



EB-2013-0207

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

AND IN THE MATTER OF a Motion by Veridian
Connections Inc. pursuant to Rule 42.01 of the Ontario
Energy Board's *Rules of Practice and Procedure* (the
"Rules") for a review of the Board's Decision and Order in
proceeding EB-2013-0022.

BEFORE: Ellen Fry
Presiding Member

Marika Hare
Member

Ken Quesnelle
Member

**DECISION AND ORDER
ON MOTION TO REVIEW
June 13, 2013**

Introduction

On May 15, 2013, Veridian Connections Inc. ("Veridian") filed with the Ontario Energy Board (the "Board") a motion ("this Motion") to review and vary the Board's Decision and Order dated April 25, 2013 in EB-2013-0022. (the "Original Motion"). The Original Motion was a motion to review and vary the Board's Decision and Order dated October 25, 2012 in EB-2102-0247 in respect of Veridian's smart meter application (the "Rates Decision"). The Board has assigned this Motion file number EB-2013-0207.

The Motion seeks to vary the decision on the Original Motion and the Rates Decision to allow 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.

Veridian bases this Motion on the following grounds:

1. Veridian submits that the Board incorrectly applied the rule against retroactive ratemaking, which in its view is a mistake in law.
2. Veridian submits that the Board erroneously failed to set rates that are just and reasonable. Veridian submits that the Board held Veridian to a standard of perfection; that the Board has given priority to punishing Veridian for its error over the Board's obligation to set rates that are just and reasonable; and that the Board's decision on the Original Motion suggests that calculation errors to the detriment of distributors should not be corrected as readily as calculation errors to the detriment of ratepayers, if they are corrected at all.

Background

On January 23, 2013, Veridian filed the Original Motion. Veridian asked the Board in the Original Motion to vary the Rates Decision to allow for recovery of an additional \$478,224 in revenue requirement related to 2009 amortization expenses associated with smart meter capital expenditures made in 2006, 2007, and 2008. It requested that this be done through the amendment of the existing Smart Meter Disposition Rider ("SMDR"). The amended SMDR was proposed to commence on May 1, 2013 and to continue until April 30, 2014.

The Original Motion was based on the ground that there was an error in fact in the Rates Decision. Veridian argued that it followed the Board's Smart Meter ("SM") Model in calculating the SM revenue requirement it filed with the Board in EB-2012-0247, but that the SM Model did not address Veridian's situation. Veridian argued that as a result the Board made a calculation error that caused it not to allow Veridian's 2009 SM amortization expense.

On April 25, 2013, the Board issued its decision on the Original Motion. The Board found that the grounds for the Original Motion met the Board's threshold test for

considering motions to review, and therefore proceeded to consider the merits of the motion.

The Board denied the Original Motion, and stated its grounds for denying the motion as follows:

... 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, 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 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. 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 mandate¹.

¹ EB-2013-0022, Decision and Order on Motion to Review, April 25, 2013, pages 9 - 10

The Threshold Question

Rule 45.01 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.

As indicated in the Motions to Review the Natural Gas Electricity Interface Review Decision², two key factors that the Board considers in determining the threshold question are

- (1) Whether there is enough substance to the issues raised such that a review based on these issues could result in the Board deciding that the decision should be varied, cancelled or suspended; and
- (2) That a review is not an opportunity for a party to reargue the case.

Board's Findings

Pursuant to Rule 45.01 the Board has determined, without a hearing, the threshold question of whether the matter raised in this Motion should be reviewed. For the reasons below, the Board has determined that the matter raised in the Motion should not be reviewed. As indicated above, Veridian based this Motion on the following two grounds:

1. The Board made a mistake in law in applying the rule against retroactivity on a motion to review; and,
2. The Board erroneously failed to set rates that are just and reasonable.

Ground #1 – Mistake in Law

The relevant portion of the Board's decision on the Original Motion is reproduced above.

Although the Board states that the portion of the decision concerning retroactive ratemaking is a "very important factor", it is clear that this factor is not part of the basis for the Board's decision. It is merely a comment made by the Board on one aspect of the situation being addressed.

² EB-2006-0322/EB-2006-0338/EB-2006-0340

The Board's decision was based on its analysis of the issue concerning alleged error in fact raised by Veridian. The conclusion of the Board's analysis concerning this issue was reached prior to the Board's comment on retroactive ratemaking and without considering retroactive ratemaking in the analysis. The conclusion of the analysis concerning the alleged error of fact is that "The Board will not adjust for this error", i.e. that the Board denies the motion. It is only after the Board reaches the conclusion that it should deny the motion that it comments about retroactive ratemaking.

Accordingly, if Veridian were to be successful in its argument concerning mistake in law, this would not lead to a change in the Board's decision on the Original Motion.

Ground #2 – The Board Erroneously Failed to Set Rates that are Just and Reasonable

In the view of the Board, this ground is an attempt to reargue the issues that have already been considered by the Board in the Original Motion. It is not appropriate for the Board to review this issue on its merits a second time.

Accordingly, the Board dismisses the motion to review.

DATED at Toronto, June 13, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary