2013, Kaiser was interviewed by the MSA in connection with the investigation into TransAlta's timing of discretionary outages and the trading related to them.

843. He argued that he should have received a notice of investigation at that time and been given the opportunity to retain his own lawyer. The Commission finds that Kaiser was not a party under investigation at that time. The Commission accepts the evidence of the MSA that in May, 2013, Kaiser was interviewed as an employee who possessed relevant information about TransAlta's discretionary outages and trading related to those events. It was not until the emergence of the emails of January 6, 2011, which occurred after the MSA's interview of Kaiser on May 13, 2013,[630] that the MSA directed its attention to Kaiser (and Connelly). The Commission finds that Kaiser has not shown how he was prejudiced by the lack of the notice of investigation prior to the May 2013 interview and, in any event, had the benefit of TransAlta's lawyer who advised the MSA interviewer that Kaiser would not be answering any questions about non-public outage information in the relevant time period.[631]

844. The MSA did not give a notice of investigation to Connelly and Kaiser prior to issuing its Facts and Findings of November 29, 2013. This was not in strict compliance with sections 5.1 and 5.2 of the Investigation Procedures but the Commission does not consider that the failure to issue a notice of investigation amounts to unfair conduct on the part of the MSA because both Connelly and Kaiser had ample opportunity to know and respond to the MSA's case once they had received the Facts and Findings. Both men responded in writing to the Facts and Findings on January 24, 2014.

845. The MSA was conducting a lengthy and complex investigation of TransAlta's Portfolio Bidding Strategy, had interviewed numerous TransAlta employees and examined thousands of documents in the course of the investigation. In its role as an investigator into TransAlta's activities, the MSA had become satisfied in September of 2013, that Connelly and Kaiser were involved in trading on non-public outage information. There was nothing improper about using evidence obtained in the TransAlta investigation for the purpose of establishing a case involving different contraventions and different persons. The fluid nature of an investigation is commented on in *Alberta (Market Surveillance Administrator) v Enmax Energy Corporation,* 2008 ABQB 54, paragraph 9.[632]

846. The Commission finds that in these circumstances, investigatory fairness was preserved by providing Kaiser and Connelly with the MSA's Facts and Findings in November of 2013, without the necessity of first issuing a notice of investigation. The Facts and Findings did more than "describe in general terms the scope of the investigation;" as Section 5.1 of the Investigation Procedures states, the Facts and Findings set out the case as the MSA had assessed it, with supporting evidence.

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630 Exhibit 3110-X0003, Final Argument of MSA, part 2, page 206, paragraph 853, and Tr. Vol. 4, December 4, 2014, page 914, lines 2-25 and page 915, lines 1- 4.

631 Exhibit 170.01, Witness Statement of Nathan Kaiser, December 12, 2014, page 19, paragraph 125.

632 Also, see Exhibit 37.02, MSA *Investigation Procedures*, August 11, 2010.

847. In their replies, Kaiser and Connelly acknowledged that the contents of the Facts and Findings represented a preliminary view of the MSA and a statement of allegations, which may or may not be the subject of a proceeding before the Commission.[633]

848. At their respective requests, the MSA extended the time in which to respond to the Facts and Findings. Kaiser and Connelly raised legal and factual issues in their replies that were relevant to the allegations of trading on non-public outage records and which were clearly intended to persuade the MSA that they had not breached Section 4 of the *Fair, Efficient and Open Competition Regulation*. Both could have included any exculpatory evidence they thought was relevant. For example, Connelly could have informed the MSA that he probably did not open or read the e-mail of January 6, 2010 sent by Kaiser, which referred to the Calgary Herald article. The Commission finds that they were given a fair opportunity to respond to the MSA's case and they took it.

849. The Commission emphasizes that the role of the MSA is to investigate fairly any potential contraventions in the Alberta wholesale electricity market and when satisfied that contraventions have occurred, bring those cases before the Commission for adjudication. It is trite to say that the Commission is not bound simply to accept the MSA's case. The other side of a case before the Commission is, of course, the evidence and argument of the respondents and the Commission considers all the evidence before it determines the outcome of a proceeding.

850. The Commission finds that in this case, Kaiser and Connelly had a full and fair opportunity to mount a vigorous and thorough defence to the MSA's application. The Commission does not impute any unfairness to the MSA because of the legal positions it took on disclosure issues. There was legitimacy to all parties' positions on the various disclosure issues, including the effect of Section 6(12) of the *Market Surveillance Regulation,* as described earlier in this decision.

851. Connelly raised other examples of what he described as unfair or biased behaviour on the part of the MSA, including singling him out as the only trader to be charged, exhibiting an animus toward him because of Connelly's involvement in a Federal Energy Regulatory Commission proceeding in the United States and misrepresenting to the Commission and parties on June 19, 2014, in the pre-hearing meeting, that all relevant and exculpatory documents had been disclosed.

852. The Commission finds that the MSA's knowledge that Connelly was involved in regulatory proceedings in the United States is unremarkable and does not show that the MSA was biased against him. Similarly, the Commission finds the fact that Connelly was the only trader facing enforcement proceedings does not constitute unfair or biased conduct. The MSA has the discretion to proceed against an individual based on the MSA's assessment of the evidence gathered in a fair process where the MSA is satisfied that a person has contravened the relevant legislation.

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633 Exhibit 169.01, Witness Statement of Scott Connelly, Tab O, Reply of Scott Connelly to MSA Summary Facts and Findings Dated November 28, 2013, PDF page 66, paragraph 2; Exhibit 170.01, Witness Statement of Nathan Kaiser, Tab 28, Reply of Nathan Kaiser to MSA Summary Facts and Findings of November 29, 2013, January 24, 2014, PDF page 147, paragraph 2.

853. With respect to Connelly's submission that, at the pre-hearing meeting the MSA misrepresented the extent of its disclosure, the question for the Commission to consider is whether these circumstances show that the MSA breached its statutory duty to act in a fair and responsible manner by not including these documents in its application. The Commission notes that the MSA had amassed approximately 250,000 documents in putting its case together and had selected in a document-intensive exercise, what it believed were the 200 or so documents relevant to its application. The Commission is not satisfied that the representations at the pre-hearing meeting or the failure of Chandler to correct the statements at that time, was the result of deliberate malice or unfairness toward Kaiser or Connelly. Kaiser and Connelly did receive these documents as a result of the Commission's disclosure rulings and utilized them as part of their defences. In that sense, their positions were not prejudiced.

854. Kaiser and Connelly have also pointed to Chandler's answers on cross-examination as an example of the MSA's bad faith. Chandler was rigorously questioned by TransAlta, Kaiser and Connelly over a period of five days (although not continuously) and on some occasions during cross-examination, the Commission finds that he misunderstood the role of a witness. However, looking at the whole of his conduct in the hearing room and taking account of these apparent shortcomings, the Commission does not find that Chandler's comportment during the hearing and, in particular, during a portion of cross examination, demonstrated an innate unfairness or unsuitability for the statutory role he carried out.

855. In summary, the Commission finds that the MSA carried out its mandate in a fair and responsible manner, pursuant to Section 40 of the *Alberta Utilities Commission Act*, throughout the investigation and hearing of this matter.

856. Kaiser and Connelly argued that the Commission should award costs in their favour because the MSA has breached its common law and statutory duties of fairness. An award of costs, they submitted, is a tribunal's expression of disapproval of a party's conduct. Given the Commission's findings in this section that the MSA did not act unfairly, the request for costs is denied.

857. Kaiser and Connelly also submitted that the Commission should instruct the MSA on how to conduct a proper investigation in future cases. Given the findings in this section, the Commission declines to do so.

6 TransAlta's compliance policies and procedures

858. The MSA submitted that TransAlta did not have effective internal compliance policies and practices that prevented anticompetitive conduct from occurring and in particular, criticized TransAlta for lack of a policy and training regarding the use of non-public outage information. It characterized TransAlta's practices as substandard and amounting to a breach of the positive obligation to conduct itself in a manner that supports the fair, efficient and openly competitive operation of the market set out in Section 6 of the *Electric Utilities Act.*

859. The MSA outlined some specific situations in support of its position:

- co-locating asset optimizers with traders and analysts including daily meetings between them

- allowing asset optimizers to self-regulate their use of non-public information
- allowing asset optimizers to obtain outage information from plant staff and share it directly or indirectly with forecast analysts
- allowing asset optimizers to notify traders that non-public outage information was about to go public so they could be ready to trade the instant the information became public
- an incident where no action was taken when an asset optimizer reported a non-compliance
- failure to apply reasonable oversight practices to the Portfolio Bidding Strategy arising from shared information among asset optimizers, traders and analysts that related to discretionary outages,[634]
- failure to retain relevant documents and records and failure to prevent the deletion or loss of potentially relevant documents and records.[635]

860. The MSA argued that TransAlta's failure to implement meaningful compliance policies and practices meant that trading contraventions were inevitable. It maintained that expert or other evidence was not required for the Commission to conclude that on the facts of this case, TransAlta's compliance program failed any reasonable scrutiny for effectiveness.

861. TransAlta submitted that it operated within a culture of compliance and that this was reflected in well understood policies, a vigilant regulatory compliance group, ongoing guidance on regulations and rules, and mandatory training for new trading staff as well as annual refresher courses. Trading staff also had to certify each year that they read and understood the compliance policies. It identified its Corporate Code of Conduct and Policy 106(a): Power Purchase Arrangement Information Management as examples of its rigorous approach to compliance and its trading witnesses at the hearing attested to the importance of their employer's compliance practices in their daily work lives. They could be fired if they did not take the policies seriously.

862. TransAlta further argued that the MSA had not established, on the balance of probabilities, that (i) there existed an identifiable industry standard for compliance plans and policies; (ii) TransAlta's compliance program fell below that proven standard; and (iii) the absence of such a program caused or contributed to the conduct complained of.[636] On this basis, it submitted that the MSA had not proven a contravention of Section 6 of the *Electric Utilities Act*.

Commission Findings

863. The Commission finds that the MSA has not proved, on the balance of probabilities, that TransAlta breached Section 6 of the *Electric Utilities Act* on the basis that its compliance policies, practices and oversight thereof, were inadequate and deficient.

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634 Exhibit 14.02, MSA Application, March 21, 2014, pages 116-119, paragraph 409.
635 *Ibid.*, page 15, paragraphs 53-54.
636 Exhibit 3110-X0162, Final Argument of TransAlta, February 10, 2015, page 221, paragraph 691.

864. The MSA contended that TransAlta's organizational structure and practices around the timing of outages represented compelling evidence of a compliance program that was ineffectual in supporting the fair, efficient and openly competitive operation of the market. However, the MSA's evidence essentially consisted of two things. First, showing how the Portfolio Bidding Strategy unfolded over the November, 2010 to February, 2011 period (the actions of the plant staff, the asset optimizers and the traders). Second, limited evidence from one of TransAlta's competitors, Capital Power,[637] to the effect that Capital Power in its capacity as a PPA owner, segregated its trading staff from any decision making around outages.

865. The MSA did not give any detailed evidence about compliance plans and conduct in the industry and how TransAlta's policies and practices measured up to general industry standards. Importantly, no independent expert evidence was called by the MSA to establish a benchmark for compliance plans and how TransAlta's fared in comparison. Without this type of evidence, the Commission is unable to conclude that TransAlta's compliance policies and practices were sufficiently inadequate as to constitute a contravention of Section 6 of the *Electric Utilities Act*.

866. While the Commission has found that the evidence in this case falls short of establishing a contravention of Section 6 of the *Electric Utilities Act,* effective compliance policies, plans and practices require ongoing review, especially around non-public outage information. The Commission places a high value on a robust compliance regime and strongly suggests that TransAlta retain an outside, independent expert in the compliance field, to review its policies and practices and make recommendations for improvement.

7 Relief requested

867. The MSA sought a finding from the Commission that TransAlta contravened Section 6 of the *Electric Utilities Act* and sections 2(h), 2(j) and 4 of the *Fair, Efficient and Open Competition Regulation*, and that Kaiser and Connelly contravened Section 6 of the *Electric Utilities Act* and Section 4 of the *Fair, Efficient and Open Competition Regulation*.[638]

868. After considering the evidence and arguments presented in this proceeding, and for the reasons given in this decision, the Commission finds as follows:

The outage allegations

a) TransAlta 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 as described in Article 5.2 of the PPA on four occasions (November 19, 2010 at Sundance 5, November 23, 2010 at Sundance 2, December 13-16, 2010 at Sundance 2, Keephills 1 and Sundance 6, and February 16, 2011 at Keephills 2).

[637] Exhibit 14.07, Witness Statement of Bryan DeNeve, Capital Power Corporation, March 19, 2014, pages 5 and 6.

[638] Exhibit 3110-X0003, MSA Final Argument, part 2, January 20, 2015, page 218, paragraph 901; Exhibit 3110-X0174, MSA Reply Argument, February 19, 2015, page 95, paragraph 414.

b) TransAlta could have deferred each of the outage events to off peak hours[639] but chose instead to take them during peak or super-peak hours to maximize the benefit to its own portfolio.

c) TransAlta's timing of outages increased average pool prices from what they would otherwise have been had the outages been scheduled to commence on off peak hours.

d) TransAlta's implementation of the Portfolio Bidding Strategy did affect the forward markets; however, the Commission makes no finding regarding the magnitude of the effects associated with the discretionary outages in question.

e) For each of the four outage events, TransAlta restricted or prevented a competitive response from the respective PPA buyers, contrary to Section 2(h) of the *Fair, Efficient and Open Competition Regulation* and, therefore, Section 6 of the *Electric Utilities Act*.

f) For each of the four outage events, TransAlta manipulated market prices away from a competitive market outcome, contrary to Section 2(j) of the *Fair, Efficient and Open Competition Regulation* and, therefore, Section 6 of the *Electric Utilities Act*.

g) TransAlta has not established the defences of due diligence or officially induced error, with respect to any of the four outage events.

h) TransAlta has not demonstrated that the MSA's investigation into the outage events or the actions it took to seek enforcement against TransAlta for those events, was an abuse of process.

The trading allegations

i) TransAlta, Kaiser and Connelly were "market participants" at all material times.

j) On January 6 and 7, 2011, Kaiser used non-public outage records to trade contrary to Section 4(1) of the *Fair, Efficient and Open Competition Regulation*.

k) Kaiser took all reasonable steps to avoid a breach of Section 4(1) by seeking and getting direction from senior TransAlta management on his continued eligibility to trade on two separate occasions after he received non-public outage records. Kaiser has established the defence of due diligence. Given the finding, the Commission cannot conclude that Kaiser otherwise breached Section 6 of the *Electric Utilities Act*.

l) The evidence tendered by the MSA failed to demonstrate that Connelly had or used non-public outage records to trade during the period between January 6 and 21, 2011 or that Connelly otherwise breached Section 6 of the *Electric Utilities Act*.

[639] The PPAs define peak hours as 7:00 a.m. to 9:00 p.m. on Alberta business days, with all other hours being off peak. Exhibit 14.02, MSA Application, March 21, 2014, page 42, paragraph 158 defines super peak as the period from 5:00 p.m. to 9:00 p.m.

m) TransAlta breached Section 4(1) of the *Fair, Efficient and Open Competition Regulation*, and, therefore, Section 6 of the *Electric Utilities Act*, by allowing Kaiser to trade while in possession of a non-public outage record.

n) TransAlta has not established the defence of due diligence with respect to the trading allegations.

o) The MSA carried out its mandate in a fair and reasonable manner, pursuant to Section 40 of the *Alberta Utilities Commission Act*, throughout the investigation and hearing of this matter.

The compliance allegations

p) The MSA has not proved, on the balance of probabilities, that TransAlta breached Section 6 of the *Electric Utilities Act* on the basis that its compliance policies, practices and oversight thereof, were inadequate and deficient.

869. The MSA stated that if the Commission finds TransAlta has contravened the *Electric Utilities Act* or the *Fair, Efficient and Open Competition Regulation* pursuant to the MSA's application, the MSA will seek an order at the penalty phase pursuant to Section 63(1)(a) and (b) and Section 63(2)(a) and (b) of the *Alberta Utilities Commission Act*. The MSA indicated that it will also seek penalties pursuant to Section 63(1)(b) and Section 63(3) of the *Alberta Utilities Commission Act*.The MSA further indicated that it would seek an order imposing costs of the investigation and hearing against TransAlta and/or Kaiser and Connelly.[640]

870. The *Alberta Utilities Commission Act* establishes in Section 53 that the Commission shall hold a hearing or other proceeding into the matters set out in the MSA's notice of application, and in sections 56 and 63 provides, among other things, that if the Commission finds a person in contravention of the *Electric Utilities Act* or any of its regulation, the Commission may, by order, do any or all of the following: a) impose an administrative penalty, b) impose any terms and conditions and c) prohibit the person from engaging in conduct specified in the order or direct the person to take action specified in the order. Further, Section 66 of that act provides that the Commission may order a person who has not complied with an act or regulation under the Commission's jurisdiction, and who was the subject of an investigation, to pay the costs of the investigation and the related hearing or proceeding.

871. In Decision 2014-204, the Commission confirmed that this proceeding could potentially consist of two phases. The Commission described the two phases as follows:

> The first phase is currently before the Commission; in this phase, the MSA has the burden of proving on the balance of probabilities the allegations of misconduct set out in its notice and application. In the second phase, which will only proceed if the MSA is successful in the first phase, the Commission will consider the remedy for the misconduct established in the first phase.[641]

[640] Exhibit 0014.02, MSA Application, March 21, 2014, pages 119-120, paragraphs 410-413.
[641] Decision 2014-204: Market Surveillance Administrator, Preliminary matters in Market Surveillance Administrator allegations against TransAlta Corporation et al., Mr. Nathan Kaiser and Mr. Scott Connelly, Application No. 1610350, Proceeding 3110, July 11, 2014, paragraph 49.

872. The findings in this decision report constitute the Commission's decision on the first phase of the proceeding. Based on the findings above, the Commission has determined that it must now proceed to the second phase of this proceeding to consider what remedy the Commission will impose against TransAlta as a result of its contraventions of sections 2(h) and (j) and 4 of the *Fair, Efficient and Open Competition Regulation* and Section 6 of the *Electric Utilities Act*. The Commission will issue a process letter in the near future regarding the next phase of this proceeding.

Dated on July 27, 2015.

Alberta Utilities Commission

(original signed by)

Tudor Beattie, QC
Panel Chair

(original signed by)

Henry van Egteren
Commission Member

(original signed by)

Moin A. Yahya
Acting Commission Member

Appendix 1 – Proceeding participants

Name of organization (abbreviation) counsel or representative	Witnesses
TransAlta Corporation et al. (TransAlta) Tristram Mallett – Osler, Hoskin & Harcourt LLP Martin Ignasiak – Osler, Hoskin & Harcourt LLP Christopher Naudie – Osler, Hoskin & Harcourt LLP Kelly Osaka – Osler, Hoskin & Harcourt LLP Jessica Kennedy – Osler, Hoskin & Harcourt LLP	TransAlta Panel R. Schaefer D. Luciuk B. van Melle K. Koay D. Riddell TransAlta Operations Panel M. Clark (Investigative Engineering Corporation) S. Paterson (PIKA Solutions) T. Burnett (Intertek AIM) R. Emmott R. Dewalt T. Gelinas TransAlta Economic Panel J. Falk (NERA Economic Consulting) R. Shehadeh (NERA Economic Consulting) J. Frayer (London Economics International LLC)
Mr. Nathan Kaiser (Kaiser) Steven H. Leitl – Norton Rose Fulbright Canada LLP Lara Mason – Norton Rose Fulbright Canada LLP Martha Peden – Norton Rose Fulbright Canada LLP	N. Kaiser
Mr. Scott Connelly (Connelly) Eric R. Hoaken – Lax O'Sullivan Scott Lisus LLP Larissa C. Moscu – Lax O'Sullivan Scott Lisus LLP Lauren P.S. Epstein – Lax O'Sullivan Scott Lisus LLP	S. Connelly
Market Surveillance Administrator Randall W. Block, QC – Borden Ladner Gervais LLP John D. Blair, QC – Borden Ladner Gervais LLP Sandi J. Shannon – Borden Ladner Gervais LLP	MSA Panel H. Chandler M. Ayres J. Church (Church Economic Consultants Ltd.) S. Eisenhart (VATIC Associates) D. Heath (Renoir Consulting Inc.) C. Joy (ENMAX Energy Corporation) B. DeNeve (Capital Power Corporation)

Alberta Utilities Commission

Commission panel
- Tudor Beattie, QC, Panel Chair
- Henry van Egteren, Commission Member
- Moin A. Yahya, Acting Commission Member

Commission staff
- Doug Larder, QC (General Counsel)
- JP Mousseau (Commission Counsel)
- Darin Lowther (Director, Markets)
- Andrew Davison (Senior Market Analyst)
- Deniz Corbaci (Economic Research Analyst)
- Andrew Eckert (Visiting Scholar)

Appendix 2 – List of persons referred to in this decision

MSA Employee	Job Title (at the time of events)
Ayres, Matt	Deputy Administrator and Chief Economist
Chandler, Harry	Administrator
Kendall-Smith, Richard	
TransAlta Employee	**Job Title (at the time of events)**
Black, Paul	Commercial Analyst
Cochlan, Marcy	Manager, Regulatory Affairs
Connelly, Scott	Head Trader
Dewalt, Ronald	SD5/SD6 Operations Manager
Edge, Michael	SD5/SD6 Shift Supervisor
Emmott, Robert	Chief Engineer
Farrell, Dawn	Chief Operating Officer
Farris, Brendan	Market Analyst
Fortune, Ross	Senior Western Market Analyst
Gelinas, Trevor	SD1/SD2 Operations Manager
Gellner, Brett	Chief Financial Officer
Grieco, John	Commercial Manager, Thermal
Gollner, Steven	
Hein, Frank	KH1/KH2 Shift Supervisor
Jackson, Doug	Vice President of Coal and Mining Operations
Kaiser, Nathan	Asset Optimizer
Koay, Kelvin	Commercial Manager, Thermal
Koch, Sterling	Vice President of Regulatory and Legal Affairs
Kline, Gary	Director, Commercial Management
Luciuk, Dean	Vice President of Trading and Asset Optimization
McCarter, Mark	Keephills Operation Manager
McLachlan, Len	SD5/SD6 Plant Manager
Navarro, Jerry	Keephills Plant Manager
Nelson, Bob	Sundance Plant Manager
Nguyen, Thanh	Regulatory Specialist
O'Connor, James	Portfolio Analyst/Asset Optimizer
O'Driscoll, Jacqueline	
Politylo, Jason	Technical Director, Hedging
Price, Cairns	Regulatory Counsel
Root, Dean	
Rylance, Timothy	Keephills Shift Supervisor
Schaefer, Rob	Vice President of Commercial Operations and Development
Shaffer, Blake	Term Trader in Alberta Forward market
Sharma, Dinesh	Employee of TransAlta's Project Engineering/Project Management group
Strickland, Ken	Chief Legal Officer
van Melle, Blain	Term Trader in Alberta Forward market
Vaughan, Ken	SD5/SD6 Maintenance Manager

Wilkins, Marianne	
Wood, Stu	Outage Services, Boiler Supervisor
Other Persons	**Job Title / Role**
Coutts, Tracy	Manager of Commercial Contracts, ENMAX

Appendix 3 – Summary of outage events

Event 1: Sundance 5 on November 19, 2010

Date / Time	Events
November 19, 2010 06:34	Sundance 5 unit was running at 353 MW and dispatched up to 370 MW. Alarm indicated that deaerator level control valve was failing (valve H47).[642]
~07:00	TransAlta derated Sundance 5 to 280 MW – manual bypass valve used.[643]
07:16	TransAlta informed Capital Power that Sundance 5 derated until noon.[644]
08:55	Michael Edge emailed Dinesh Sharma that "Unit 5 is having problems and will likely require co[m]ing off line. Will this help you? We do not have a time set up for an outage yet."[645]
09:37	Trevor Gelinas emailed Nathan Kaiser: "Sun 5…You aware it is coming off line."[646]
09:58	Nathan Kaiser emailed Len McLachlan and Trevor Gelinas that "I've worked through the numbers here and it makes sense to remove it from service as soon as possible. The cost of the penalty for the On peak hours today will be about $50k higher than is we wait until 21:00 tonight; we can will [sic] be able to make this up with higher prices today."[647]
11:26	TransAlta informed Capital Power, that Sundance 5 would be derated to 280 MW until 21:00 on November 19, 2010, and then come offline for 48 hours because "Unit outage to repair deaer.level control/hotwell control."[648]
12:37	Michael Edge emailed Len McLachlan and Ken Vaughan indicating: "Marketing has identified TA as long. Nathan mentioned ideal is off line 16:00."[649]
12:53	Ken Vaughan emailed Michael Edge and Len McLachlan: "We have no parts for H47. PM&M are all over this and what we have from Spartco is 3-4 weeks

642 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*,March 21, 2014, page 11, paragraph 28.
643 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, page 11, paragraph 28.
644 Exhibit 14.15, MSA Application, Tab 57, TMS Restatements for November 18 and 19, 2010, PDF page 21.
645 Exhibit 14.16, MSA Application, Tab 63, email from Michael Edge, November 19, 2010, PDF page 15.
646 Exhibit 14.16, MSA Application, Tab 64, email from Trevor Gelinas, November 19, 2010, PDF page 17.
647 Exhibit 14.15, MSA Application, Tab 56, email from Nathan Kaiser, November 19, 2010, PDF page 18.
648 Exhibit 14.15, MSA Application, Tab 57, TMS Restatements for November 18 and 19, 2010, PDF page 21.
649 Exhibit 14.16, MSA Application, Tab 66, email from Michael Edge, November 19, 2010, PDF page 21.

	delivery."[650]
14:40	Dewalt stated that sometime during the day, in addition to the H47 valve malfunction, an issue developed with the water level signal (which is the feed for the overall feedwater system), which required manual control with no visibility of level in the control room. "With the multiple issues detected, it became a significant equipment and safety risk to continue to operate the unit. In addition, through correspondence with the asset optimizers, we learned that it would be financially beneficial if we took the plant down earlier. Therefore, we had no incentive to incur the significant risks associated with operating the unit. We therefore began to ramp down around 14:40 and the unit was off by 18:00."[651]
16:31	TransAlta informed Capital Power that the unit would be offline at 17:30 rather than 21:00.[652]
16:37	TransAlta informed Capital Power that the unit was "dropping load to come offline."[653]
16:40	Sundance 5 ramped down from 274.2 MW at 16:40 to 0 MW at 18:00.[654]
November 20, 2010	Kaiser stated: "Sun 5 came down early" and "[w]ith the unit coming offline and Poplar Creek pricing up, prices jumped to over $400 over the peak hours. Our portfolio benefitted from a ton of length."[655] To which Schaefer responded on November 20, 2010 via email: "[g]reat job this first week. Some great value and it's clear we're learning a ton."[656]
November 21, 2010 18:06	Sundance 5 returned to service (an outage of approximately 48 hours).[657]

650 Exhibit 14.16, MSA Application, Tab 65, email from Ken Vaughn, PDF page 19.
651 Exhibit 150.01, Witness Statement of Ron Dewalt, December 5, 2014, page 9, paragraphs 54-55.
652 Exhibit 14.15, MSA Application, Tab 57, TMS Restatements for November 18 and 19, 2010, PDF page 21.
653 Exhibit 14.15, MSA Application, Tab 57, TMS Restatements for November 18 and 19, 2010, PDF page 21.
654 Exhibit 14.16, MSA Application, Tab 67, AESO dispatch and generation data, PDF page 24.
655 Exhibit 14.15, MSA Application, Tab 58, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 19*, November 20, 2010, PDF page 22.
656 Exhibit 14.15, MSA Application, Tab 59, email from Rob Schaefer, November 20, 2010, PDF page 25.
657 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, page 11, paragraph 28.

Event 2: Sundance 2 on November 23, 2010

Date / Time	Events
November 21, 2010 11:02	Sundance 2 was derated from 280 MW available capability to 255 MW due to "nbfp c/v [north boiler feedwater pump control valve] problems."[658]
November 22, 2010 18:41	Trevor Gelinas emailed Nathan Kaiser stating: "In order to repair the feedwater control v/v on Sun 2 we need to remove a pump from service and derate the unit to approx. 130 mw's. We may plan to do it tomorrow during peak...will be a 6-8 hour derate...a successful repair will allow us to restate the unit for full load. Are we still in place for derates during peak?"[659]
21:38	Nathan Kaiser replied to Trevor Gelinas via email, stating: "If it works ok for you for a manpower issue I would say let's look at doing it from about 2 pm on. Ideally you'll be derated through dinner until about 8 pm"[660]
November 23, 2010 09:11	Sundance 2 was derated from 255 MW available capability to 125 MW due to "Nbfp c/v repair."[661]
10:13	Nathan Kaiser circulated an email titled *Portfolio Bidding Report – Nov 23*. The strategy section of the report included the following: "The big impact today was due to the timing of a derate at Sundance 2. Trevor Gelinas, Operations Manager for Sun 1/2, had called me Monday afternoon about timing a 150 MW derate in order to fix the ongoing derate the plant had been experiencing. We determined to take the derate during the day for a price impact. This derate by far had the largest impact on price. This was a great example of the ongoing coordination we have had with AB Thermal to optimize outages."[662]
November 24, 2010 00:00	Sundance 2 returned to 280 MW available capability and "normal ops."[663]

[658] Exhibit 14.17, MSA Application, Tab 76, AESO restatement data for November 21, 2010, PDF page 17.
[659] Exhibit 14.17, MSA Application, Tab 71, email from Nathan Kaiser, November 22, 2010, PDF page 6.
[660] Exhibit 14.17, MSA Application, Tab 71, email from Nathan Kaiser, November 22, 2010, PDF page 6.
[661] Exhibit 14.17, MSA Application, Tab 77, AESO restatement data for November 23, 2010, PDF page 19.
[662] Exhibit 14.17, MSA Application, Tab 74, email from Nathan Kaiser, *Portfolio Bidding Report – Nov 23*, November 24, 2010, PDF page 12.
[663] Exhibit 14.17, MSA Application, Tab 77, AESO restatement data for November 23, 2010, PDF page 19.

Event 3: Sundance 2 / Keephills 1 / Sundance 6 on December 13 and 14, 2010

Date / Time	Events
December 11, 2010 20:25	Michael Edge emailed Trevor Gelinas and Ron Besler stating: "[s]mall noise that is considered to be a small boiler leak on U2, located on south furnace lower boiler near mid wall area. Leak can be heard from the porthole with the soots steam supply isolated. My current plan is to continue monitoring, awaiting outage and ACI electrical planning.[664]
20:28	Trevor Gelinas emailed James O'Connor: "[t]houghts of when to take off for an outage?"[665]
December 12, 2010 08:58	Stan Petersen emailed two TransAlta distributions lists and stated: "SD U#2 has sprung a leak @ the south (left) Bullnose Inspection port, Ops is saying that it has gotten louder since they 1st heard it, I came in this AM & listened, still pretty small but it is there, it will probably run until the [w]eekend if that is what you want. Will monitor daily[.]"[666]
12:26	Trevor Gelinas emailed James O'Connor: "[d]ue to the position of the leak we may need to take it off sooner, [h]ow does Wednesday look with the temps cooling of[f] Thursday."[667]
13:46	James O'Connor replied to Trevor Gelinas: "[a]s it stands today, forecast is calling for cold temperatures Thursday and Friday so coming off Wednesday evening (HE17) is the most opportune time from a marketing perspective. If the forecast holds, the portfolio benefit of stronger prices from the cold temps and Sun 2 offline should offset the increased RAPP penalty. I would like to rerun the numbers tomorrow with a more accurate weather forecast but a Wed. evening outage looks very promising.[668]
December 13, 2010 ~08:00	Boiler leak was found on Keephills 1.[669]
09:05	Tim Rylance emailed a TransAlta distribution list: "Keephills Unit one has a suspected boiler leak in the upper area of the furnace in and around the Superheaters. The leak sounds louder on the east side around the 9th floor, and may be on the superheater. Presently we have no plans to take the unit off line."[670] [emphasis in original]

664 Exhibit 14.18, MSA Application, Tab 85, email from Michael Edge, December 11, 2010, PDF page 14.
665 Exhibit 14.18, MSA Application, Tab 85, email from Michael Edge, December 11, 2010, PDF page 14.
666 Exhibit 14.18, MSA Application, Tab 86, email from Stan Petersen, December 12, 2010, PDF page 16.
667 Exhibit 14.18, MSA Application, Tab 86, email from Stan Petersen, December 12, 2010, PDF page 16.
668 Exhibit 14.18, MSA Application, Tab 87, email from James O'Connor, PDF page 18.
669 Exhibit 14.18, MSA Application, Tab 87, email from James O'Connor, PDF page 20.
670 Exhibit 14.19, MSA Application, Tab 90, email from Tim Rylance, December 13, 2010, PDF page 2.

09:16	Nathan Kaiser emailed James O'Connor regarding a suspected boiler leak at Keephills 1;"Jerry is going to call you. Give me a shout once you[']ve talked to him."[671]
09:20	Plant Manager at Keephills 1 emailed plant staff, stating that the Keephills 1 outage might be scheduled for "this week, Wednesday evening."[672]
10:06	Brendan Farris emailed James O'Connor and stated: "I have attached the price forecast which includes Wednesday (BASE, ONE UNIT & TWO UNIT STARTING HE17), THURSDAY (BASE, ONE UNIT & TWO UNIT), Friday (BASE, ONE UNIT, TWO UNIT ENDING HE17) and then the same scenarios if the outage started on Friday HE17. It's pretty clear to me that the value is starting on the Wednesday evening with Thursday forecast settle around $260 with two units out. I did not include pricing up in the forecast so if you can take another 300MW off the grid you are looking at a +$300 day for Thursday. The weekend I am assuming no wind. There is tightness for the weekend with two units out but nothing compared to the Thursday and Friday as we lose between 200-400MW of demand. Let me know if you want to discuss."[673]
12:08	Battle River 5 (PPA Owner is ATCO Power[674] and PPA Buyer is Capital Power) was dispatched down from 385 MW to 0 MW, with the unit steadily ramping down, eventually providing 0 MW by 13:44.[675]
12:52	Brendan Farris emailed James O'Connor an updated price forecast email which stated: "I am assuming with KH2, SD2 and BR5 we lose 1000MW of base load generation. I am seeing some pretty expensive prices for tomorrow. I was conservative on some of the early morning prices tomorrow. The [F]riday offer curve was showing some $800 hours during the morning ramp. Let me know if you want to discuss."[676]
12:59	Brenden Farris emailed James O'Connor: "[n]ow that I think about it with Battle River 5 off cancelling out the wind, these days are identical to [T]hursday/[F]riday now. It shouldn't matter when you take them off, should have a similar [e]ffect on price. Unless Battle River 5 doesn't come back for [T]hursday/[F]riday[.]"[677]

671 MSA Application, Tab 90, email from Tim Rylance, December 13, 2010, PDF page 2.
672 Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, page 17 paragraph 38.
673 Exhibit 14.19, MSA Application, Tab 91, email from Brenden Farris, December 13, 2010, PDF page 4, with price forecasts at PDF pages 5-10 of 30.
674 Exhibit 14.08, MSA Application, Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 1, paragraph 5.
675 Exhibit 14.19, MSA Application, Tab 92, AESO dispatch and generation data, PDF page 12.
676 Exhibit 14.19, MSA Application, Tab 93, email from Brendan Farris, December 13, 2010, PDF page 14, with the price forecasts at PDF pages 15-16.
677 Exhibit 14.19, MSA Application, Tab 94, email from Brenden Farris, December 13, 2010, PDF page 18.

13:22	James O'Connor emailed Russell Asplund with instructions to change the offers at Genesee 3. The revisions were forwarded to Capital Power and EPCOR EMC at 13:29, and to the AESO by 13:32.[678]
13:46	James O'Connor emailed Trevor Gelinas, Troy Pederson and two TransAlta distribution lists: Sundance -- let's make sure Sun 5 is restated to ~$24 for HE17 and onwards. We also want to take Sun 2 down for HE17 (5pm) to repair the boiler leak. Keephills -- similar to Sun 2, we want to take the unit down for repair beginning HE17 (5pm) All restat[e]ments must be submitted by 1:59.[679]
13:51	TransAlta informed TransCanada that the Sundance 2 unit was coming offline at 17:00 for 48 hours due to a boiler leak.[680]
13:52	TransAlta informed ENMAX that the Keephills 1 unit was coming offline at 17:00 for 48 hours due to a boiler leak.[681]
13:54	ENMAX called the Keephills operator to verify that the Keephills 1 unit would be coming offline as declared, and asked: "are there any other options with this?" To which the response was: "we have got a big boiler leak here, so it's the way it has to be here....they just had their big meeting out there."[682]
13:58	ENMAX called the Keephills 1 supervisor and asked: "is there any way you can push this until, like 19:00" and was advised: "no...the boiler leak has taken a turn for the worse."[683]
13:59	TransCanada scheduled an outage for Sundance 2 starting at 17:00. Shortly thereafter, the outage information for Sundance 2 became public via reports on the AESO website.[684]
14:09	Capital Power changes the offers for TransAlta's uprate capacity at the Sundance 5 unit.[685]
14:12	ENMAX scheduled an outage for the Keephills 1 unit starting at 17:00. Shortly thereafter, the outage information for Keephills 1 became public via

678 Exhibit 14.26, MSA Application, Tab 165, email from James O'Connor, Decembe 13, 2010, and Tab 166, AESO restatement data, PDF pages 13 and 15.
679 Exhibit 14.19, MSA Application, Tab 97, email from James O'Connor, December 13, 2010, PDF page 24.
680 Exhibit 14.19, MSA Application, Tab 95, TMS restatement data, PDF page 20.
681 Exhibit 14.19, MSA Application, Tab 96, TMS restatement data, PDF page 22.
682 Exhibit 14.08, MSA Application Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 9, paragraph 41.
683 *Ibid.*, page 9, paragraph 41.
684 Exhibit 14.02, MSA Application, March 21, 2014, page 104, paragraphs 368.
685 Exhibit 14.02, MSA Application, March 21, 2014, page 104, paragraphs 369.

	reports on the AESO website.[686]
14:17	James O'Connor emailed Paul Black, Kelvin Koay, John Grieco and copied Sterling Koch, Marcy Cochlan, Dean Luciuk, Nathan Kaiser and Tim Rylance indicating "I just received a call from the shift supervisor Tim Rylance at Keephills. He has advised ENMAX is requesting KH1 stay on until 19:00 (KH1 is scheduled to come offline for HE17 to repair a boiler leak). Please confirm that we have no obligation to stay on for the extra hour."[687]
14:50	James O'Connor responded to Tim Rylance and the group on the 14:17 email that "[i]f Enmax gets in touch with you again about the KH1 outage, please advise that we have considered their request but will proceed with the original schedule."[688]
16:08	Sundance 2 began to be dispatched down from 200 MW, and by 17:10 the unit was completely offline.[689]
~16:55	Keephills 1 unit was fully offline.[690]
December 14, 2010 07:27	Steve Gollner emailed the CMT Sundance 5 6 Forced Outage distribution list indicating "boiler leak sun 6…8th floor corner 8, waiting for report from boiler inspector[.]"[691]
07:30	Stu Wood replied to Steve Gollner indicating "[i]t is in the reheat platens on the right side of the boiler."[692]
07:36	Len McLachlan emailed Ken Vaughan and Ron Dewalt and stated: "[g]ents please send me the plan once you have reviewed with marketing."[693]
07:49	Len McLachlan forwarded Stu Wood's email to Bob Nelson and stated: "[t]he leak sounds like it is in the reheat. Ron and Ken will review with marketing and [sic] I will send out a plan soon."[694]
10:06	Len McLachlan emailed Bob Nelson, Ken Vaughan and Ron Dewalt regarding the "S6 Forced Outage" and stated "Bob, sun 6 boiler leak is small and we will be waiting till sun 2 and Keephills come back before we schedule it off. Ron is working with marketing to optimize the time and we will send out a detailed plan by end of day[.]"[695]

[686] Exhibit 14.02, MSA Application, March 21, 2014, page 104, paragraphs 370.
[687] Exhibit 14.19, MSA Application, Tab 98, email from James O'Connor, December 13, 2010, PDF page 26.
[688] Exhibit 14.19, MSA Application, Tab 98, email from James O'Connor, December 13, 2010, PDF page 26.
[689] Exhibit 14.19, MSA Application, Tab 99, AESO dispatch and generation data, PDF page 30.
[690] Exhibit 14.02, MSA Application, March 21, 2014, page 70, paragraphs 242.
[691] Exhibit 14.26, MSA Application, Tab 100, email from Steve Gollner, December 14, 2010, PDF page 2.
[692] Exhibit 14.26, MSA Application, Tab 100, email from Steve Gollner, December 14, 2010, PDF page 2.
[693] Exhibit 14.26, MSA Application, Tab 104, email from Len McLachlan, December 14, 2010, PDF page 11.
[694] Exhibit 14.26, MSA Application, Tab 100, email from Steve Gollner, December 14, 2010, PDF page 2.
[695] Exhibit 14.26, MSA Application, Tab 101, email from Len McLachlan, December 14, 2010, PDF page 4.

10:06	Bob Nelson replied to Len McLachlan "[a]re you thinking it will be a 48 hour duration or less? Sun 2 will be 48 hours is cut out is required, 40 in temp repair, will know shortly. Keephills will be 48, maybe a little longer and they may have another area to repair? Is marketing suggesting waiting until one or both units come back on? Once we get confirmation on timing and the plan put together I will send Doug a note."[696]
10:38	Len McLachlan replied to Bob Nelson: "James is working out the numbers still on when to take it off."[697]
10:49	Ron Dewalt emailed Stu Woods and stated: "marketing is looking at perhaps taking Unit 6 off tonight being of most benefit to the corporate position so I have 2 questions 1) are you confident the leak can be found? 2) will you have people available for the fix tomorrow? Please advise, thanks."[698]
11:19	Ron Dewalt emailed James O'Connor: "[w]e would likely be using contractors for repair work if we took Unit 6 off tonight, which adds to cost but can be done if it provides sufficient benefit."[699]
11:26	James O'Connor emailed Ron Dewalt (copied Nathan Kaiser): "[t]hanks Ron, I have asked our price analyst to run the different price scenarios so I will get back to you after I am able to calculate the Portfolio impact of taking the unit down tonight, later this week, or the weekend. I will advise shortly."[700]
11:32	Brendan Farris emailed James O'Connor with price forecasts with 400 MW coming offline HE17 on Tuesday versus 400 MW coming offline on Wednesday, and stated: "[l]ooks like you guys are right. Tonight looks best. Not including TCPL pricing up."[701]
11:47	Nathan Kaiser circulated an email titled *Portfolio Bidding Report – Dec 10-13.* The strategy section of the report included the following: "On Friday we offered up Sundance Uprates, Poplar Creek and G3. Market was tight due to cold temps and no wind. On Monday we took 2 units offline for the super peak to optimize price for the balance of our portfolio."[702]
12:03	James O'Connor emailed Dean Luciuk (copied Nathan Kaiser) regarding "Unit 6 boiler leak" and stated: "[h]ey Dean, do you have a minute to discuss? We should also discuss with Sterling and Doug."[703]

696 Exhibit 14.26, MSA Application, Tab 102, email from Len McLachlan, December 14, 2010, PDF page 6.
697 Exhibit 14.26, MSA Application, Tab 102, email from Len McLachlan, December 14, 2010, PDF page 6.
698 Exhibit 14.26, MSA Application, Tab 105, email from Ron Dewalt, December 14, 2010, PDF page 13.
699 Exhibit 14.26, MSA Application, Tab 107, email from Ron Dewalt, December 14, 2010, PDF page 17.
700 Exhibit 14.26, MSA Application, Tab 107, email from James O'Connor, December 14, 2010, PDF page 17.
701 Exhibit 14.26, MSA Application, Tab 108, email from Brenden Farris, December 14, 2010, PDF page 19, with price forecasts pages 20-25.
702 Exhibit 14.18, MSA Application, Tab 83, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 10 – 13*, December 14, 2010, PDF pages 8-9.
703 Exhibit 14.20, MSA Application, Tab 107, email from Ron Dewalt, December 14, 2010, PDF page 17.

12:38	James O'Connor emailed Ron Dewalt (copied Nathan Kaiser): "Ron, please take Sun 6 offline for HE17 to repair the boiler leak. Also, TMS will have to be updated immediately."[704]
13:02	TransAlta informed Capital Power that the Sundance 6 was coming offline at 17:00 for 48 hours due to a boiler leak.[705]
13:14	James O'Connor emailed March Cochlan (copied Sterling Koch and Nathan Kaiser) and stated: "I advised the shift supervisor to take Sun 6 off for HE 17 but they restated for HE18. Since it is currently HE 14, is there any issue if I request they take the unit down an hour earlier as originally requested? HE 17 is still outside the T minus 2 window. Please advise."[706]
13:34	James O'Connor emailed Ron Dewalt (coped Nathan Kaiser): "[h]ey Ron, I have yet to receive a TMS confirmation email. If we are to restate the outage to begin at 4pm this evening TMS must be updated immediately."[707]
14:56	Ron Dewalt emailed Len McLachlan with an update regarding "Unit 6 Outage". The email included: "[m]arket recommendation/impact?? Market dictated time off of 16:00 today[.]"[708]
15:30	Sundance 6 began to be dispatched down from 370 MW, and by 16:02 the unit was completely offline.[709]
December 15, 2010 08:20	Nathan Kaiser circulated an email titled *Portfolio Bidding Report – Dec 14*. The strategy section of the report included the following: "With 3 Thermal units offline and a boiler leak on Sun 6 we made the decision to bring Sun 6 offline to repair the leak. Having taking these units offline, we priced all our units at marginal cost during the evening peak." At the end, he added: "One final note – great work by our plant managers at AB Thermal over the past 2 days. All 3 of the outages were discretionary and all 3 plant managers worked with us on the timing. It means juggling schedules and moving into position faster than they might have to otherwise, but we received full support through the process. Great work!"[710]
16:01	Keephills 1 came back online with 310 MW available capability.[711]
December	Sundance 2 came back online with 5 MW of available capability, reaching 280 MW of available capability by 16:52.[712]

[704] Exhibit 14.18, MSA Application, Tab 82, email from James O'Connor, December 14, 2010, PDF page 6.
[705] Exhibit 14.21, MSA Application, Tab 110, TMS restatement data, PDF page 2.
[706] Exhibit 14.21, MSA Application, Tab 111, email from James O'Connor, December 14, 2010, PDF page 4.
[707] Exhibit 14.21, MSA Application, Tab 111, email from James O'Connor, December 14, 2010, PDF page 4.
[708] Exhibit 14.21, MSA Application, Tab 112, email from Ron Dewalt, December 14, 2010, PDF page 7.
[709] Exhibit 14.21, MSA Application, Tab 113, AESO dispatch and generation data, PDF page 9.
[710] Exhibit 14.18, MSA Application, Tab 84, email from Nathan Kaiser, *Portfolio Bidding Report – Dec 14*, December 15, 2010, PDF pages 11-12.
[711] Exhibit 14.21, MSA Application, Tab 114, AESO restatement data, PDF page 11.
[712] Exhibit 14.21, MSA Application, Tab 115, AESO restatement data, PDF page 13.

16, 2010 07:26	
12:33	Sundance 6 came back online with 5 MW of available capability, reaching 377 MW available capability by 23:35.[713]

[713] Exhibit 14.21, MSA Application, Tab 116, AESO restatement data, PDF page 15.

Event 4: Keephills 2 on February 16, 2011

Date / Time	Events
February 14, 2011 14:26	Frank Hein emailed CMT Forced Outage Heads-Up distribution list regarding "boiler leak – U2", that "3 3/2 floor, West wall by economiser hopper. No visual of leak yet."[714]
15:01	Mark McCarter emailed Doug Jackson, Jerry Navarro and Fred Todemann regarding "K2 Report Waterwall Leak on the 5&2/3 floor west side of boiler in the economizer area" and stated: "K2 Report Waterwall leak on the 5&2/3 floor west side of boiler in the economizer area. KHP personnel will review the K2 Forced Outage SAP package. I spoke with James O'Connor and depending on the recommendations of the Boiler Repair Team we've been given two possible off-line dates/times Tue, Feb 15 @ 17:00 hrs or Wed, Feb 16 @ 17:00 hrs."[715]
16:11	Mark McCarter emailed Doug Jackson, Jerry Navarro and Fred Todemann and indicated: "K2 scheduled forced outage for economizer leak start date/time is Wed, Feb 16 @ 18:00 hrs."[716]
16:32	James O'Connor emailed Mark McCarter (copied Nathan Kaiser) and stated: "A Wednesday outage will save us approximately $89,678 in RAPP penalties since on peak RAPP will be ~$105; relative to an on peak RAPP of ~$122 if the outage went ahead tonight. Also, from an incentive standpoint (i.e. production greater than 340MW), the revenue loss is approx.. $23,586 less by delaying the outage. In summary, from strictly a RAPP perspective the cost savings is approx.. $113,264 by waiting until Wednesday to take the unit off. It sounds like we are in the final stages of scheduling that outage so we will have to enter the outage into TMS to ensure we stay compliant with AESO regulations."[717]
17:13	TransAlta informed ENMAX that Keephills 2 would be coming offline Wednesday, February 16, 2011 at 18:00 for a 48 hour period, with the comment "unit offline."[718]
17:27	Jerry Navarro emailed Mark McCarter "[h]ave ops restate K2 boiler leak for 48 hours at the time you and James worked out as soon as they can."[719]
18:26	Jerry Navarro emailed Stu Wood and Dean Root regarding "K2 welding jobs for forced outage this week" and stated: "[a]s you are aware, K2 has an economiser leak. Small at present but we are scheduled to come off on

[714] Exhibit 14.22, MSA Application, Tab 129, email from Frank Hein, February 14, 2011, PDF page 31.
[715] Exhibit 14.22, MSA Application, Tab 122, email from Mark McCarter, February 14, 2011, PDF page 10.
[716] Exhibit 14.23, MSA Application, Tab 130, email from Mark McCarter, February 14, 2011, PDF page 2.
[717] Exhibit 14.23, MSA Application, Tab 132, email from James O'Connor, February 14, 2011, PDF page 6.
[718] Exhibit 14.23, MSA Application, Tab 131, TMS restatement data, PDF page 4.
[719] Exhibit 14.23, MSA Application, Tab 132, email from James O'Connor, February 14, 2011, PDF page 6.

	Wednesday evening for work Thursday. We have some other jobs we would like to plan. Can you drop by to review the scope and help us determine feasibility and plan."[720]
18:58	TransAlta informed ENMAX that the Keephills 2 outage scheduled for Wednesday, February 16, 2011 was for a "[b]oiler leak."[721]
February 15, 2011 07:17	James O'Connor emailed Nathan Kaiser regarding the Keephills 2 outage: "I am showing a[n] incremental cost of about $187k to take the unit down Wednesday relative to Thursday. A Wednesday vs. Saturday outage will cost an extra $420k. Our PPA exposure tilts long Thursday so we will see the RAPP incentive benefit assuming Thermals run better than our forced outage factor. This should help cover any increased outage cost due to high prices."[722]
07:20	Nathan Kaiser replied to James O'Connor: "Just $187K? I was thinking it was closer to $310K given that you have an extra week day."[723]
07:24	James O'Connor replied back to Nathan Kaiser: "I am using committed capacity. My outage costs are $1,370,679 beginning Wed. and $1,184,008 beginning Thursday."[724]
February 16, 2011 08:55	Tracy Coutts (from ENMAX) communicated with John Grieco about the pending outage at Keephills 2, to which Grieco stated: "... that he could not tell EEC [ENMAX] where the leak was because it was "speculative"".[725]
09:15	John Grieco forwarded Tracy Coutts email to Jerry Navarro, Gary Kline, Marcy Cochlan and Nathan Kaiser, indicating: "A warning: I think your operators are going to get pestered a lot about this outage today. I've told Tracy Coutts at Enmax the following: - I don't have any of the information she's requesting - I cannot move an outage or bypass operational decisions - I will not bypass any traditional information channels such as TMS or operator to operator calls - I received guidance from our Regulatory Group last

720 Exhibit 14.23, MSA Application, Tab 133, email from Jerry Navarro, February 14, 2011, PDF page 8.
721 Exhibit 14.23, MSA Application, Tab 131, TMS restatement data, PDF page 4.
722 Exhibit 14.23, MSA Application, Tab 134, email from James O'Connor, February 14, 2011, PDF page 10.
723 Exhibit 14.23, MSA Application, Tab 134, email from Nathan Kaiser, February 14, 2011, PDF page 10.
724 Exhibit 14.23, MSA Application, Tab 134, email from James O'Connor, February 14, 2011, PDF page 10.
725 Exhibit 14.08, MSA Application Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 11, paragraph 49.

	November not to provide speculative information Tracy has indicated they are going to get in touch with the plant directly. It is entirely your discretion as to what info you want to provide on this but if the outage cannot be moved for a specific reason then let's give some information to get them off our back."[726]
~14:00	Representatives of ENMAX met with John Grieco and Patrick Taylor from TransAlta, with TransAlta indicating that "... those TransAlta representatives received "marching orders" from Sterling Koch (then VP, Regulatory) not to move the outage."[727]
15:36	TransAlta Manager of Regulatory Affairs phoned the AESO System Controller and confirmed that the AESO had not issued a directive to TransAlta to move the outage at Keephills 2.[728]
16:01	Jerry Navarro emailed John Grieco regarding the ENMAX information request from Tracy Coutts stating: "John: What response do we need to make on this IR? It is an economiser boiler leak. It is deemed to be close to the exterior wall of the boiler, steam and water are leaking out of the casing now. Should it get worse, it could put personnel at risk. If the leaks gets worse we can also put water down the gas path and into the precip which could create a serious issue in the precipitator plugging hoppers and even freezing in the hoppers.[729]
16:17	ENMAX real-time trading desk contacted the operator of Keephills 2 and asked about the ability to postpone the outage, to which the operator responded: "[t]he decision was made to stay with our schedule. So I'm not the – I didn't get any privy to the reason. All was...said was that we're following our schedule."[730]
16:45	Keephills 2 began ramping down, and the unit was offline at around 18:00.[731]

[726] Exhibit 14.23, MSA Application, March 21, 2014, Tab 135, PDF page 12 of 22.
[727] Exhibit 14.08, MSA Application Appendix 6: Q&A of Christopher Joy on behalf of ENMAX Energy Corporation, March 7, 2014, page 11, paragraph 49.
[728] Exhibit 17.02, MSA Application, Tab 136, supplemental filing of audio file transcripts, March 28, 2014.
[729] Exhibit 14.23, MSA Application, Tab 137, email from Jerry Navarro, February 16, 2011, PDF page 17.
[730] Exhibit 17.03, MSA Application, Tab 138, supplemental filing of audio file transcripts, March 28, 2014.
[731] Exhibit 14.04, MSA Application, Appendix 2, Expert report prepared by Mr. Heath: *Discretionary Outages*, March 21, 2014, page 26, paragraph 53.

18:16	The AESO issued an Emergency Alert 1, which lasted until 20:00.[732]
February 17, 2011 08:25	Nathan Kaiser circulated an email titled *Portfolio Bidding Report – Feb 16,* which stated in part: "Up week over week with yesterday being our strongest day year to date. Value add was $1.7 million. Keephills 2 came off with a leak last night tightening up the market for the evening. Given the expected strong prices over the peak hours, our biggest impact was through the ramp up in HE 17 and the ramp down in HE 23."[733]
February 18, 2011 16:09	Keephills 2 came back online with 310 MW of available capability, reaching 387 MW available capability by 20:30.[734]

[732] Exhibit 14.02, MSA Application, March 21, 2014, page 86, paragraph 298. AESO Operating Policy and Procedure 802 Section 3 states, in part:

An Energy Emergency Alert 1 will be declared after the following steps have been taken:

- All available resources in the energy market merit order are committed to meet AIES firm load and reserve requirements.
- Non-firm loads have been curtailed.
- Procedures have been implemented to optimize the use of resources in the ancillary service merit order.

[733] Exhibit 14.24, MSA Application, Tab 142, *Portfolio Bidding Update – Feb 16*, February 17, 2011, PDF page 6.

[734] MSA Application, Tab 116, AESO restatement data, PDF page 15.

Appendix 4 – Abbreviations

Abbreviation	Name in full
ABSA	Alberta Boiler Safety Association
AESO	Alberta Electric System Operator
AIP	Availability incentive payments
AUC or the Commission	Alberta Utilities Commission
CEA	Canadian Electric Association
Control Room Operator Logs	Log entires from the unit operators
EUB	Energy and Utilities Board
FEOC	Fair, efficient and openly competitive
IAT	Independent Assessment Team
ISO	Independent system operator
LEI	London Economics International LLC
LOTO	Lock out Tag Out forms
MSA	Market Surveillance Administrator
NERA	NERA Economic Consulting
OBEG	Offer behaviour enforcement guidelines
PPAs	Power purchase arrangements
SSNIP	Small but significant and non-transitory increase in price
TMS	Transaction Management System
TransAlta	TransAlta Corporation, TransAlta Energy Marketing Corp/ and TransAlta Generation Partnership