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January 14, 2008

VIA COURIER AND EMAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
26th Floor
2300 Yonge Street
Toronto, ON
M4P 1E4

Dear Ms. Walli:

Re: Enbridge Gas Distribution Inc.
EB-2007-0731 EGDI Class Action Deferral Account

Please find enclosed VECC's Argument with respect to the above noted proceeding.

Yours truly,

Michael Buonaguro
Counsel for VECC
Encl.

EB-2007-0731

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, Sched. B, as amended;

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for an order or orders approving the balance and clearance of the Class Action Suit Deferral Account;

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for an order or orders amending or varying the rates charged to customers for the sale, distribution, transmission, and storage of gas commencing as of January 1, 2008

Submissions of the Vulnerable Energy Consumers Coalition ("VECC")

BACKGROUND

1. The application (including the relief requested) is summarized by EGDI as follows:

> The CASDA was created in 1995. The Board has previously approved the clearance of balances in the CASDA for years from 1995 to 2004. The total amount recorded in the 2007 CASDA, as of August 1, 2007, is a debit of $23,537,600 plus interest of $682,400. Interest continues to accrue and there will be modest additional principal amounts incurred and included in the 2007 CASDA over the balance of this year.
>
> All amounts collected in the CASDA since 2004 have been rolled forward into the 2007 CASDA, and there are no outstanding amounts in the CASDA accounts for 2004, 2005 and 2006. The Company requests approval of the collection of all amounts into the 2007 CASDA and requests that the actual amount recorded in the 2007 CASDA at the date of decision in this Application be approved by the Board. The Company further requests, in the event that there is no final Order in this Application prior to December 31, 2007, that the 2007 CASDA be continued in 2008.

The Company further requests that the balance in the 2007 CASDA be cleared to ratepayers over the course of eight years from 2008 to 2015, to be cleared each year at the same time as other deferral and variance accounts are cleared. The Company proposes that the recovery from ratepayers of the 2007 CASDA through this eight year annual clearance would be allocated on the basis of customer numbers. The Company requests that interest continue to accrue, in the ordinary fashion, on the remaining balance in the 2007 CASDA until it is fully cleared in 2015.

In general terms, the impact of the Company's request for recovery of approximately $3.5 million per year over eight years equates to approximately $1.90 per year per customer (or 16¢ per month).

Enbridge Gas Distribution therefore applies to the Board for such final and interim Orders (including but not limited to Rate Orders for 2008 to 2015), accounting orders and deferral and variance accounts as may be necessary in relation to clearance of the amounts in the 2007 CASDA. The Company further applies to the Board pursuant to the provisions of the Act and the Board's *Rules of Practice and Procedure* for such final and interim Orders and directions as may be necessary in relation to the Application and the proper conduct of this proceeding.[1]

VECC'S POSITION ON THE RELIEF REQUESTED

2. VECC respectfully submits that

   a) it is inappropriate to recover any amounts in the CASDA related to damages and plaintiff's fees paid by EGDI in relation to the settlement agreement in the Garland action;

   b) it may be appropriate to recover amounts related to EGDI's own costs in defending the Garland action. However, it is VECC's position that following the decision of the Board on the nature of the amounts (if any) that may be recovered in rates, EGD should provide a full accounting of the final legal and staff costs recorded in the CASDA. This accounting should be reviewed by an independent auditor and a report filed with the Board;

   c) with respect to the implementation issues raised by Board staff, and the proposition that the allocation be based on customer count, it is VECC's position that the issues are premature until

[1] Exhibit AT2S1 pages 2-3, paragraphs 5-9.

the Board has determined what amounts are actually to be cleared from the CASDA into rates.

THE NATURE OF THE AMOUNTS RECORDED IN THE CASDA

3. VECC submits that the amounts recorded in the CASDA can be divided into three types for the purpose of regulatory treatment:

a) the expenses incurred directly by EGDI ("EGDI Legal Fees") in the years 2004, 2005, 2006, 2007 with respect to its own legal fees related to the Garland action, totaling $1,537,600.00,[2]

b) $22,000,000 related to the judgment paid in respect of the Settlement Agreement (the "Judgment Costs") in the Garland action, including damages and the plaintiff's legal fees, and

c) Interest on the principal amounts, calculated at the time of the application as $682,400. VECC presumes that the interest associated with either of the two principal amounts is calculated mechanically and easily separated depending on whether the Board orders only partial clearance of the CASDA to ratepayers as opposed to no or complete clearance.

THE ISSUE OF CLEARING AMOUNTS IN THE CASDA IS OPEN

4. In its application EGDI asserts, after noting that amounts recorded in the CASDA from 1995 to 2003 have already been cleared to rates either as a result of settlement agreements and/or Board decisions, that

> It appears, therefore, that there has been no principled objection on the part of stakeholders or the Board to the clearance of amounts recorded in CASDA. It is submitted that there is no principled reason to treat the 2006 and 2007 CASDA any differently.[3]

5. VECC respectfully submits that it is a mischaracterization of the history and nature of the CASDA to conclude that clearance of the CASDA between 1995 and 2003 is grounds for clearance of the remaining amounts in a similar fashion.

6. In considering the CASDA in EGDI's 2005 rate case, the Board summarized the history of the CASDA and the difference between the previous (1995 to 2003) years and the 2004 year and beyond:

[2] Exhibit BT2S5 page 5 of 5; it is assumed that the constituent figures of $859,510 for legal, actuarial, consulting and expert costs and $678,090 for data extraction, analytical and media notices all constitute fees incurred by EGDI for the purposes of the Garland action.
[3] Ibid. page 4 to 5, paragraph 14.

> The Board is prepared to approve a CASDA for 2005 which includes the Company's legal costs, the costs of actuarial advice and the costs of analyzing historic billing records. However, the Board will not include the costs of any judgment against the Company, nor will it include the plaintiff's costs. **The Board does not regard the 2004 CASDA as having any precedential value for the 2005 rates case, and costs recorded in this account have not yet been approved for recovery from ratepayers.**
>
> The Board will not include the judgment costs, including any award of costs against the Company, in the 2005 CASDA for several reasons. First, such inclusion would be premature. One principle that comes into play is the extent to which the amounts included in the account are likely to arise in the relevant period, which in this case is fiscal year 2005. The Board is not convinced of the Applicant's assertion of the likelihood that such costs will arise in 2005. The timing of the judgment and related orders and their implementation are unknown. The Board also considers that the degree of uncertainty respecting the quantum of damages, if any, and the method of arriving at them makes it inappropriate to include the judgment costs in the 2005 CASDA.
>
> Further, the Board is concerned that by including judgment costs in a deferral account there is a heightened expectation of recovery. The Board wants to be clear though, that excluding these costs from the deferral account at this time does not suggest that the Board will not allow the judgment costs, if any, to be recovered from ratepayers when they arise. **The question of ratepayer recovery remains open. The Board expects that there will be developments with respect to the ongoing court proceedings that will lead to a clearer understanding of any amounts and the reasons for them. This greater understanding should assist the Board and the parties in arriving at a determination in respect of a potential ratepayer, or shareholder, responsibility for judgment costs.** (emphasis added)[4]

7. Several things are clear from EGDI's summary of the CASDA and the above quoted passage:

a) the CASDA and clearance of it up until 2003 is distinct from the 2004 to 2007 period in that up to and including 2003 the CASDA only included EGDI's legal costs;

[4] Exhibit C1T1S30, pages 6-7, decision in RP-2003-0203

b) judgments against EGDI were be tracked in the CASDA for the first time in 2004, but at no time has the Board approved the clearance of amounts related to judgments against EGDI included in the CASDA to ratepayers;

c) the question of the responsibility for judgment costs recorded in the CASDA remains open, with no pre-determination by the Board; and

d) The Board expected that the Supreme Court of Canada decision with respect to Late Payment Penalties would assist the Board and the parties in arriving at a determination in respect of a potential ratepayer, or shareholder, responsibility for judgment costs.

EGDI'S LEGAL FEES

8. VECC accepts that EGDI's legal fees, prudently incurred, may be recoverable from the CASDA. It is not contested that for the majority of the years the CASDA was used it recorded EGDI's legal fees incurred in the relevant year in connection with the Garland litigation.

9. It appears to VECC that with respect to the current application, however, that other then noting the amount recorded in the CASDA relating to EGDI's own costs, no information has been filed to substantiate that amount.

10. VECC respectfully submits that the applicant has the burden of supplying sufficient supporting material to substantiate amounts recorded in a deferral account, and that it is plainly insufficient to simply quote an amount without further detail and supporting documentation.

11. Accordingly VECC submits that following the decision of the Board on the nature of the amounts (if any) that may be recovered in rates, EGD should provide a full accounting of the final legal and staff costs recorded in the CASDA. This accounting should be reviewed by an independent auditor and a report filed with the Board.

THE JUDGMENT COSTS

QUANTUM

12. VECC does not object to the quantum of the Judgment Costs insofar as they were reviewed and approved by the Ontario Superior Court of Justice.

13. VECC does object to the recovery of any amount of the judgment costs from ratepayers for the reasons set out below.

THE DISTINCTION BETWEEN EGDI'S LIABILITY TO GARLAND CLASS MEMBERS AND THE RELATIONSHIP BETWEEN EGDI AND ITS RATEPAYERS

14. In its application EGDI sets out the history of LPP's in support of its position.[5] VECC respectfully submits that this history, and EGDI's characterization of the LPP, is set out in support of EGDI's position that through a combination of Board approvals and orders, legislative direction, and intervenor acquiescence that EGDI had little or no choice but to implement and charge the LPP. As a result, EGDI argues, EGDI should not bear the responsibility for the judgment against it.

15. VECC respectfully submits that whether LPP's were entirely a creation of EGDI and implemented by them at their discretion or whether LPP's were implemented by order of the Board without any discretion on the part EGDI is entirely irrelevant to the question as to whether EGDI should be able to, from ratepayers, recover a judgment against it related to LPP's..

16. The question of why and at whose direction EGDI charged LPP's was raised in defence to the Garland action. EGDI argued that it was required by the Board to charge LPP's, such that EGDI should not be held liable for damages to the Garland class members.

17. The Supreme Court of Canada (the "SCC"), to an extent, agreed with EGDI, disallowing the Garland claim for damages related to LPP's charged up until the Garland claim was served in 1994. Before that time, the SCC held, the fact that EGDI was operating under Board order provided a juristic reason for them to collect the LPP's based on the legitimate expectations of the parties.[6]

18. However, for the period after 1994, the SCC held, EGDI could not rely on Board orders as an excuse to retain revenue collected on the basis of a LPP because the claim, once filed in 1994, changed the legitimate expectation of the parties. Specifically the SCC determined as follows:

> However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LPPs were in excess of the s. 347 limit. **Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made.** Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble". After the action was commenced and

[5] Exhibits B1T2S1 and B1T2S3, in combination, summarize the history of the LPP, including
[6] Exhibit C1T1S11 page 28, paragraph 58

> Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code,* it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.(emphasis added) [7]

19. Accordingly EGDI was found liable to the Garland class members for LPP's charged between 1994 and 2004.

20. In this proceeding EGDI is asserting that because there are Board orders providing for the recovery of LPP in amounts that constituted a criminal rate of interest that ratepayers should bear the cost of EGDI's liability based on the credit that ratepayers received in rates related to LPP revenue.

21. VECC respectfully submits that this proposition confuses the issue of EGDI's liability to the Garland class members with the relationship between EGDI and ratepayers.

22. That the Board directed EGDI to collect LPP's is relevant to the issue of EGDI's liability to the Garland class members, as discussed in the 2004 SCC decision, and ultimately served to reduce EGDI's liability to the class.

23. That EGDI collected LPP's under Board orders is not, however, relevant to the issue of the relationship between EGDI and ratepayers. The governing issue between EGDI and its ratepayers is not what revenue EGDI collected, but rather how revenue was or was not incorporated into the Board's determination of just and reasonable rates.

THE REGULATORY COMPACT

24. The "regulatory compact" under the OEB Act has a number of important features that are relevant to the issue at hand, as it determines how revenue generated by LPP's was accounted for in rates, which in turn determines the responsibility for variations in the amount of revenue generated.

25. In return for providing the regulated gas distribution services in its franchise area, a regulated utility is allowed to apply for rates designed to recover its legitimate, prudently incurred costs of service plus a fair return on equity.

26. Except for short periods under a limited PBR, EGDI was regulated under a Cost of Service (COS) framework, such that rates have and continue to be (subject to a decision in EB-2007-0615) set on the basis of forecast costs and revenues for a forward test year. Within this framework the utility is provided with the opportunity to earn its allowed return on equity.

[7] Ibid. page 28-30.

27. In practice, prudent utility managers will view the allowed return on equity as a "floor" and try to provide a higher return to the utility. This is commonly viewed as over-earning in relation to the Board approved return on equity under COS regulation.

28. Rates are set based in accordance with Board Decisions on a utility's COS for the forward test year and a rate order setting out the rates is issued.

29. As part of the regulatory compact the utility (and its shareholder) assumes various risks, including:

- forecast risks for key costs and revenues;
- business risks related to economic conditions;
- weather risks that affect the volume of gas transported/distributed;
- physical risks to its distribution plant, including liability for third party; and
- property and personal injury claims.

30. In return the utility is provided with an opportunity to earn a fair return on equity on an after tax basis, and keep any over-earnings it is able to generate.

31. Under COS regulation the utility forecasts the revenue and expense for each year based on the experience of prior years. LPP revenue was incorporated by EGDI into rates during the relevant period on a forecast basis.

32. Regulatory variance and deferral accounts can be applied for to protect the utility and its ratepayers from the consequences related to material cost/revenue items that are difficult or impossible to forecast and for which the cost consequences for ratepayers and shareholders are significant. Outside of cost/revenue items recorded in variance and deferral accounts, however, the Board-approved forecasts of costs/revenue items are used to determine just and reasonable rates, with the risk of variation from those forecasts accruing to the utility.

33. Exhibit C Tab 1 Schedule 20 page 5 sets out the Board's finding in RP-2001-0032 in this respect:

> One of the fundamental bases of the prospective test year rate making process is for the utility to forecast, to the best of its ability, its prospective revenues and expenses. These forecasts are tested by the other parties and ultimately subject to final determination of the Board.[8]
>
> While the Board acknowledges that the forecasts, by their nature, are imprecise, **it is generally not appropriate to create a variance**

[8] Exhibit CT1S20 page 5.

account to insulate the utility from the consequences of an inaccurate forecast.

> The forecast of the LPP revenue is not fundamentally different from the other forecasts contained in ECG's evidence in the main RP-2001-0032 rates proceeding. The Board notes that ECG on January 18, 2002 filed updated evidence to reduce its forecast of the LPP revenue from *$13.4* million to $7~8 million to reflect the proposed change in the LPP. Consequently, the Board is not convinced that it is necessary to establish a variance account to record the differences between the revised forecast and actual LPP revenue.[9]

34. Under the regulatory compact a utility can often exceed its allowed return with rates that, as a result of forecast error, are too high. Until adjusted by order of the Board, the utility will over-earn for providing (and ratepayers overpay for) regulated services. If the utility under-earns it can file an application to increase rates on a prospective (as opposed to retroactive) basis.

35. In practice, the timing of applications is largely in the hands of the utility and if the utility is over-earning, then the application to adjust rates may not be made until either the regulator or the ratepayers request a review, whereas an application to correct anticipated under-earning is (generally) made by the utility as soon as the problem is identified.

36. This has been the regulatory structure under which EGDI operated during the relevant time period within which it seeks to attribute the judgment costs associated with LPP litigation to ratepayers.

37. The fact of EGDI's regulatory history raises the fundamental issue of fairness with respect to its application to have ratepayers bear the full responsibility for the LPP litigation. By virtue of this application EGDI is asking the Board to retroactively adjust the COS rates for the services provided by the utility during the period covered by the LPP litigation. VECC respectfully submits that this would be fundamentally unfair, given that:

a) the revenue from LPP during the relevant period was incorporated into rates on a forecast basis without being subject to variance or deferral account treatment, such that the risks associated with the forecast accrued to EGDI. It may well be, for example, that the forecast amount of LPP over the relevant period may have been conservative, such that

[9] Exhibit CT1S20 page 5. VECC notes that the variance account applied for in this decision did not relate to a LPP that was challenged as being criminal, nor was the variance account applied for on the basis that the revenue from LPP in the forecast year may be partly or entirely at risk as a result of the Garland action. In fact, the variance account applied for was intended to capture variations related to the change by the utility from the impugned LPP structure to a new structure designed to avoid the possibility of being criminal in nature, and related to possible variation based on, for example, unanticipated behaviour as a result of the new level of LPP.

EGDI may have benefitted from low forecast amounts of LPP revenue compared to higher actual revenue from LPP's. If that is the case, then the possibility that EGDI could then ask the Board to clawback a portion of the LPP included in the forecast amount from ratepayers while allowing EGDI to keep amounts in excess of the forecast amount highlights the unfairness to ratepayers in retroactively seeking to change the forecast downward based solely on the Judgment costs;[10]

b) as pointed out by the SCC, EGDI was put on notice in 1994 as a result of the filing of the Garland action that the revenue generated by LPP's may be criminal in nature and that accordingly they may have to pay it back. At that time, EGDI could have sought an alternative rate structure for LPP's (including deferral or variance account treatment) to shield itself from the Judgment Costs. Instead, the SCC determined, EGDI chose to "gamble" that it would win the Garland action, proceeding not only with the collection of LPP's in the same manner and level, but also proceeding to have the revenue incorporated in rates on a forecast basis;

c) as the LPP revenue was incorporated into rates on a forecast basis, the Decisions and Settlement Agreements within the relevant period came to a determination of just and reasonable rates that appropriately contemplated that the forecast risk related to LPP's rested with EGDI. Had EGDI not "gambled" with LPP's and instead applied for and/or negotiated rates in the relevant years on the basis that LPP may be subject to clawback, the Board decisions and/or Settlement Agreements reached in those years may have fundamentally changed. It is in part because of the impossibility of "turning back the clock" to determine the impact of making LPP revenue a variable as opposed to forecast item within Board Decisions and/or Settlement negotiations that retroactive ratemaking of this kind is avoided;

d) On a weather-normalized basis the utility over-earned in every single year within the relevant time period, such that EGDI benefitted from its assumption of forecast risk in every year. To isolate the forecast risk assumed by EGDI with respect to LPP revenue and shift it entirely to ratepayers retroactively, when clearly other forecasted cost/revenue items have benefitted EGDI is self-evidently unfair.[11]

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[10] It appears from Exhibit CT1S31, page 2 that the total LPP revenue from 1994 to 2002 was $74.2 million, although it is unclear from the record whether that was the amount forecast into rates or whether it was the actual amount collected. VECC is unaware of any part of the filing that explicitly sets out the actual LPP and the forecasted LPP over the relevant period. VECC accepts that it is equally possible that the total forecast amount included in rates could have been more then $74.2 million. VECC submits, however, that whatever the forecast amount was over the relevant period is the amount that EGDI assumed the forecast risk on.

[11] EB-2006-0034, Exhibit I-Tab24-Schedule 45, page 2 of 2. VECC notes that although the actual return on equity in several of the relevant years is less then the Board approved amount, that was

38. For all these above reasons, VECC respectfully submits that no part of the judgment costs should be recovered from ratepayers.

IMPLEMENTATION ISSUES

39. Board Staff requested that intervenors address the following aspects of the proposed 8 year recovery period. Specifically,

a) The very low monetary impact of $1.90 per customer per year compared with the impact of recovery over a shorter time period of 1 or 2 years.

b) The long period over which this issue has evolved through repeated legal proceedings and the intergenerational issues that are exacerbated with an extended 8 year recovery period.

c) Interest cost savings if the account were cleared over a shorter time period.

40. VECC's general position with respect to implementation issues, including the proposal that amounts be cleared on the basis of customer count, is that it is premature to determine an appropriate implementation plan for amounts cleared from the CASDA.

41. Specifically with respect to issues a) and c) from Board Staff, VECC's position is that the appropriateness of the impact of clearing the account over 8 years as opposed to some shorter number of years, along the associated interest savings, are both entirely dependant on at least two factors: how much the Board actually allows EGDI to recover from rates, and what other rate impacts are anticipated over the term. VECC notes that the rates over the next several years are at issue in EB-2007-0615, such that the rate impact out of that decision could materially impact on the reasonableness of any implementation plan for clearance out of the CASDA.

42. With respect to issue b), VECC submits that the significant existing intergenerational recovery resulting from the proposed recovery of amounts related to rate years as much as 13 years prior (as opposed to the exacerbation of the intergenerational recovery by a further 8 years) supports the view that recovery of any part of the Judgment Costs is inappropriate. VECC respectfully submits that the Board does not intend and generally does not permit rate determinations in prior years to be retroactively changed and recovered on a prospective basis, in part to avoid intergenerational recovery.

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strictly a result of the weather risk assumed by the company, manifesting to the detriment of the company. Normalizing for weather risk reveals that in relation to all of the other items of cost/revenue forecast risk EGDI netted over-earnings in the relevant years.

EGDI'S RELIANCE ON VECC SUBMISSIONS

43. At Exhibit BT2S3 page 4, paragraph 19, EGDI quotes VECC as having questioned "what is the rush?" for a change in LPP's, and goes on to quote further from some VECC submissions made by letter dated April 27, 2000. The EGDI reliance on VECC's submissions seems to be in support of EGDI's general position that in implementing LPP's they were simply doing what the Board required of them, and that interested parties were not really concerned with the possible illegality of the existing LPP structure in 2000.

44. The complete text of the VECC submission appears at Exhibit CT1S16, pages 28-31. The reference to the quote "What is the Rush?" appears at page 30 of the Exhibit as the title to a paragraph which questions why the Board was providing such a narrow timeframe for interested parties to provide input into the creation of new, uniform LPP's that protected, amongst other things, universal access to the utility. The thrust of the paragraph, contrary the impression that may be taken from EGDI's use of the submission, is that the structure of a LPP was of such significant importance that it "merits more consideration then a staff discussion paper and more ideas and information that are contained therein."[12]

45. Likewise, EGDI quotes the VECC submission as stating that:

> As these charges come about as a result of obligations sanctioned by the Board's rate and rulemaking authority, it is a dubious proposition to suggest that the establishment of a late payment policy is part of the prerogatives of distributor management.

46. It appears from the context of the EGDI submissions that they rely on the VECC submission as support for the proposition that EGDI had no control over LPP.

47. In fairness, the complete paragraph goes on to read as follows:

> We are unaware of such innovative and unique practices by distribution utilities involving late payments by customers that would justify the significant concern expressed in the discussion paper concerning loss of freedom and flexibility in commercial practice for a distributor by a Board established policy. In our view, there is little to be gained from a public interest standpoint in the Board allowance of a hodge podge of different customer service practices for late payments by distributors. The Board should exercise its traditional duty of fairness associated with ratemaking by setting a uniform late

[12] Exhibit CT1S19 page 31

payment policy which is, to paraphrase the discussion paper, is fair, transparent, simple, and symmetric.[13]

48. The issue raised by the VECC submission relates to a concern that the Board Staff discussion paper was suggesting that individual distributors create their own LPP policies. It was VECC's position that the issue of an appropriate LPP policy was of such importance that the Board should exercise its jurisdiction to set a uniform, fair, transparent, simple, and symmetric LPP policy through proper consultation with all stakeholders on all relevant issues.

COSTS

49. VECC respectfully submits that it has participated responsibly in all aspects of the proceeding, in a manner designed to assist the Board as efficiently as possible, and accordingly requests that it be awarded 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF JANUARY, 2008

Michael Buonaguro
Counsel for VECC

[13] Exhibit CT1S19 page 29