



ENMAX Power Corporation and ENMAX Energy Corporation (collectively referred to as ENMAX) have reviewed the rule changes proposed by the Commission in Bulletin 2023-07 and provide the following comments.

**Addition of Sections 4(1)(e) and (f) and Changes to Section 5(1)(a)**

With respect to the proposed addition of Sections 4(1)(e) and (f), ENMAX believes that the proposed wording of Section 4(1)(f) is unclear when read together with the proposed changes to Section 5(1)(a).

Read together, the proposed changes are as follows:

**4 Contents of a review application**

(1) An application for a review must:

...

(f) 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.

**5 Grounds for review and granting of review**

(1) The Commission may grant an application for review of a decision, in whole or in part, where it determines that the review applicant has demonstrated:

(a) The Commission made a palpable and overriding error of fact, or mixed fact and law, ~~where the legal principle is not readily extricable~~, which is material to the decision, ~~and exists on a balance of probabilities.~~

In June 2021, the Commission revised Rule 016. Prior to this revision, Commission decisions could be reviewed for errors of fact, law or jurisdiction. After the 2021 revision, Commission decisions could only be reviewed for “errors of fact or mixed fact and law where the legal principle is not readily extricable, which is material to the decision and exists on a balance of probabilities.”

The “readily extricable” language in the current rule, distinguishes between errors of mixed fact and law which are considered errors of fact versus those that are considered errors of law. Specifically, errors of mixed fact and law where the legal principle is readily extricable are treated as errors of law, whereas errors of mixed fact and law where the legal principle is not readily extricable are treated as errors of fact.



The removal of “where the legal principle is not readily extricable” broadens the grounds for review from errors of mixed fact and law that are considered to be errors of fact to all errors of mixed fact and law (including those that are considered errors of law because the legal principle is readily extricable). Bulletin 2023-07 does not suggest that it was the Commission’s intent to broaden the grounds for review. In fact, the Commission’s inclusion of “overriding and palpable error” in the rule, which is the appellate standard of review for errors of fact, suggests the Commission intended to leave the grounds of review to include only errors of fact. Accordingly, ENMAX recommends that the “not readily extricable” language be left in Rule 016.

The June 2021 version of Rule 016 also incorporated the civil standard of proof where it states that an error must “exist on a balance of probabilities.” Standard of review and standard of proof are distinct legal concepts. The standard of proof is the level of certainty and the degree of evidence required to establish proof. The standard of review is the level of scrutiny that is applied on a review of a decision. As discussed previously, the appellate standard of review for errors of fact is whether the lower court or tribunal made a “palpable and overriding error”.

Based on the language of the bulletin, it appears that it was the Commission’s objective to: 1) limit reviews to errors of fact; 2) adopt the appellate standard of review of “overriding and palpable error”; and 3) leave the standard of proof as the civil standard. It does not appear that the Commission intended to adopt a different standard of proof such as the criminal standard of “beyond a reasonable doubt”. Accordingly, ENMAX proposes the following wording:

**4 Contents of a review application**

(1) An application for a review must:

...

~~(e) if alleging an error of fact under subsection 5(1)(a), identify the alleged error of fact~~ identify the alleged error and indicate whether it is an error of fact or an error of mixed fact and law where the legal principle is not readily extricable.

~~(f) 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.~~

...



## **5 Grounds for review and granting of review**

- (1) The Commission may grant an application for review of a decision, in whole or in part, where it determines that the review applicant has demonstrated, on a balance of probabilities:
  - (a) The Commission made a palpable and overriding error of fact, or mixed fact and law where the legal principle is not readily extricable, which is material to the decision ~~and exists on a balance of probabilities.~~

### **Addition of Section 4(2) and Section 5(3)**

There is considerable overlap between Section 4(1)(h) and Section 4(2). These two sections should be consolidated. The language in Section 4(2) and Section 5(3) states that the Commission can dismiss an application “with or without notice”. ENMAX assumes that the intent of these sections is to allow the Commission to summarily dismiss an application, not that the Commission would dismiss an application without providing notice to the applicant. ENMAX suggests deleting Section 4(2) and replacing Section 4(1)(h) and 5(3) with the following:

#### **Add to section 4:**

- (h) If an applicant fails to comply with any of the requirements of subsection 4(1), the Commission may summarily dismiss the application without further process.

#### **Add to section 5:**

- (3) If the Commission determines that any grounds in an application for review concern errors outside the scope of subsection 5(1), the Commission may summarily dismiss those grounds without further process.

### **Addition to 4(3)**

ENMAX agrees with the addition of page limits for response and reply submissions unless otherwise directed by the Commission.