

January 21, 2019

Mr. Gordon Kaiser
Market Surveillance Administrator
Suite 500, 400 – 5th Avenue SW
Calgary, AB T2P 0L6

Filed Electronically

Re: Advisory Opinion Programme

On October 22, 2018 the Market Surveillance Administrator (“MSA”) provided notice that it would consult to determine if the establishment of an Advisory Opinion Programme (“Advisory Programme”) is warranted.¹ The MSA retained Ian Nielsen-Jones to prepare a report (the “Report”) to consider the following three questions:

- Could an Advisory Opinion Programme assist market participants?
- If so, what form should that programme take?
- What has been the experience of other regulators with these types of programmes?

On December 14, 2018 the MSA issued the Report² and requested written stakeholder comments on the Report by end of day on January 21, 2019. Suncor appreciates the opportunity to comment on this matter.

Suncor is of the opinion that an Advisory Programme would be a useful tool for market participants and the MSA to seek and provide guidance to avoid investigations and distortions from overly conservative conduct. Given the specific nature of guidance arising from an Advisory Programme, Suncor believes such a programme would not be a substitute but should supplement broader market guidance achieved by reinstating the Offer Behaviour Enforcement Guidelines.³ In addition to expressing its overall support for an Advisory Programme, Suncor would like to provide the following specific responses to the Report.

1. The Binding Nature of the MSA’s Opinion

¹ Available online: <https://albertamsa.ca/uploads/pdf/Archive/000000-2018/2018-10-22%20Notice%20re%20Advisory%20Opinion%20Programme.pdf>

² Available online: <https://albertamsa.ca/uploads/pdf/Archive/000000-2018/Report%20to%20MSA%20re%20Merits%20of%20Introducing%20an%20Advisory%20Opinions%20Program.pdf>

³ As advocated for in Suncor’s submission regarding *Offer Behaviour Guidelines prior to the implementation of a capacity market* dated January 11, 2019. Available online: <https://albertamsa.ca/uploads/pdf/Archive/2019/2019-01-14%20Suncor%20Response%20January%2011%202019.pdf>

In recommendation 5⁴, the Report suggests that the MSA's opinion should be binding on the MSA, if all of the material facts have been submitted, were accurate, and remain substantially unchanged. Suncor is supportive of positive opinions providing safety and certainty to market participants, would however like to understand any practical limitations, if any. Particularly, are there any circumstances under which a market participant could be penalized for conduct in line with the guidance provided by the MSA?

2. Term of Validity of Advisory Opinions

Recommendation 6⁵ proposes that the MSA's opinions should be valid for a defined period of time such as five years. Suncor questions the need for opinions to have a fixed expiry date. Previously the Report stated:

The MSA could also pro-actively advise applicants and market participants, when appropriate, that an opinion or opinions issued in the part is/are no longer partially or entirely applicable because of rule changes or decisions of the Alberta Utilities Commission.⁶

Suncor is more supportive of this approach. The validity of an opinion should be unchanged unless underlying circumstances change and not be dependent on an arbitrary timeline. Any issued opinion should therefore remain in effect until it is revoked due to changes in legislation, regulation or rules or in response to relevant Alberta Utilities Commission ("AUC") decisions.

3. Third Party Information

The Report recommends that if independent third-party information is required to issue an opinion, it should be up to the applicant to obtain the information.⁷ Suncor acknowledges that this would already be an improvement over the practice of the Competition Bureau to not issue opinions if third party information is required.⁸ However, Suncor would be interested to investigate whether a combined best effort between the MSA and the applicant could result in even better outcomes. While any costs associated with third party information should clearly be borne by the applicant, third parties might be more open, and potentially only permitted, to providing information directly to the MSA instead of the applicant (for example, where the information may be commercially sensitive, or where the third party is reluctant to provide information directly to the applicant)

4. Right to Decline Providing an Opinion

Section 3 of the Report⁹ and recommendation 9¹⁰ suggest that the MSA should retain the discretion to decline to issue a written advisory opinion in certain circumstances. While Suncor recognizes that there

⁴ Report at page 7.

⁵ Ibid.

⁶ Report at page 3.

⁷ Report at page 7.

⁸ Report at page 4.

⁹ Report at page 3.

¹⁰ Report at page 8.

are certain circumstances under which it would be appropriate to decline issuing an opinion, Suncor submits that the goal should be to limit these to the extent possible.

For example, if the party seeking an advisory opinion did not provide sufficient and/or suitable information¹¹ or if the facts are uncertain or hypothetical,¹² the MSA should work with the applicant to seek proper information and clarity in order to be able to render an opinion.

Ultimately, whenever the MSA is made aware of specific actual conduct, it has a mandate to form an opinion if the conduct is supportive of a fair, efficient and openly competitive market. It should therefore be almost always possible to form and publish such an opinion with regard to proposed conduct.

5. Confidentiality Provisions

Suncor would like a greater understanding of any confidentiality provisions pertaining to the Advisory Programme. In particular, would applicants have a right to participate on a confidential basis, and would they have an absolute right to not be identified publicly in any associated written decisions or publications? Some applicants may prefer to submit inquiries on a no-names basis – would the MSA be amenable to such inquiries?

Suncor wishes to reiterate its support for establishing an Advisory Opinion Programme to supplement broader guidance in the form of offer behaviour guidelines. Suncor is looking forward to working with the MSA to develop its details. If you have any questions concerning the above submissions, please contact the undersigned.

Sincerely,

- original signed by -

Horst Klinkenborg
Senior Regulatory Advisor
Suncor Energy Marketing Inc.
as duly authorized agent for
Suncor Energy Inc.

¹¹ Report at page 3.

¹² Ibid.