EB-2013-0022

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 related to Smart Meter deployment, to be effective November 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 by the Board's Decision and Order in proceeding EB-2012-0247.

BEFORE: Marika Hare
Presiding Member

DECISION AND ORDER ON MOTION TO REVIEW April 25, 2013

INTRODUCTION

On January 23, 2013, Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board (the "Board") a motion for request to review and vary (the "Motion") the Board's Decision and Order dated October 25, 2012 (the "Decision") in respect of Veridian's smart meter application (EB-2012-0247) (the "Final Disposition Proceeding"). The Board assigned the Motion file number EB-2013-0022.

The Motion sought to extend the time for filing the Motion with the Board and vary the

Board's EB-2012-0247 Decision to permit Veridian to recover an additional $478,224 in revenue requirement related to 2009 amortization expenses associated with smart meter capital expenditures made in 2006, 2007, and 2008. The recovery is to be made through amendment of the existing Smart Meter Disposition Riders ("SMDRs") commencing on May 1, 2013 and continuing until April 30, 2014.

The Board issued its Notice of Motion to Vary and Procedural Order No. 1 on March 6, 2013. The Board granted intervenor status and cost award eligibility to the Vulnerable Energy Consumers Coalition ("VECC"), as it was the only intervenor in Veridian's smart meter rate proceeding under EB-2012-0247. 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* (the "Rules"), and the merits of the Motion.

The Board established a timetable for Veridian to file any additional material in support of the Motion, followed by written submissions by VECC and Board staff, and a reply submission by Veridian.

Veridian submitted additional material in support of its Motion on March 13, 2013. Board staff filed its submission on March 22, 2013. Veridian filed its reply submission on April 3, 2013. VECC did not file any submission.

For the reasons that follow the Board grants the extension of time for filing the Motion and finds that the threshold test has been met. The Board has reviewed the Motion materials and the Decision, and for the reasons set out below has determined that it will not grant the relief requested.

BACKGROUND

On October 2, 2009 Veridian applied to the Board for approval of 2010 rates on a Cost of Service basis (EB-2009-0140) (the "Interim Disposition Proceeding"), within which Veridian applied for interim disposition of smart meter-related revenue requirement amounts. As part of the Interim Disposition Proceeding, the capital expenditures associated with smart meter investments up to December 31, 2008 were included in Veridian's rate base effective January 1, 2010. Accordingly, going forward from January 1, 2010, the revenue requirement associated with smart meter capital expenditures up to December 31, 2008 was included in base rates.

Even after taking into account the interim clearance of smart meter amounts as approved by the Board in the Interim Disposition Proceeding, the 2009 amortization amounts related to smart meter capital investments made prior to January 1, 2009 were neither: a) included in base rates; nor b) recovered as part of the interim clearance.[1]

The Smart Meter Model (the "Model") issued by the Board along with Guideline G-2011-0001: Smart Meter Meter Funding and Cost Recovery – Final Disposition, issued December 15, 2011, and used by Veridian in its smart meter application EB-2012-0247 did not specifically address the fact that the 2009 amortization related to the pre-2009 smart meter capital expenditures remained outstanding and unrecovered either through an earlier rate rider or through approved distribution rates.

On May 31, 2012, Veridian applied for final disposition of smart meter-related amounts under Board file number EB-2012-0247. As part of that proceeding Veridian used the Board's Model to calculate the revenue requirement to be cleared.

The application sought approval for the final disposition of Account 1555 and 1556 related to smart meter expenditures. Veridian requested SMDRs and Smart Meter Incremental Revenue Requirement Rate Riders ("SMIRRs") effective November 1, 2012.

On October 25, 2012, the Board issued its Decision in the EB-2012-0247 proceeding and found that Veridian's documented costs, as revised in responses to interrogatories, related to smart meter procurement, installation and operation were reasonable. The Board approved the recovery of the costs for smart meter deployment and operation as of December 31, 2011. The Board directed Veridian to establish the SMDRs based on an 18-month recovery period to April 30, 2014, and to accommodate within the SMDR the applicable SMIRR amount related to the period from May 1, 2012 to October 31, 2012.

Veridian filed its Draft Rate Order and provided the following summary table outlining the SMDR and SMIRR rate riders as originally filed, as revised as per interrogatories and as recalculated pursant to the Board's Decision.

[1] Motion for Request for Review and Variance filed by Veridian, January 23, 2013, paragraphs 5 & 6

Class	SMDR ($/month for 18 months)			SMIRR ($/month until new rates set under rebasing)		
	As Filed	Update-Board Staff IR#13	Update - Board Decision	As Filed	Update-Board Staff IR#13	Update - Board Decision
Residential	$0.97	$0.83	$0.55	$0.98	No Change	$ 1.25
GS < 50 kW	$2.45	$4.15	$3.45	$2.46	No Change	$ 3.17

Board staff filed comments on the draft Rate Order on November 5, 2012 and agreed that Veridian had appropriately reflected the Board's findings in its draft Rate Order and proposed Tariff of Rates and Charges.

The Board issued Veridian's final Rate Order on November 15, 2012.

Veridian is now asking the Board through its Motion to allow for recovery of smart meter capital expenditures in the amount of $478,224, inclusive of Payment In Lieu of Taxes ("PILs") impacts, through the amendment of the existing SMDR. The amended SMDR is proposed to commence on May 1, 2013 and to continue until April 30, 2014.

Issues Before the Board

1. Extension of time

As noted by Veridian in its Motion materials, Veridian discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

As a result of the timing of Veridian's discovery of this amount for which it had not sought recovery it was not in a position to file its Motion within the prescribed 20 days specified in the Rules, which expired on or about November 14, 2012. Accordingly, Veridian asks that the Board use its discretion to extend the time period for filing a request for review.

The Board notes that parties are expected to respect the Board's deadlines and comply with the Rules, however the Board understands that the error was not identified by Veridian until after the 20 day period had expired and Veridain filed its motion immediately after becoming aware of the error. The Board therefore will use its discretion to hear the Motion, despite the timelines being exceeded.

2. Motion to Review and Vary

Veridian's Motion seeks to vary the Decision so that Veridian may recover an additional $478,224 in revenue requirement related to 2009 amortization expense of $528,859 associated with smart meter capital expenditures made in 2006, 2007, and 2008, less a credit to Grossed-up Taxes/PILs of $50,635.

Veridian requests revisions to its SMDR as outlined below.

Rate Class	Currently Approved Rate Rider	Requested Revision to Rate Rider effective May 1, 2013
Residential	$0.55	$0.83
Residential – Urban Year Round	$0.55	$0.83
Residential – Suburban Year Round	$0.55	$0.83
General Service Less Than 50 kW	$3.45	$4.59

Veridian bases its Motion on the following grounds:

1. There is an identifiable error in the Decision and that there are inconsistent findings in the Decision. The error is material and relevant to the outcome of the Decision. The omission of the 2009 amortization is a calculation error that should be remedied through a variance of the original Decision.

2. Veridian also notes that as part of the EB-2012-0247 proceeding, Veridian completed the Board's Model to calculate the revenue requirement to be recovered. However, the Model, in its design, did not anticipate any gap (i.e., unrecovered amounts from a reviewed and approved interim recovery, and final disposition of smart meter-related amounts in relation to amortization expense of installed smart meters.

The Threshold Test

The application of the threshold test was considered by the Board in its Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision"). The Board, in the NGEIR Review Decision, 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. Further, in the NGEIR Decision, the Board 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”.

In addition to the test set out in the NGEIR Review Decision, Rule 45.01of the Board’s Rules provides that, with respect to a motion for review the Board may determine, with or without a hearing, a threshold question whether the matter should be reviewed before conducting any review on the merits.

Rule 44.01(a) sets out some of the grounds upon which a motion may be raised with the Board:

> Every notice of 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.

The Board also notes that in the NGEIR Review Decision it was established that the Board has the necessary discretion to supplement the above list of grounds upon which a motion to review and vary may be raised in an appropriate case.[2]

[2] EB-2006-0322/EB-2006-0338/EB-2006-0340, Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, page 15

The Board received submissions from Veridian and Board staff. Board staff submitted that the threshold test has not been met arguing that none of the grounds listed in Rule 44.01 had been established. Veridian argued that the threshold had been met and that the Motion had merit.

The Board discusses each of the grounds set out in Rule 44.01 below with respect to the facts as presented in this Motion.

i. Error in fact

Veridian argued that a combination of what it would characterize as unusual circumstances relating to the multi-proceeding approach to the recovery of its smart meter-related revenue requirement led to an error in the calculation of the rider that was intended to fully compensate Veridian for costs incurred in the deployment and operation of smart meters. Veridian also submitted that the error related to the failure of the SMDR to compensate Veridian for 2009 Amortization Expenses related to 2006, 2007, and 2008 smart meter Capital Expenses in the amount of $478,223.79.

Veridian stated that the error it is seeking to have corrected is not related to the omission of evidence that, had it been before the Board prior to the Decision may or may not have influenced the exercise of the Board's discretion or judgment with respect to the prudence of Veridian's smart meter-related expenditures. Veridian noted that it is asking the Board to correct a clear error in the calculation of the recovery that necessarily follows from the Board's analysis of the prudence of Veridian's spending.

Board staff submitted that 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. Board staff submitted that the Board's Decision is consistent with the evidence provided by Veridian.

Veridian argued in its reply submission that Board staff has admitted that there is an error in the Decision when it accepted that the $478,223.79 amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board finds that Veridian has failed to demonstrate that the findings are contrary to the evidence that was before the Panel, that the Panel failed to address a material issue or that the Panel made inconsistent findings. The Board finds that the Decision was correct based on the evidence presented by Veridian in its pre-filed materials and during the proceeding.

ii. Change in circumstances

The Board finds no change in circumstances and notes that neither Veridian nor Board staff made any submissions with respect to this aspect of the threshold test.

iii. New facts that have arisen

Both Board staff and Veridian acknowledged that the review of accounting year-end working papers did result in the discovery of the amount of $478,224 now claimed by Veridian. The amortization expenses claimed in this Motion are for the previously installed and approved smart meters for the discrete time period of 2009. The Board notes that these amounts were at the time both unaudited and outside of the test year for 2010 rates.

In its submission Board staff noted that Veridian is asking the Board to address a calculation error that was made when implementing the Board's approval of Veridian's smart meter capital expenditures through an SMDR.

Board staff acknowledged that the Model did not explicitly contemplate Veridian's circumstances, but submitted that the use of the Model does not preclude the need for other calculations to accommodate the special circumstances of any particular distributor or its application. Further, Board staff submitted that Veridian should have been aware that there was an amount missing prior to filing its application, as the expenses documented in the Model would have been diferent than the principal balances in Account 1556 for OM&A, and specifically, depreciation. Veridian was in the best position to identify the missing depreciation expense during that proceeding and it should not be incumbent on the Board, Board staff, or VECC as the intervenor to recognize this oversight.

Veridian stated that it only discovered the gap in recovery of smart meter expenses on January 9, 2013 during preparation of its regular year-end accounting working papers. It was during this process that Veridian realized that, with respect to the costs incurred by Veridian in relation to smart meter implementation it had not yet recovered the 2009 amortization expense related to pre-2009 smart meter capital expenditures, totalling $528,859 (before accounting for PILs impacts) and recorded in Account 1556.

Veridain submitted that the omission of the 2009 amortization is a calculation error that constitutes a new fact and that the omission of the $478,224 should be remedied through a variance of the original Decision.

The Board finds that this is a new fact for the purpose of the threshold test. This amount was not previously in evidence, nor was the fact that amortization for 2009 had never been addressed nor that the total amount in the account was not cleared. The Board therefore finds that the threshold test for reviewing the Decision has been met.

The Merits of the Motion

Both Board staff and Veridian agree that the amount of $478,224 that Veridian is now seeking recovery of in its Motion is both material and is not in dispute. It is also submitted by Veridian and agreed to by Board staff that the amount should have been factored into the SMDR calculation as it is an outcome of the smart meter capital expenditures approved by the Board.

The Board notes that it has been consistent in allowing for the full recovery of the prudently incurred revenue requirement for approved smart meters deployed in accordance with the Government's regulations.[3] However, the Board finds that the failure to include the $478,224 for recovery in the EB-2012-0247 proceeding was an error on the part of Veridian. Veridian itself submitted that it was an omission to not include the 2009 amortization expenses.

Previous decisions of the Board when dealing with distributors' errors in calculations have resulted in disallowance of the correction, when in the distributor's favour. For example, in the North Bay Hydro decision[4] the Board found that "[t]he utility has control of its books and records and has the responsibility to ensure mistakes do not occur." As a result, the Board in that decision denied the application of North Bay Hydro.

The Board finds some parallels in this situation. Veridian should have been aware of

[3] EB-2012-0081, Cambridge and North Dumfries Hydro Inc., July 26, 2012, page 9
[4] EB-2009-0113, North Bay Distribution Ltd., September 8, 2009

the correct amount of the smart meter expenditures, including amortization expenses. The Board's Guideline G-2011-0001 and Smart Meter Model make it clear that it is the responsibility of the distributor to amend the models as appropriate.[5] The Board expects a utility to provide the Board with accurate accounting for rate setting purposes. Veridian has control of its books and records and has the responsibility to ensure mistakes do not occur. The Board will not adjust for this error.

A second very important factor is with respect to retroactive rate-making. If the Board were to allow recovery this would result in retroactive ratemaking in that Veridian is asking to recover an additional $478,224 in revenue requirement related to 2009 amortization expense through revisions to the SMDR which were established in a Final Rate Order. The courts have made it very clear that retroactive rate-making, the adjustment to rates after a final rate order has been issued, is not allowed. Rather, the principles of certainty and finality are a necessary component of effective rate regulation. To allow Veridian to correct a calculation error after a final rate order was issued would require the Board to engage in retroactive ratemaking, which is contrary to the legal principles upon which the Board performs its legislated mandate.

DATED at Toronto, April 25, 2013
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

[5] Guideline G-2011-0001 and the associated Board-issued models contemplate that a smart meter cost recovery application will cover all costs up to and including the prospective test year to appropriate calculate the SMDR and SMIRR to recover all historical and prospective costs until the distributor's next cost of service application. This thus consists of both audited and unaudited actuals historically and to the bridge year, and forecasts for part of the bridge and test years. This avoids the need for a further application to review audited stub period costs.