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Filed on AUC Engage

Alberta Utilities Commission
425 1 St SW
Calgary, AB
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Attention: **Jaimie Graham**

Re: Response to Bulletin 2023-07 – Consultation on Proposed Amendments to Alberta Utilities Commission Rule 016: Review of Commission Decisions

Thank you for the opportunity to comment on the Alberta Utilities Commission's (AUC or the Commission) proposed amendments to Rule 016.

AltaLink has reviewed the proposed amendments and has the following comments for the Commission's consideration.

Minimum Information Requirement for Filing

AltaLink agrees with the Commission's proposal to require review applicants to provide the following minimum information requirements:

- if alleging an error of fact under Subsection 5(1)(a), identify the alleged error of fact; and
- if alleging an error of mixed fact and law under Subsection 5(1)(a), identify the legal standard and facts that are at issue, and explain how the Commission erred in applying the legal standard to those facts.

The proposed amendment will likely provide more clarity and efficiency to the review process for all parties involved.

Change to the Standard of Proof for Errors of Fact and of Mixed Law and Fact

AltaLink objects to the Commission's proposed amendment to the standard of proof for errors of fact or errors of mixed fact and law from a "balance of probabilities" to a standard of "palpable and overriding error." AltaLink submits that the current applicable standard of "balance of probabilities" for the Commission to grant an application for review is the more appropriate standard for the following reasons.

First, Rule 016 contemplates a two-step process for review and variance of a decision that includes: (1) an initial review application and (2) if a review is granted, a variance proceeding where the Commission determines whether a decision should be confirmed, rescinded, or varied. With the Commission's proposed amendment to the standard of proof, it would have the *adverse* effect of making the first step of the review process under Rule 016 function like an appellate court, without any recourse.

The much higher standard of proof of "palpable and overriding error" is an onerous standard. It is well known that this standard is a highly deferential standard of review typically reserved for appellate courts reviewing the decision of a first-instance decision maker. According to the Federal Court of Appeal in *South Yukon,* "palpable" means an error that is obvious, and "overriding" means an error that goes to the very core of the outcome of the case. A palpable and overriding error must,

therefore, "obviously and fundamentally affect the outcome of the case."[1] In other words, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.[2]

Similarly, in *Bennett*, the Federal Court of Appeal stated "the test for setting aside a decision for palpable and overriding factual error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached."[3]

This standard of review of "overriding and palpable error" is highly deferential to ensure that an appellate court's role is not to second-guess the weight to be assigned to the evidence. Applying the *Vavilov*[4] standard, the first-instance decision maker benefits from a presumption that they have considered and assessed all the evidence placed before them.

Based on the above, AltaLink is concerned that the proposed amendment is too onerous for a first-level review, and the reasons for applying such a highly deferential standard do not apply to the first step of the Commission's review process. Accordingly, the "overriding and palpable error" standard is not appropriate for the first step of the review process.

Second, AltaLink notes that while the Commission has a robust regulatory landscape that makes it unique compared to its other provincial counterparts, it is instructive for the Commission to consider the standard of proof for similar boards, commissions, and administrative tribunals who are also at the fact-finding level of the decision-making process.

The British Columbia Utilities Commission review/reconsideration process under Rule 26.05[5] does not include a standard of "overriding and palpable error." Instead, it requires the error to have a "material bearing" on the decision. The commission may summarily dismiss an application for reconsideration if the application fails to establish, on its face, any reasonable grounds for reconsideration (Rule 28.01).

Similarly, the Manitoba Public Utilities Board's review process does not include a standard of "overriding and palpable error." Instead, the board may review, rescind, change, alter, or vary any decision or order made by it under Rule 36(1)[6], and the Board determines the preliminary question of whether the matter should be reviewed and whether there is reason to believe the order or decision should be rescinded, changed, altered or varied (Rule 36(4)).

Finally, the Ontario Energy Board (OEB), pursuant to Section 19 of the *OEB Act*[7], has in all matters within its jurisdiction authority to hear and determine all questions of law and fact. Rules 40 and 42[8] outline the detailed process for the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

The standard of proof is also not one of "overriding and palpable error." Instead, the standard is a "material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a)." The relevant ground for our purposes is where the "OEB made a material and clearly identifiable error of fact, law or jurisdiction." (Rule 42.01(a)(i)). The OEB *Rules of Practice and Procedure* also states the OEB may determine a threshold question of whether the matter should be reviewed before conducting any review of the merits of the motion. Thus, there is a threshold question as well as a consideration of the merits of the motion to review.

Despite the different mandates and purposes of similar administrative bodies, the common thread is they do not invoke the higher standard of review of "overriding and palpable error" which the Alberta Utilities Commission proposes for the first level review process.

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[1] South Yukon Forest Corporation, 2012 FC 165, 431 N.R. 286 at para. 46 [*South Yukon*]; also see Ark Angel Fund v. Canada (National Revenue) (Fed CA, 2020) at para. 5.

[2] *Supra* note 1. Also see *Millennium Pharmaceuticals Inc. v. Teva Canada Limited*, 2019 FCA 273 at para 6

[3] *Bennett v. Canada,* 2022 FC 73 (CanLII) at para. 7

[4] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*]

[5] British Columbia Utilities Commission Rules of Practice and Procedure.

[6] *The Public Utilities Board Rules of Practice and Procedure.*

[7] *Ontario Energy Board Act*

[8] The OEB Rules of Practice and Procedure (July 13, 2023).

Codifying the Commission's discretion to dismiss a review application if it does not comply with the minimum information requirements or is out of scope of the permissible grounds for review

AltaLink agrees with the codification of the Commission's discretion to dismiss deficient review applications on the proposed grounds.

Introduction of page limits for response submissions

AltaLink agrees with the Commission's proposal to introduce page limits for response submissions.

Yours truly,

Zora Lazic
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