Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0201

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

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 by Veridian Connections Inc. pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review by the Board of its Decision and Order in proceeding EB-2011-0199 dated March 22, 2012.

BEFORE: Cynthia Chaplin
Vice Chair and Presiding Member

Paula Conboy
Member

DECISION AND ORDER ON MOTION TO REVIEW June 14, 2012

INTRODUCTION

On April 11, 2012, Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order (the "2012 IRM Decision") dated March 22, 2012 in respect of Veridian's 2012 rate application (EB-2011-0199). The Board assigned the Motion file number EB-2012-0201. For the reasons set out below the Board is declining to hear the Motion as it does

not meet the "threshold test" for review that has been established by the Board and upheld by the courts.

The Board issued a Notice of Motion to Vary and Procedural Order No. 1 on April 25, 2012. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), which was the only intervenor in Veridian's 2012 rate application. The Board also determined that the most expeditious way of dealing with the Motion was 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. The Board established a timetable for Veridian to file any additional material in support of the Motion, written submissions by VECC and Board staff, and reply submission by Veridian.

Board staff filed its submission on May 9, 2012. Veridian filed its reply submission on May 11, 2012.

A submission from VECC was filed on May 13, 2012. Veridian filed a letter with the Board noting that it would be inappropriate for the Board to accept VECC's late filing. However, if the Board accepted VECC's submission, Veridian requested the right to reply. On May 14, 2012, the Board issued Procedural Order No. 2, accepting VECC's submission, notwithstanding the late filing, and allowing Veridian to file a further reply submission.

On May 16, 2012, Veridian filed its response to VECC's submission.

BACKGROUND

On October 14, 2011, Veridian filed a rate application under section 78 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B) based on the Board's 3rd generation Incentive Regulation Mechanism ("IRM"). The application sought approval for changes to the rates that Veridian charges for electricity distribution, to be effective May 1, 2012. The application was assigned Board file number EB-2011-0199.

Veridian originally requested the recovery of a Lost Revenue Adjustment Mechanism ("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.

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.

Board staff did not support the recovery of lost revenues associated with persisting effects of 2005 to 2009 CDM programs in 2010, or the lost revenues persisting beyond 2010, as these amounts should have been incorporated into Veridian's last approved load forecast. VECC also submitted that the LRAM claim approved by the Board should be adjusted to exclude the proposed lost revenue in 2010 from CDM programs implemented between 2005 and 2010.

Veridian submitted that its expectation of future recovery could be inferred from the Settlement Agreement from its 2010 cost of service proceeding (EB-2009-0140), since the stated reason for omitting CDM impacts from the 2010 load forecast was "lack of available information" at the time. Veridian noted that once the necessary information became available, Veridian would use it to address CDM impacts in the 2010 test year. Veridian submitted that it never agreed to forego its lost revenues from its 2010 CDM programs.

Veridian also noted that the regression model (used to develop the load forecast) projected sales volumes based on power deliveries from May 2002 to December 2008. Veridian delivered CDM programs during this time period, and therefore some historical savings were captured and projected into the test year. Veridian submitted that these implicit savings in its 2010 load forecast are approximately 22% of the actual 2010 impact of its 2005 to 2010 CDM programs. However, Veridian maintained that it should be awarded the full LRAM amount of $1,389,688 for lost revenues in years 2007 to 2010. Alternatively, Veridian noted that it would be willing to accept a discounted 2010 LRAM amount to account for the 22% impact identified.

On March 22, 2012, the Board issued its 2012 IRM Decision. The Board did not approve Veridian's full LRAM claim. 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. With respect to the issue which is now the subject of this Motion, the Board stated:

> With respect to the LRAM claim associated with the effect of 2010 programs in the 2010 rate year and persistence from legacy programs in 2010, the Board finds 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. The Board notes the assertion in the Settlement Agreement that "Veridian has not included any CDM program impacts in the 2010 load forecast" 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.[1]

The Motion seeks to vary the Board's 2012 IRM Decision so that Veridian may recover an 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. The grounds for the Motion is an alleged inconsistency between the 2012 IRM Decision and the Board's decision in respect of Bluewater Power Distribution Corporation's ("Bluewater Power") 2012 rate application (EB-2011-0153). Veridian proposed that the Motion be heard by way of a written hearing.

On April 24, 2012, Veridian submitted a letter noting that in the Board's decision in Enersource Hydro Mississauga Inc.'s ("Enersource") 2012 rate proceeding (EB-2011-0100) the Board approved the recovery of lost revenues for 2010, which included the persistence of CDM savings from programs that were implemented prior to Enersource's 2008 cost of service rebasing. Veridian submitted that, just like Enersource, Veridian's intent was to remove the impacts of CDM from its load forecast. Veridian further submitted that both Enersource and Veridian's load forecasts included implicit CDM impacts, yet Enersource's LRAM recovery was granted and Veridian's was denied.

[1] EB-2011-0199, Decision and Order, March 22, 2012, p. 15

POSITIONS OF PARTIES

VECC submitted that regulatory inconsistency is not adequate grounds to meet the threshold for a motion to review, particularly when previous Board decisions have not always been consistent. VECC noted that panels of the Board are not and cannot be thought to be bound to the decisions of preceding panels and that each panel must make its decision on the basis of the facts before it and the relevant policies and principles affecting the decision. VECC cautioned that if the Board allows the Motion to be heard solely on the basis of regulatory inconsistency, other parties will look to vary Board decisions on the same grounds and will inevitably rely on past Board decisions that support their alternative view.

Veridian replied that the principle of regulatory consistency has been supported by the Supreme Court of Canada and the Board and submitted that dismissing its Motion out of a concern for future review motions would discount that principle and discredit the Board's expertise. Veridian also noted that the Board and parties before the Board should want consistency of decision making so that all parties have a reasonable expectation of what to expect from the regulator. Veridian further submitted that if future parties were to rely on the grounds of regulatory inconsistency in support of a motion to review, the Board could decide these motions on a case by case basis. Veridian also noted that where the Board finds that a departure from established decisions was made on the basis of "reasoned principle", those motions would not satisfy the threshold question.

Board staff submitted that there is no identifiable error in the Board's 2012 IRM Decision to warrant review and the Motion should be denied at the threshold test. Board staff submitted that Veridian's situation is not comparable to Bluewater Power's situation, because there was no evidence that Bluewater Power included any implicit CDM impacts in its load forecast and Veridian conceded that its load forecast did include CDM impacts related to programs delivered in prior years. Board staff concluded that the evidentiary basis for the two decisions is distinct and there is no inconsistency.

VECC made similar submissions to the effect that Veridian's circumstances are distinct from those of Bluewater Power and Enersource. VECC noted that Veridian included CDM impacts in its load forecast, while Bluewater Power and Enersource did not.

Veridian responded that the language in Veridian's Settlement Agreement was more specific than the wording in Bluewater Power's Settlement Agreement and submitted that on an adjusted basis, Veridian's situation is comparable to that of Bluewater Power's. Veridian also submitted that although Board staff submitted there was a difference between Veridian's and Bluewater Power's respective situations, it did not provide a rationale as to why that difference justifies different treatment between the two utilities, especially when Veridian adjusted its LRAM claim to account for the implicit CDM impacts.

VECC further submitted that the 2012 IRM Decision is consistent with the Board's Hydro Ottawa decision (EB-2011-0054). Veridian replied that its circumstances are not consistent with those of Hydro Ottawa, because there was no forecast of CDM savings built into Veridian's load forecast. It was Veridian's intention to exclude CDM savings from its load forecast. Veridian further submitted that it is not requesting a true-up of its implicit CDM savings to its actual CDM savings. Veridian maintained that it is seeking to recover its entire actual CDM savings as contemplated by the Settlement Agreement, but that in order to do so without double recovering a portion of its CDM savings it proposed to adjust its LRAM claim to account for the unintended implicit CDM savings included in its load forecast.

THE "THRESHOLD TEST"

Section 44.01 of the Board's *Rules of Practice and Procedure* (the "Rules") provides 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:
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> 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[2]

[2] Ontario Energy Board's *Rules of Practice and Procedure*, revised July 14, 2008, section 44.01

Under section 45.01 of the Rules, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. Section 45.01 of the Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits[3].

The Board has considered previous decisions of the Board in which the principles underlying the "threshold question" were discussed, namely in the Board's Decision on a Motion to Review Natural Gas Electricity Interface Review Decision[4] (the "NGEIR Review Decision") and most recently in the Divisional Court's decision *Grey Highlands v. Plateau*, in which the court dismissed an appeal of the Board's decision in EB-2011-0053.

In the NGEIR Review Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision. The Board also indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought and that "the review is not an opportunity for a party to reargue the case"[5]. The Board stated as follows:

> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.[6]

In the *Grey Highlands v. Plateau* decision the Divisional Court dismissed an appeal of a Board decision where the Board determined that the motion to review did not meet the

[3] Ontario Energy Board's *Rules of Practice and Procedure*, revised July 14, 2008, section 45.01
[4] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") at page 18 and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012)
[5] EB-2006-0322/0388/0340, NGEIR Decision, at pages 16 and 18
[6] Ibid., p. 18

threshold test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

> The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.[7]

The Divisional Court also noted that the plain language of section 44.01 which enumerates the various grounds which the Board "may" consider in determining whether to hear a motion to review does not require the Board to consider other grounds, such as errors or law, and decided not to interfere with the Board's discretion in that regard. The court stated:

> We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.[8]

BOARD FINDINGS

The Board concludes that the Motion does not meet the threshold test. In this panel's view, the Motion does not indicate an error of fact or any of the other grounds for review enumerated in section 44.01 of the *Rules.* Neither does it raise a question as to the correctness of the original 2012 IRM Decision nor does it point to an "identifiable error" in the 2012 IRM Decision. The basis for the Motion is alleged regulatory inconsistency. Veridian argues that its situation is sufficiently similar to that of Bluewater Power and Enersource to warrant the same conclusion being reached by the Board.

It is well established that a decision of one panel of the Board cannot bind another panel. However, it is also true that consistency in decision making is good regulatory practice as it promotes stability, predictability and fairness.

[7] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para 7
[8] *Grey Highlands v. Plateau* at para 8

The Board concludes that regulatory consistency is not sufficient grounds for a review. As indicated above, the Board is guided by the principles articulated in the NGEIR Review Decision regarding the presence of an "identifiable error" as grounds for a review. The Board concludes that a lack of regulatory consistency cannot be an error, because if it were, then a future panel's discretion would be bound by the prior decision. This is wholly inappropriate. While a panel should endeavour to consider other similar cases and the associated decisions, no prior decision of the Board can fetter the discretion of a later panel. Further, any enquiry into regulatory consistency would result in a potentially complex analysis. For example, the Board would need to consider and potentially determine which decision, from amongst a set of decisions, is the "correct" decision which in turn forms the standard against which others are measured for consistency. Does the earliest decision form the standard against which others are measured for regulatory consistency? If there are two or more decisions which appear to be the same, do they form the standard against which other decisions before or after are measured for consistency? The enquiry in any particular review motion would introduce an enquiry into other decisions which had not been the direct subject of the motion.

Veridian argues that the Board should have reached the same decision for Veridian as the Board reached for Enersource and Bluewater Power. Veridian submits "with the exception of the treatment of implicit CDM impacts, the circumstances in Veridian's proceeding were not distinguishable from those in the Bluewater Power and Enersource proceedings."

Each Board decision must be reasoned and free of errors, but that does not mean that decisions will be – or should be – identical in every case where there are similar fact situations. In reaching a decision, the Board must take into account all aspects of the specific fact situation and the interplay amongst facts and issues within the application. Decisions are often complex and multi-faceted documents. As a result, the Board may well reach a different decision in two cases which present similarities in their fact situations. (For the same reason, the Board may reach the same decision in two cases which present different fact situations.)

Veridian maintains that its fact situation is not distinguishable from that of Bluewater Power or Enersource, but for the treatment of implicit CDM impacts. Veridian submits that all three utilities *intended* to exclude CDM impacts from their load forecasts. Veridian submits that it only differs from the other two in that there was an *unintended*

inclusion of CDM impacts in the forecast which was revealed during the IRM proceeding. Veridian maintains that this difference is fully accounted for through Veridian's adjustment to its LRAM to account for (and remove) this *implicit, but unintended* inclusion. Even if regulatory consistency were potential grounds for review, Veridian has not substantiated its claim that the fact situations of Veridian, Bluewater Power and Enersource are indistinguishable in all material respects.

The decisions in Bluewater Power and Enersource explicitly acknowledge that CDM impacts were excluded from the relevant load forecasts and both decisions quote from the respective Settlement Agreements to that effect. In neither decision is there any reference to evidence of unintended or implicit inclusion of CDM impacts.

In Veridian's case, the Board acknowledged the statement in the Settlement Agreement to the effect that CDM impacts were excluded from the load forecast, but also identified Veridian's evidence that its load forecast did in fact include CDM impacts:

> The Board notes the assertion in the Settlement Agreement that "Veridian has not included any CDM program impacts in the 2010 load forecast" 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.[9]

Veridian maintains that its willingness to adjust its LRAM claim for the implicit CDM impacts serves to align its circumstances with those of Bluewater Power and Enersource. The Board does not agree. The 2012 IRM Decision is based on a factual finding that CDM impacts were included in the load forecast (which Veridian does not dispute) while the Bluewater Power and Enersource decisions are based on the factual finding that CDM impacts were completely excluded from the load forecast.

The Board has decided to dismiss the Motion without a hearing, pursuant to Section 45.01 of the Board's *Rules of Practice and Procedure*. In the Board's view, for the reasons outlined above, the Motion does not meet the requirements of Rule 44.01 of the *Rules of Practice and Procedure* or the established Threshold Tests required for further consideration of the motion to review.

[9] EB-2011-0199, Decision and Order, March 22, 2012, p. 15

COST AWARDS

The Board will issue a separate decision on cost awards once the following steps are completed:

1. VECC shall submit their cost claims no later than **7 days** from the date of issuance of this Decision and Order.

2. Veridian shall file with the Board and forward to VECC any objections to the claimed costs within **21 days** from the date of issuance of this Decision and Order.

3. VECC shall file with the Board and forward to Veridian any responses to any objections for cost claims within **28 days** from the date of issuance of this Decision and Order.

4. Veridian shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, June 14, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary