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**ONE Nicholas Street, Suite 1204, Ottawa, Ontario, Canada K1N 7B7**

Tel: (613) 562-4002. Fax: (613) 562-0007. e-mail: [piac@piac.ca](mailto:piac@piac.ca). <http://www.piac.ca>

Michael Janigan  
Counsel for VECC  
(613) 562-4002 ext. 26

May 13, 2012

**VIA MAIL and E-MAIL**

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

Dear Ms. Walli:

**Re: Vulnerable Energy Consumers Coalition (VECC)**  
**Veridian Connections Inc.**  
**Notice of Motion to Vary, EB-2012-0201**  
**Submissions of VECC**

Please find enclosed the submissions of VECC in the above-noted proceeding. We have also directed a copy of the same to the Applicant.

Thank you.

Yours truly,

*(ORIGINAL SIGNED BY)*

Michael Janigan  
Counsel for VECC  
Encl.

cc: Veridian Connections Inc.  
Mr. George Armstrong

**ONTARIO ENERGY BOARD**

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

**AND IN THE MATTER OF** an Application by Veridian Connections Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2012.

**AND IN THE MATTER OF** a Motion to Review and Vary by Veridian Connections Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's decision and Order in proceeding EB-2011-0199.

**FINAL SUBMISSIONS**

**On Behalf of The**

**Vulnerable Energy Consumers Coalition (VECC)**

**May 9, 2012**

## **Vulnerable Energy Consumers Coalition (VECC)**

### **Final Submissions**

#### **1 Motion To Vary**

- 1.1 On April 11, 2012 Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board ("the Board" or "the OEB"), a Notice of Motion to Review and Vary (the "Motion") the Board's decision and Order dated March 22, 2012 in respect of Veridian's 2012 IRM rate application (EB-2011-0199). The ground for the Motion is an alleged inconsistency between the EB-2011-0199 decision and Order and the Board's decision in Bluewater Power Distribution Corporation's ("Bluewater") 2012 rate application (EB-2011-0153).
- 1.2 On April 20, 2012 Veridian wrote the Board to reference an additional alleged inconsistency between the EB-2011-0199 decision and order and the Board's decision in the Enersource Hydro Mississauga Inc.'s ("Enersource") 2012 rate application (EB-2012-0100).
- 1.3 The Motion seeks to vary the Board's EB-2011-0199 decision and order so that Veridian may recover a Lost Revenue Adjustment Mechanism ("LRAM") amount of \$480,913, which represents the difference between Veridian's total adjusted LRAM claim of \$1,303,874 and the amount approved for recovery of \$822,961 for the 2007 to 2009 legacy programs.
- 1.4 Given the narrow scope of the Motion, the Board has determined that the most expeditious way of dealing with this Motion is to consider concurrently the threshold question of whether the matter should be reviewed (as contemplated in the Board's Rules of Practice and Procedure) and the merits of the Motion.<sup>1</sup>

#### **2 Threshold Question**

- 2.1 Section 44.01 of the Board's Rules of Practice and Procedure (the "Rules") requires that "Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
  - (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
    - (i) error in fact;
    - (ii) change in circumstances;
    - (iii) new facts that have arisen;
    - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;"

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<sup>1</sup> PO#1 dated April 25, 2012, Page 2

- 2.2 Veridian submits that the list of grounds provided in the Rules is not exhaustive, as evidenced by the words, “which grounds may include”, and as such a moving party is not limited by the grounds set out in Section 44.01 of the Rules, and may bring a motion on grounds other than those listed. The ground for Veridian’s motion is regulatory inconsistency, which is synonymous with regulatory arbitrariness.<sup>2</sup>
- 2.3 In its May 2, 2012 submission, Veridian indicates that “With the exception of the treatment of implicit CDM impacts, the circumstances in Veridian’s proceeding were not distinguishable from those in the Bluewater and Enersource proceedings. Although Veridian identified some implicit CDM impacts related to programs delivered in prior years (and adjusted its proposed LRAM claim accordingly), the intention to remove CDM impacts from the load forecast for future recovery in the settlement agreement should receive the same Board treatment for Veridian, Enersource and Bluewater.”<sup>3</sup>
- 2.4 Veridian takes the position “Because of this disparate treatment by the Board, as well as the importance of the objective of consistency in decision making described by the Supreme Court of Canada, Veridian submits that *in this circumstance* the ground of regulatory inconsistency satisfies the threshold for a motion to review.”<sup>4</sup>
- 2.5 VECC makes the following two points on the threshold question.
- 2.6 First, VECC does not agree that regulatory inconsistency satisfies the threshold for a motion to review, particularly when previous Board decisions have not always been consistent. VECC notes as did Veridian in its submissions<sup>5</sup>, that panels of the Board are not and cannot be thought to be bound to the decisions of proceeding panels. Each panel must make its decision on the basis of the facts before it and the relevant policies and principles affecting the decision.<sup>6</sup>
- 2.7 VECC cautions that if the Board allows this Motion solely on the basis of regulatory inconsistency, other parties will look to vary Board decisions on the ground of regulatory inconsistency and will inevitably rely on past Board decisions that support their alternative view.
- 2.8 Second, VECC does not agree an inconsistency has occurred to warrant a review. VECC submits the Board’s decision in EB-2011-0199 is consistent with the Hydro Ottawa decision (EB-2011-054). The Board’s decision relies on the distinction that there are CDM impacts incorporated in the actual load forecast

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<sup>2</sup> Veridian Submission, May 2, 2012, Section 20

<sup>3</sup> Veridian Submission, May 2, 2012, Section 24

<sup>4</sup> Veridian Submission, May 2, 2012, Section 26

<sup>5</sup> Veridian Notice of Motion to Review, April 24, 2012, Section 12

<sup>6</sup> EB-2011-0256 Decision, Bluewater Motion, Page 5

that was approved by the Board. The Veridian decision is not inconsistent with the Bluewater and Enersource decisions. It is distinct from these decisions, and consistent with the Hydro Ottawa decision. In the case of both Veridian and Hydro Ottawa, the utility had the effects of CDM embedded in the load forecast that was denied (or in Hydro Ottawa's case protected from) adjustments through an LRAM to reflect the actual impacts of CDM in and prior to the last rebasing load forecast.

- 2.9 In summary, VECC submits that for the reasons noted above, the threshold test has not been met and Veridian's Motion to Vary should be denied.

### **3 Merits of the Motion**

- 3.1 Veridian originally requested the recovery of an LRAM claim of \$1,388,731 over a one year period. Veridian's LRAM claim included lost revenues from programs delivered in 2007 to 2010 as well as persisting effects from 2005 to 2006 programs.
- 3.2 The Board's *Guidelines for Electricity Distributor Conservation and Demand Management* (the "CDM Guidelines") issued on March 28, 2008 outline the information that is required when filing an application for LRAM or SSM.
- 3.3 The Board's CDM Guidelines state "The LRAM is determined by calculating the energy savings by customer class and valuing those energy savings using the distributor's Board-approved variable distribution charge appropriate to the class. The calculation does not include any Regulatory Asset Recovery rate riders, as these funds are subject to their own independent true-up process. Lost revenues are only accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time."<sup>7</sup>
- 3.4 In its decision regarding Veridian's 2012 rate application, EB-2011-0199, the Board approved an LRAM claim of \$822,961 representing the lost revenue associated with persistence from the legacy programs implemented in 2007 to 2009. The Board did not approve the LRAM claim associated with the effect of 2010 programs in the 2010 rate year and persistence from legacy programs in 2010 as the Board found that it would be inappropriate to deviate from the 2008 Guidelines, which state that lost revenues are accruable until new rates are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time.<sup>8</sup>

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<sup>7</sup> Guidelines for Electricity Distributor Conservation and Demand Management (EB-3008-0037), Page 18

<sup>8</sup> EB-2011-0199 decision, Page 15

- 3.5 Veridian's rates were last rebased in 2010 (EB-2009-0140) and its load forecast was updated for rates effective May 1, 2010.
- 3.6 The Settlement Agreement in EB-2009-0140 was accepted by the Board in its decision dated March 31, 2010. The section regarding the impact of CDM in the load forecast is as follows:

*3 b. Is the impact of CDM initiatives suitably reflected in the load forecast?*

**Complete Settlement:** Veridian has not included any CDM program impacts in the 2010 load forecast as details regarding Ontario Power Authority programs in the test year were not available at the time that the load forecast was prepared. For the purpose of obtaining complete settlement of all issues, the Parties agree that this treatment is appropriate.

**Evidence:** N/A

**Supporting parties:** VCI, SEC, EP, CCC, and VECC

**Parties taking no position:** None.

**Opposing parties:** None

- 3.7 In its EB-2011-0199 decision, the Board noted the assertion in the Settlement Agreement that "Veridian has not included any CDM program impacts in the 2010 load forecast". However, the Board concluded that this "has been contradicted by Veridian's response to Board staff interrogatory #14 in this proceeding, which states that approximately 22% of the 2010 impacts of Veridian's 2005 to 2010 CDM programs are included in the approved 2010 load forecast. As set out in the Hydro Ottawa decision (EB-2011-0054), the current CDM Guidelines do not consider a true-up of the effects of CDM activities embedded in the rebasing year. As such, there is no reasonable basis for the Board to vary from the existing CDM Guidelines."
- 3.8 In response to Board Staff interrogatory # 14 referenced above regarding why Veridian's last load forecast excluded the impacts of CDM programs, Veridian indicated "Veridian clearly did not explicitly include in its 2010 load forecast, projected CDM savings related to forecast CDM program activity in its 2010 test year. However, in preparing this interrogatory response it has concluded that its load forecast did include some CDM impacts related to programs delivered in prior years. Veridian's load forecast was prepared using a regression model that projected 2010 sales volumes based on an historic dataset of wholesale power deliveries from May 2002 to December 2008. Since Veridian did deliver CDM programs during the period of time covered by this dataset, some historical savings would have been captured and projected into the test year.
- 3.9 In response to Board Staff interrogatory #14, Veridian proposed to reduce its LRAM claim by \$85,814 to \$1,303,874 to account for implicit CDM impacts

related to programs delivered in prior years.

- 3.10 In its final submission in EB-2011-0199<sup>9</sup>, VECC noted that Veridian indicated that the approved May 1, 2010 distribution rates were based on a load forecast that excluded the impacts of CDM programs.<sup>10</sup> However, VECC submitted that the LRAM claim and rate riders approved by the Board should be adjusted to exclude the proposed lost revenue in 2010 from CDM programs implemented between 2005 and 2010. In making this submission, VECC relied on the recent Hydro Ottawa decision (EB-2011-0054), where the Board disallowed a true-up of the effects of CDM. In that decision, the Board noted firstly, that the Board's CDM Guidelines do not consider symmetry with respect to LRAM; and secondly, that there have been expectations related to LRAM including no-true up of the effects of CDM activities embedded in a rebasing year.<sup>11</sup>
- 3.11 VECC also noted other recent decisions, the Whitby Hydro decision (EB-2011-0206) and the Hydro One Brampton Decision (EB-2011-0174) decision where the Board disallowed LRAM claims in the rebasing year and beyond for CDM programs implemented prior to (and including) the rebasing year as the savings would be assumed to be incorporated in the load forecast at that time.

#### Bluewater Decision

- 3.12 In Bluewater's 2012 rate application (EB-2011-0153), Bluewater requested an LRAM amount of \$308,567.16 (revised) for lost revenues that included the effect of new 2010 programs as well as persistence of 2006-2009 programs in 2010, and the persistence of 2006-2010 programs for 2011.
- 3.13 Bluewater's rates were last rebased in 2009 (EB-2008-0221) and its load forecast was updated for rates effective May 1, 2009.
- 3.14 In the Bluewater decision (EB-2011-0153) dated March 22, 2012, the Board acknowledged and accepted the provision in the Settlement Agreement relating to EB-2008-0221, which states: "For the sake of clarity, the revised forecast does not reflect in any way specific electricity conservation programs". In its decision, the Board deviated from the 2008 CDM Guidelines and approved an LRAM claim in 2010 for CDM impacts that accrued prior to the rebasing year as the Board accepted that they were not included in the load forecast at that time. Specifically, the Board approved an LRAM recovery for the persistence of 2006 – 2009 programs in 2010 and the effect in 2010 of the programs implemented in 2010, totalling \$168,049.85 to December 31, 2010, plus interest to April 30, 2012. The Board did not approve recovery of persistence from 2006 to 2010 programs in 2011 and 2012, as it found it as premature to do so and inconsistent

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<sup>9</sup> Page 5

<sup>10</sup> Exhibit 2, Tab 1, Schedule 1, Page 23

<sup>11</sup> EB-2011-0054 Hydro Ottawa decision, Page 24

with the LRAM Guidelines.

#### Enersource Decision

- 3.15 Enersource sought to recover a total LRAM claim of \$856,957, including carrying charges, over a one-year period. The lost revenues include the persisting impacts of 2005-2009 CDM programs in 2010 and lost revenues from 2010 CDM programs in the Enersource decision
- 3.16 Enersource's rates were last rebased in 2008.
- 3.17 The Board approved Enersource's revised LRAM claim of \$860,339, representing lost revenues arising from the persistence of 2005-2009 CDM programs in 2010 and lost revenues from 2010 CDM programs in 2010.
- 3.18 In its decision, the Board stated, "In general, the Board is of the view that LRAM is accruable until new rates (based on a new revenue requirement and load forecast) are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time. However, as set out in the Settlement Agreement and the transcript from the oral hearing in EB-2007-0706, in which the Settlement Agreement was accepted by the Board, it is apparent that the intent was to remove the CDM effects from the load forecast and defer consideration of those CDM effects to a future LRAM proceeding. As such, the Board is of the view that it is appropriate to deviate from the 2008 CDM Guideline and approve the LRAM recovery sought by Enersource in this application."

#### VECC's Position

- 3.19 For the same reasons noted in section 2 above, VECC submits the Veridian decision is not inconsistent with the Bluewater and Enersource decisions. Rather, Veridian's circumstances are distinct from that of Bluewater and Enersource. Veridian included implicit CDM impacts in its load forecast. Bluewater and Enersource did not.
- 3.20 In its decisions regarding Bluewater and Enersource, the Board accepted that the load forecast did not include an adjustment for CDM and it was clear that there was an expectation that a future LRAM application would address the issue.
- 3.21 VECC submits that although it may have been Veridian's intent to remove the CDM effects from its 2010 load forecast, the current understanding based on Veridian's response to Board Staff IR#14, is that the load forecast did in fact contain implicit CDM effects. As such, VECC submits that the Board made an appropriate finding in its EB-2011-0199 decision that the current CDM Guidelines do not consider a true-up of the effects of CDM activities embedded in the rebasing year and it would be inappropriate to deviate from the 2008 Guidelines.



Lost revenues are accruable until new rates are set by the Board, as the savings would be assumed to be incorporated in the load forecast at that time.

- 3.22 VECC submits the Board's Veridian decision (EB-2011-0199) is distinct from the Bluewater and Enersource decisions, and consistent with the Board's Hydro Ottawa decision (EB-2011-0054).
- 3.23 Specifically, the Hydro Ottawa decision states, "The Board's Guidelines for *Electricity Distributor Conservation and Demand Management* do not consider symmetry with respect to LRAM. In addition, as noted in the Board staff submission, there have been expectations related to LRAM, including no true-up of the effects of CDM activities embedded in a rebasing year."
- 3.24 In considering the above, VECC submits that Veridian's Motion to Vary should be denied.
- 3.25 In making these submissions, VECC acknowledges that the Board's decision could have been different in this case and yet still be appropriate. For example, the Board may have decided, in the first instance, to exercise its discretion to allow Veridian to "correct" its 2010 load forecast after the fact to remove all CDM effects as had been indicated in the settlement agreement and subsequently allowed the requested LRAM claim. However, having not made such a decision, the resulting denial of the LRAM claim on the basis that Veridian had included CDM in its 2010 load forecast is not a substantive error.

#### **4 Recovery of Reasonably Incurred Costs**

- 4.1 VECC submits that its participation in this proceeding has been focused and responsible. Accordingly, VECC requests an order of costs in the amount of 100% of its reasonably-incurred fees and disbursements.

All of which is respectfully submitted this 9<sup>th</sup> day of May 2012.