

# The Review Process – Utility Regulation

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It is a well known fact that the Fair Trading Commission, when conducting most utility regulation matters has the power to convene hearings, make decisions and reassess decisions that it makes. It is expected that decisions and orders made by the Commission should be final and rarely changed. Parties therefore from the outset put their best case before the Commission.

At all of its hearings the Commission is conscious of its obligation and responsibility to carefully consider the information placed before it whilst following the correct procedure. This ensures that consistent with its mandate, the Commission operates fairly and in a transparent manner and in tandem with the provisions of the legislation. However, there may be instances where errors occur or where persons are not satisfied with a Commission decision. Have you ever wondered what happens after a Commission decision is issued? Sometimes, persons ask for a variation or modification of a Commission decision based on the grounds for review that are set down in the legislation. Further, the legislation states that the Commission on its own, may at anytime, without notice or a hearing correct any errors it has made in its decision or order. There is no formal process involved as this relates mainly to typographical or other such errors that may occur.

Essentially, the legislators recognised that there may be instances in which it may be necessary for a Commission decision to be reviewed and as such the Fair Trading Commission Act contains a built-in mechanism which the Commission can utilise in order to reconsider and where necessary vary its original decision. This mechanism is known as the “Review Process”.

The Commission’s review process is set out under the Utilities Regulation (Procedural) Rules “Rules”. These Rules are in keeping with the Utilities Regulation Act and contain the grounds under which a request for a review may be made and/or granted.

A person applying for a review needs to show that:

(1) An error of law has been made in the decision. The applicant needs to establish that the Commission has made a material error of law or has somehow exceeded its jurisdiction when making its decision; only then will a review and variation of the decision be granted.

(2) An error of fact has been made in the decision. This refers to a situation where a decision made by the Commission was based on a misinterpretation, misunderstanding or ignorance of an established and relevant fact or where the Commission acts upon an incorrect basis of fact in making its decision. If this occurs, an aggrieved party is entitled to a review of the decision.

(3) There has been a change in circumstances that is as great or fundamental to the decision as to affect the core or basis of the Commission's decision.

(4) New facts have arisen which are material to the Commission's decision or order.

(5) There are facts that were not previously placed in evidence in the proceedings and could have been discovered by reasonable diligence at the time.

(6) An important matter of principle has been raised by the order or decision. A party can rely on this ground when seeking a review where the Commission failed to take into consideration an important principle that has arisen as a result of the decision. This occurs where an applicant has experienced some hardship or was in some way prejudiced by the Commission's omission.

The grounds and evidence that are being relied upon by an applicant in support of a request for a review of a Commission's decision must be set out in a document that is called a motion for review and must be filed at the Commission's office by the party requesting the review. Affidavits, which are sworn statements, must also accompany a motion for review.

The requesting party may either be a person who had been involved in the proceeding before the Commission or a person who may not necessarily have been a part of the proceeding but has been granted permission by the Commission to request a review of a final decision or order.

Having received a motion for review, there are two steps which the Commission must take. For both, the Commission is mandated to convene a hearing in order to determine the matter. The Commission will first seek to determine if the applicant has met the threshold test. This means the Commission must decide whether the applicant has properly established that there is a need for a review when the motion is first presented.

Where this preliminary requirement is met, the Commission will then deliberate on the merits of the matter that have been placed before it for its determination. Once the Commission has undertaken the review on the merits, it may be decided that the original decision should be varied or that the original decision will stay. Oftentimes, review hearings are written rather than oral so parties are given an opportunity to express their arguments in writing. Their submissions, along with relevant affidavits, are filed with the Commission and are circulated among all of the parties who were involved in the proceedings from the beginning, and form part of the record of the hearing.

The Commission's review process is not a rehearing. There is therefore no re-opening of proceedings where parties are given the opportunity to re-submit and re-argue their case. It also differs from appeals, which is where a higher court re-hears the matter only on points of law and then the court's decision is substituted for that of the tribunal's.

If you have any questions email the Fair Trading Commission at [info@ftc.gov.bb](mailto:info@ftc.gov.bb), call us at 424-0260 or visit our website [www.ftc.gov.bb](http://www.ftc.gov.bb). You may also visit our offices at 'Good Hope', Green Hill, St. Michael.