



Market Surveillance Administrator

**Application For Approval of a Settlement Agreement
Between the Market Surveillance Administrator,
EPCOR Energy Alberta GP Inc. and
1772387 Alberta Ltd. (Encor by EPCOR)**

October 11, 2023

Alberta Utilities Commission

Decision 28207-D01-2023

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Proceeding 28207

Application 28207-A001

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Published by the:

Alberta Utilities Commission

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1 Introduction

1. On May 18, 2023, the Market Surveillance Administrator (MSA) filed an application for approval of a settlement agreement between the MSA, EPCOR Energy Alberta GP Inc. as general partner of EPCOR Energy Alberta Limited Partnership (collectively, EEA), and 1772387 Alberta Ltd. (Encor by EPCOR), as general partner of 1772387 Alberta Limited Partnership, pursuant to sections 44 and 51 of the *Alberta Utilities Commission Act*.
2. The settlement agreement was reached after an MSA investigation regarding conduct that occurred between 2016 and 2021, which the parties agree gave EEA and Encor an unfair competitive advantage derived from prohibited sharing of customer information between EEA and Encor.

2 Application

2.1 Investigation and contraventions

3. Section 17(2) of the *Code of Conduct Regulation*, prohibits the sharing of customer information between a regulated rate option (RRO) provider and its affiliates that creates an unfair competitive advantage for the regulated rate supplier or its affiliate. Section 18 of the *Code of Conduct Regulation* suggests that sharing of customer information for a *sales purpose* would be prohibited under Section 17(2).
4. Following an investigation, the MSA was satisfied that EEA (an RRO provider), on behalf of Encor (EEA's affiliate), used RRO customers' billing histories to determine whether prospective Encor customers were financially eligible for Encor's services. The investigation found that under the service level agreement (SLA) between EEA and Encor, EEA assessed the financial eligibility of prospective Encor customers, who were asked to consent to a review of their billing history with EEA (an internal credit assessment), for retail electricity services provided by Encor. Where a prospective customer did not consent to an internal credit assessment or one was not available, financial eligibility was assessed on the basis of an external credit score.
5. By using the internal credit assessment provided by Encor, the cost to EEA, passed on to Encor, was lower than the cost of an external credit assessment. This resulted in cost savings to Encor from July 1, 2016 to June 20, 2021. EEA shared the creditworthiness assessment derived from its RRO billing history information with Encor for a sales purpose.

6. EEA and Encor admitted that EEA and Encor contravened Section 17(2) of the *Code of Conduct Regulation*, as well as Section 6 of the *Electric Utilities Act*, which requires electricity market participants to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the electricity market.

7. EEA and Encor cooperated fully with the MSA investigation, took remedial steps, and agreed to the imposition of conditions to maintain the remedial steps in order to prevent a recurrence of the contraventions. EEA and Encor also admitted to the contraventions and agreed to pay administrative monetary penalties (AMP) and the MSA's costs.

2.2 The proposed settlement

8. Included in the settlement agreement are the following terms:

- (a) Encor will pay an AMP of \$105,000, including \$84,000 as the approximate benefit taken by Encor due to the contraventions, plus an additional penalty of \$21,000;
- (b) EEA will pay an AMP of \$21,000; and
- (c) EEA and Encor will pay, jointly and severally, costs of the investigation to the MSA in the amount of \$20,000.

9. The settlement agreement additionally reflects remedial actions undertaken by both EEA and Encor after receiving the MSA's Summary of Facts and Findings, which the MSA presented to EEA and Encor following its investigation. In particular, EEA and Encor ceased using RRO billing histories to assess prospective Encor customers' financial eligibility, developed training and issued new scripting for call center agents, implemented an IT solution to prevent the improper use of RRO customer information, and ensured that Code of Conduct staff were aware of the outcome of the MSA's investigation.

10. The MSA requests that the Commission approve the settlement agreement pursuant to Section 44 of the *Alberta Utilities Commission Act*.

3 The regulatory framework

11. The MSA has the jurisdiction to investigate complaints which it is satisfied fall within its statutory mandate¹ and is authorized to negotiate settlements to resolve any matter that relates to its mandate and enter into settlement agreements.² The MSA is required to file any settlement agreement with the Commission for approval in accordance with Section 51(1)(b) of the *Alberta Utilities Commission Act*.³

¹ Alberta Utilities Commission Act, Section 42.

² Alberta Utilities Commission Act, Section 44(1).

³ Alberta Utilities Commission Act, Section 44(2).

12. In past MSA enforcement applications for the approval of a negotiated settlement agreement, a two-stage process was established⁴ to assess whether the agreement should be approved. First, the Commission needed to be satisfied that a contravention occurred. If that step was met, the second step required the Commission to determine if the settlement fell within a range of acceptable outcomes, taking into consideration the criteria set out in AUC Rule 013: *Rules on Criteria Relating to the Imposition of Administrative Penalties*.

13. In recent decisions, particularly in the context of enforcement applications brought by Alberta Utilities Commission Enforcement staff for the approval of settlement agreements, the Commission's second step to approving settlement agreements has been to apply the "public interest test," adopted from criminal law.⁵ The public interest test in the criminal context requires that "a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest." There is a high threshold for departing from joint submissions (or negotiated settlements in the regulatory context). The rationale for this is explained in significant detail in recent Commission decisions that decided whether to approve settlement agreements between Enforcement staff and contravening parties.⁶

14. The basis for a different test (i.e., the second step of the test) to be applied for the approval of a settlement agreement brought by the MSA as opposed to one brought by Enforcement staff is not evident. The powers of both the MSA and the Commission (i.e., Enforcement staff) to pursue enforcement are grounded in various provisions in the *Alberta Utilities Commission Act*, where the administrative penalty scheme set out in Part 6 of the Act applies to contraventions proven by the MSA and Enforcement staff alike. While the scope of matters investigated and enforced by the MSA and Enforcement staff is different, the purpose of enforcement actions pursued by either enforcement body is the same: to ensure compliance with applicable utilities laws and rules, to protect the public, and to deter future similar conduct. In the Commission's view, the same test ought to be applied to applications made for the approval of settlement agreements pursued by either the MSA or Enforcement staff.

15. While the effect of applying either test may be the same in most cases, the Commission prefers the public interest test, adapted from a decision of the Supreme Court of Canada,⁷ which respects the relevant enforcement body's fashioning of a settlement agreement in accordance with its mandate, so long as that agreement is not contrary to the public interest. In Decision 27013-D01-2022 (a decision on an application by Enforcement staff for the approval of a settlement agreement), the Commission explained that the high threshold for joint submissions in

⁴ See, for example, Decision 23828-D02-2020: Application for Approval of a Revised Settlement Agreement Between the Market Surveillance Administrator and the Balancing Pool paragraph 37; and Decision 23535-D01-2018: Application for Approval of a Settlement Agreement, paragraph 25.

⁵ The first step of the Commission's test in approving settlement agreements proposed by Enforcement staff is the same as in the MSA context, namely, is the Commission satisfied that a contravention occurred.

⁶ See, among others: Decision 27013-D01-2022: Enforcement Staff of the Alberta Utilities Commission - Allegations against ATCO Electric Ltd., Proceeding 27013, June 29, 2022, paragraphs 64-68; Decision 26379-D02-2021: Enforcement staff of the Alberta Utilities Commission - Allegations against Green Block Mining Corp. (formerly Link Global Technologies Inc.), Westlock Power Plant Phase 1, Proceeding 26379, August 19, 2021, paragraphs 14-15; Decision 27391-D01-2023: Enforcement Staff of the Alberta Utilities Commission, Settlement Agreement with the City of Grande Prairie, Proceeding 27391, January 20, 2023, paragraphs 16-19.

⁷ *R. v. Anthony-Cook*, 2016 SCC 43.

the criminal context should also apply to negotiated settlements in regulatory enforcement because there are benefits for all parties and participants involved.

16. Benefits are also apparent in the administration of justice in terms of overall efficiency and allowing for precious time, resources and expenses to be channeled into other matters. For settlements to be possible, “the parties must have a high degree of confidence that they will be accepted.”⁸ The Commission also referred in that decision to Bulletin 2016-10: *Practices regarding enforcement proceedings and amendments to AUC Rule 001: Rules of Practice*,⁹ which sets out the obligation for Enforcement staff to safeguard the public interest in pursuing the mandate to bring forward, and in appropriate cases to settle, enforcement proceedings.¹⁰

17. In the Commission’s view, the same rationale provided by the Commission in respect of Enforcement staff should apply to the MSA, which has express statutory authority to conduct surveillance, investigation, and enforcement of specified matters, and to negotiate settlement agreements.¹¹

18. For the reasons above, the Commission will consider the settlement agreement in this matter using the public interest test.

4 Should the Commission approve the application and settlement agreement

19. Based on information provided by the parties in the MSA’s application and in the settlement agreement, the Commission accepts that the contravention occurred.

20. Turning to the second part of the test, the Commission is satisfied that EEA and Encor obtained a financial benefit from the cost savings derived from its prohibited information sharing for nearly five years. The Commission understands that the exact benefit gained cannot be accurately quantified, but was of significant value.

21. The Commission is satisfied that the proposed AMP of \$21,000 for each of EEA and Encor, in addition to the \$84,000 in estimated cost savings for Encor, is reasonable, taking into consideration the seriousness of the contraventions and the mitigating actions identified by the MSA, including the EEA and Encor’s full cooperation during the course of the MSA’s investigation. The Commission is further satisfied that the proposed \$20,000 payment by EEA and Encor to the MSA for the MSA’s costs of its investigation and in respect of the application is appropriate. In the Commission’s view, the above penalties and payment, together with the remedial actions taken and maintained by EEA and Encor, achieve the goals of specific and general deterrence.

22. For the above reasons, the Commission is satisfied that approval of the proposed settlement agreement is in the public interest. The MSA’s application is approved.

⁸ Decision 27013-D01-2022, paragraph 67.

⁹ Bulletin 2016-10, March 29, 2016.

¹⁰ Decision 27013-D01-2022, paragraphs 67-69.

¹¹ See sections 39 and 44 among others.

5 Order

23. The Commission orders as follows:

- (1) The Commission approves the settlement agreement between the Market Surveillance Administrator, EPCOR Energy Alberta GP Inc. (as general partner of EPCOR Energy Alberta Limited Partnership), and 1772387 Alberta Ltd. (Encor by EPCOR) (as general partner of 1772387 Alberta Limited Partnership).
- (2) 1772387 Alberta Ltd. shall pay an administrative monetary penalty of \$105,000, including \$84,000 as the approximate benefit received as a result of the contraventions plus an additional penalty of \$21,000 in the form of a certified cheque or bank draft, payable to “General Revenue Fund c/o the Minister of Finance” and delivered to the Alberta Utilities Commission, within 30 days of the issuance of this decision.
- (3) EPCOR Energy Alberta GP Inc. shall pay an administrative monetary penalty of \$21,000 in the form of a certified cheque or bank draft, payable to “General Revenue Fund c/o the Minister of Finance” and delivered to the Alberta Utilities Commission, within 30 days of the issuance of this decision.
- (4) EPCOR Energy Alberta GP Inc. and 1772387 Alberta Ltd. jointly and severally, shall pay the amount of \$20,000 in costs to the Market Surveillance Administrator within 30 days of the issuance of this decision.

Dated on October 11, 2023.

Alberta Utilities Commission

(original signed by)

Dennis Frehlich
Acting Commission Member