



Rule 016: Review of Commission Decisions – Comments from EPCOR Distribution & Transmission Inc. and EPCOR Energy Alberta GP Inc.

1. EPCOR Distribution & Transmission Inc. and EPCOR Energy Alberta GP Inc. (collectively “EPCOR”) submit these comments in response to the Alberta Utilities Commission’s proposed amendments to AUC Rule 016. EPCOR’s comments are limited to sections 4(g) and 5(1)(a) of the amendment.

Proposed changes to section 4:

2. Section 4 of Rule 016 sets out the required contents of a Review and Variance (“R & V”) application. In its proposed amendment to the rule, the Commission proposes some additional requirements for an R&V application including the requirement that an application identify the legal error in applications that allege errors of mixed fact and law:

4(g) If alleging an error of mixed fact and law under subsections 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.

3. Although EPCOR agrees that it would be helpful if R&V applications related to errors of mixed fact and law plainly stated the legal principle and facts that are the subject of the alleged error, the proposed amended rule has the potential to expand the scope of R&V applications beyond that contemplated by the current Rule. The proposed amendment refers to subsection 5(1)(a), which currently includes language that limits the scope of review to errors of mixed fact and law where the legal principle is not readily extricable. The proposed deletion of “where the legal principle is not readily extricable” from section 5(1)(a) could be construed as expanding the scope of review beyond the scope of the current Rule.
4. EPCOR expects that the Commission did not intend to expand the scope of review and respectfully suggests, in the interests of continuity and avoiding confusion, that the



Commission retain the reference to “where the legal principle is not readily extricable” in section 5(1)(a).

Proposed changes to section 5:

5. EPCOR’s comments on the proposed changes to section 5 are limited to the proposed change to 1(a):
 - (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~~.
6. EPCOR understands that the effect of this proposed amendment could be to further narrow the scope of R&V applications. The use of the “palpable and overriding error” threshold appears to prescribe a higher level of deference for the decision of the hearing panel than that decision currently enjoys. As section 5(1)(a) is currently drafted, reviewable errors include those that are apparent on a balance of probabilities. If the review standard is restricted to palpable and overriding errors, it would arguably only include errors that are readily apparent or obvious.¹ This appears to be a more rigorous standard that is, in EPCOR’s submission, unjustified and inconsistent with the practical, accessible and efficient review framework currently provided by Rule 016.
7. EPCOR recognizes that the palpable and overriding error threshold is consistent with the appellate standard of review for errors of fact. The Commission, however, is not required to align the standard it applies when considering a review application under section 11 of the *AUC Act* with the standard a court would apply were it to consider the same issue. On the contrary, there are strong reasons why a less stringent standard is appropriate for a review and variance application.

¹ The Supreme Court held that “palpable”, in this context, means “plainly seen”: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5-6.



8. "Palpable and overriding error" is a highly deferential standard that the Supreme Court held to be justified on three bases: ensuring the efficient use of limited judicial resources, protecting of the autonomy of the lower court, and deference to the expertise and advantageous position of the trier of fact.² In EPCOR's view these bases are adequately addressed by section 5(1)(a) as it currently reads. Namely, the current section 5(1)(a) protects the AUC's limited resources by requiring an applicant for review to show that its alleged error is material to the decision. It also protects the autonomy of the hearing panel and respects its advantageous position by not allowing the hearing panel to re-weigh the evidence or substitute its own judgment for that of the hearing panel, absent a demonstrable error.³
9. The current section 5(1)(a) also accounts for two important differences between a review panel of the AUC and a reviewing court. The first concerns relative expertise. One of the reasons a court may defer to a specialized decision-maker like the AUC is its relative lack of subject-matter expertise. This is not a concern in a review application. A review panel of the AUC can fairly be assumed to have the same degree of subject-matter expertise as the hearing panel, and to be able to correctly assess whether the hearing panel is more likely than not to have erred. If the overall goal of a review application is to ensure that all material facts have been accurately appreciated and considered, then there should be no reason to require an applicant to show that a probable error satisfies a higher standard before the Commission will proceed to the second stage of its review process.
10. In addition to respecting the review panel's expertise, requiring an applicant for review to meet only the civil evidentiary standard respects the review panel's role under the *AUC Act* as the final arbiter of issues of fact (and issues of mixed fact and law with no extricable legal principle). Given that there is no further right of appeal for such issues, in EPCOR's submission this relatively low evidentiary standard appropriately empowers a review panel

² *Housen* at paras. 15ff.

³ See the oft-cited statements of principle in Decision 2012-124 at para. 31, which clearly establish that (1) decisions of the Commission are intended to be final; (2) the review process is not intended to give parties a chance to raise new arguments that they could have raised in the first instance; and (3) "the review panel's task is not to retry the [original] application based upon its own interpretation of the evidence nor is it to second guess the weight assigned by the hearing panel to various pieces of evidence ...".



to identify and correct likely errors of fact without unnecessarily constraining the scope of its review to errors that meet some higher standard.

11. As a final consideration, EPCOR expects that the proposed “palpable and overriding error” standard would entail some degree of uncertainty and confusion in its implementation. It is not immediately clear, for instance, in what circumstances a clerical error that is material and that exists on a balance of probabilities would also be considered “palpable and overriding”, nor whether it would be any less worthy of correction if it somehow did not meet that test. The current language of section 5(1)(a), by contrast, has been in place since 2016⁴ and parties are familiar with it and how it has been applied by the AUC. In the absence of a compelling need to introduce the proposed new standard, and EPCOR is aware of none, maintaining the current wording of section 5(1)(a) would avoid unnecessary complexity and the need to develop an entirely new jurisprudence interpreting and applying “palpable and overriding error” in the novel context of the first stage of a review and variance application.
12. Having regard for the foregoing, EPCOR respectfully suggests that the Commission decline to proceed with the proposed amendments to s.5(1)(a) and that it retain the provision in its current form:
 - (a) The Commission made an 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.

⁴ It was implemented in the version of Rule 016 in effect from March 24, 2016 to June 14, 2021, at s. 6(3)(a).