

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 Union Gas
Limited pursuant to section 43(1) of the Act, for an Order
or Orders granting leave to sell 11.7 kilometers of natural
gas pipeline between the St. Clair Valve Site and Bickford
Compressor Site in the Township of St. Clair, all in the
Province of Ontario.

**ARGUMENT IN CHIEF
OF UNION GAS LIMITED**

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ARGUMENT IN CHIEF OF UNION GAS LIMITED

OVERVIEW OF UNION'S POSITION

1. Union Gas Limited ("Union") is seeking leave to sell the St. Clair Line and related assets to the Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway LP") at a price equal to the net book value of the assets once all other steps necessary to put the Dawn Gateway Pipeline into service have been completed. Union submits that leave should be granted because the proposed transaction will cause no harm to any of the Board's statutory objectives set out in s. 2 of the *Ontario Energy Board Act, 1998* (the "OEB Act").
2. The sale of the St Clair Line is an integral and necessary part of the proposed plan to develop the Dawn Gateway Pipeline as a new international pipeline expansion linking Michigan and Ontario markets. The development of this additional firm year round transmission capacity into Ontario would facilitate competition in the sale of gas to users and facilitate the rational development of gas transmission and storage. The proposed sale not only does no harm, but it would also result in positive benefits for the Board's statutory objectives as a result of the development of the Dawn Gateway Pipeline.
3. The Dawn Gateway Pipeline will be owned by a joint venture which will be 50% owned by Westcoast Energy Inc. through various affiliates ("Spectra") and 50% owned by DTE Pipeline Company ("DTE"). Neither Spectra nor DTE will control the joint venture as they will each own an equal share of the business, and all management decisions will have to be made by both Spectra and DTE jointly.

Issue 1.0 Jurisdiction

1.1 If the proposed sale is approved, should the St. Clair Line be under the jurisdiction of the Ontario Energy Board (“OEB”) or the National Energy Board (“NEB”)?

4. The St. Clair Line should continue to be regulated by the OEB until it is actually sold to Dawn Gateway LP at which time it should come under the jurisdiction of the NEB as part of the greater Dawn Gateway Pipeline.
5. Union intends to continue owning and operating the St. Clair Line as it is currently until the sale actually occurs. Union acknowledges that the St. Clair Line will continue to be under OEB jurisdiction until it is sold to the Dawn Gateway LP in the future, if it is sold.
6. However, Union submits that the St. Clair Line should be regulated by the NEB as soon as the sale to Dawn Gateway LP occurs for the reasons stated in the next section.

1.2 If the proposed Dawn Gateway Line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?

7. The Dawn Gateway Pipeline should at all times be under the jurisdiction of the NEB.
8. As the Dawn Gateway Pipeline will operate as one international pipeline offering a seamless service between the US and Canada on a regular basis, the pipeline will be a federal undertaking within the meaning of section 92 (10) (a) of the *Constitution Act, 1867*¹ (the “Constitution”), and as such it would be under the exclusive jurisdiction of the NEB, regardless of who owns the pipeline. The Supreme Court of Canada addressed the test for federal jurisdiction over pipelines in *Westcoast Energy Inc. v. Canada (National Energy Board)* (“*Westcoast*”) as follows:

¹ Relevant portions of the *Constitution Act, 1867* are in Union’s Brief of Authorities, Tab 1

43 Subsection 92(10) of the *Constitution Act, 1867* provides generally that local works and undertakings within a province come within provincial jurisdiction. However, the combined effect of ss. 91(29) and 92(10)(a) creates an exception whereby Parliament has exclusive jurisdiction over works and undertakings that come within the phrase "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province" in s. 92(10)(a). **The effect of s. 92(10)(a) is that interprovincial transportation and communications works and undertakings fall within federal jurisdiction.** See the discussion by Professor Hogg in *Constitutional Law of Canada* (3rd ed. 1992) (loose-leaf), Vol. 1, at pp. 22- 2 and 22-3.

44 *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd.*, [1954] S.C.R. 207 (S.C.C.), confirmed that a pipeline which extends beyond the boundaries of a province, such as the Westcoast mainline transmission pipeline, is a federal transportation undertaking under s. 92(10)(a). It is apparent that whether the Board has jurisdiction over the construction and operation of the proposed Fort St. John and Grizzly Valley gathering pipeline and gas processing plant facilities under the *National Energy Board Act* depends on whether these facilities also come within federal jurisdiction under s. 92(10)(a).² (emphasis added)

9. While ownership is relevant, it is not determinative. The constitutional test is whether the pipeline or pipelines are being operated subject to common management and control as a single enterprise providing international services on a continuous and regular basis. In other words, even if Union, rather than Spectra, partnered with DTE, the fact that the Dawn Gateway Pipeline will cross the international border and be operated and managed as a single pipeline used to provide service outside of Ontario means that it must be NEB regulated as a matter of constitutional law. In *Westcoast*, the Supreme Court of Canada stated:

45 It is well settled that the proposed facilities may come within federal jurisdiction under s. 92(10)(a) in one of two ways. **First, they are subject to federal jurisdiction if the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or**

² *Westcoast Energy Inc. v. Canada (National Energy Board)*, (1998) 156 D.L.R.(4th) 456 (S.C.C.) at paras. 44-45. Union's Brief of Authorities, Tab 2

undertaking. Second, if the proposed facilities do not form part of a single federal work or undertaking, they come within federal jurisdiction if they are integral to the mainline transmission pipeline...

46 Thus, the first issue is whether the Westcoast mainline transmission pipeline, gathering pipelines and processing plants, including the proposed facilities, together constitute a single federal work or undertaking.

...

49 **In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction.** Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not." He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise." In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient. See *Central Western*, supra, at p. 1132.

50 **Common management and operational control was determinative in *Luscar Collieries Ltd. v. McDonald*, [1927] A.C. 925 (Canada P.C.), and their absence was determinative in *Central Western*, supra. In *Luscar*, supra, the Privy Council held that a short line of railway located entirely within Alberta formed part of the Canadian National Railway Company ("CN") federal railway undertaking. Although the line was owned by the appellant Luscar, Lord Warrington focused at pp. 932-33 on the fact that it was operated by CN pursuant to several agreements.**³

(emphasis added)

See also Professor Hogg's discussion of this issue in *Constitutional Law of Canada*, 5th ed. at p. 651-653. (Union's Brief of Authorities, Tab 3)

10. In this case, both the US and Canadian portions of the Dawn Gateway Pipeline will be managed and operated together as one single enterprise in respect of both the Canadian and US operations. Dawn Gateway Pipeline will be a 50/50 joint venture between DTE

³ *Westcoast*, at paras. 45-50, Union's Brief of Authorities, Tab 2.

See Also P.W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 1 (Scarborough, Ontario: Carswell, 2007) at p. 651-653; Union's Brief of Authorities, Tab 3

and Spectra in both Canada and the US. All financial decisions (such as capital expansion and annual operating and maintenance budgets) will be made by the Dawn Gateway joint venture which will be run by a Board of Managers that will have equal representation from both DTE and Spectra. Both DTE and Spectra will have an equal say in the decisions that affect the joint venture, and neither DTE nor Spectra will have control over the enterprise.⁴

11. The Dawn Gateway joint venture will be funded 50/50 by Spectra and DTE. The Dawn Gateway joint venture will be paying for the assets that will be purchased from Union and St. Clair Pipelines LP and also for the assets that will be purchased from DTE; those purchases will be funded 50/50 by Spectra and DTE. Through their 50/50 funding of the joint venture, Spectra and DTE will also be jointly paying for the new construction of the Bickford to Dawn line.⁵
12. Dawn Gateway is proposing to develop a transportation path from Belle River Mills, Michigan to Dawn, Ontario that will provide an integrated point-to-point service between those two points.⁶ It is expected that shippers would negotiate with DTE (as the marketing lead for the joint venture) for a single toll for seamless, long-term transportation service from Belle River Mills to Dawn. Even though there would be only one toll, shippers will enter two contracts, one for the portion of the Dawn Gateway Pipeline in the US and another for the Canadian portion of the Dawn Gateway Pipeline. This concept and service is similar to the service offered by the NEB regulated Vector Pipelines for transportation on its Chicago to Dawn pipeline. Vector Pipeline is

⁴ Testimony of Steve Baker and Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 159-162, and Ex. No. K1.4, Organizational Charts for Dawn Gateway Partnership Structure in Canada and US.

⁵ Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 161, lines 1 -10, and Union's Pre-Filed Evidence, Ex No. K1.6, paras. 2-8.

⁶ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at pp. 7, lines 10-14

structured similarly to the proposed Dawn Gateway Pipeline, and the Canadian portion of Vector Pipeline is regulated as an NEB Group 2 pipeline.⁷

13. Two important features of the proposed Dawn Gateway Pipeline for attracting shippers to use the proposed line are 1) the integrated point-to-point nature of the proposed line so that the service is co-ordinated between Belle River Mills and Dawn, and 2) Dawn Gateway Pipeline's ability to offer one fixed, long-term toll over the entire pipeline from Belle River Mills to Dawn.⁸
14. Neither of these two important features can be offered unless the Dawn Gateway Pipeline is regulated as an NEB Group 2 pipeline. If Dawn Gateway offers an integrated point-to-point service crossing the international border it must be NEB regulated pursuant to the Supreme Court of Canada's *Westcoast* decision. Moreover, in order to offer a fixed, long term toll the pipeline cannot be subject to cost of service rates (either under the OEB or the NEB) which are subject to change from time to time. As a Group 2 Pipeline, Dawn Gateway would be able to enter into fixed, long-term contracts with shippers at negotiated rates, but Dawn Gateway would also be an at-risk pipeline with the shareholders assuming all risk for construction and operating costs, and all risk of uncommitted capacity or contract non-renewals.⁹
15. Dawn Gateway LP's obligation to purchase the St. Clair Line is conditional on the Dawn Gateway LP obtaining approval from the NEB to charge tolls and tariffs under a Group 2

⁷ Union's Response to Board Staff IR #1, Ex. No. K1.7, and Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 157, lines 12 to 16.

⁸ The fact that Dawn Gateway has been able to obtain binding contracts from 5 shippers for a for an aggregate volume of 280,000 Dthd (295,459 GJ/d, 7,931 103m³/d) or 78% of the project's initial capacity (Dawn Gateway NEB Application, p. 16 and p. 55, Ex. No. K1.8) is indicative of market demand for the integrated service that Dawn Gateway is proposing to offer.

⁹ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 22, lines 22 to 26, and p. 57, lines 3 to 14.

classification because the ability to offer fixed, long-term rates (which is not available under cost of service regulation) is a key feature of the Dawn Gateway project.¹⁰

Open Access to the Pipeline under NEB Jurisdiction

16. Questions have been raised as to what assurances can be given to the OEB that shippers would still be entitled to non-discriminatory access to the pipeline if jurisdiction is transferred to the NEB so that the OEB's proposed Storage and Transportation Access Rule ("STAR") no longer applies. The OEB has stated the following objectives for the proposed STAR:

- Ensure open, fair and non-discriminatory access to transportation services for customers and storage providers;
- Provide customer protection within the competitive storage market; and
- Support transparent transportation and storage markets.¹¹

17. The OEB's concern to ensure non-discriminatory access to service is shared by the NEB, and, in fact, the requirement for non-discriminatory access is enshrined in ss. 67 and 68 of the *National Energy Board Act* (the "NEB Act"):

67. A company shall not make any unjust discrimination in tolls, service or facilities against any person or locality.

68. Where it is shown that a company makes any discrimination in tolls, service or facilities against any person or locality, the burden of proving that the discrimination is not unjust lies on the company.

As a result of these provisions, the Dawn Gateway Pipeline will have to be an open access pipeline, and the NEB will have the regulatory jurisdiction to ensure that access is granted on a non-discriminatory basis.

¹⁰ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 57, line 23 to p. 58, line 8, and Purchase and Sale Agreement, Confidential Undertaking X1.2, at para. 3.1(v)

¹¹ OEB's Notice of Proposal to issue a Storage and Transportation Access Rule, April 9, 2009, at p. 3, Union's Brief of Authorities, Tab 14

18. The NEB regulates Group 2 companies on a complaint basis which means that shippers and other interested parties may file a complaint with the NEB if they believe that there has been discrimination in respect of traffic, toll or tariff issues.¹²
19. With respect to price transparency, shippers have real-time, daily access to the information that they need in order to decide whether the price being offered on the Dawn Gateway Pipeline is reasonable. When shippers are considering whether they want to contract for transportation, the determining factor is the difference between the market price for gas in Michigan and at Dawn. That price differential is what shippers look at in order to decide what price they are willing to pay for the transportation. For example, if the difference in price between Michigan and Dawn is \$0.10 per GJ, a marketer would be willing to pay something less than the \$0.10 per GJ to move gas. If the total transportation cost (i.e. the toll and fuel charge) is higher than \$0.08 or \$0.09 per GJ, it would be uneconomic for the shipper to contract for the transportation.¹³ The price of gas in Michigan and Dawn is posted every day on various bulletin boards, and published in various trade publications, ensuring the market price is transparent for all Dawn Gateway shippers.¹⁴
20. With respect to the OEB's concern to protect customers in the competitive storage market from being tied to transportation services, although affiliates of Spectra and DTE (i.e. Union and MichCon) separately offer storage services, neither Spectra nor DTE would be willing to agree that the other partner could tie Dawn Gateway transportation customers to storage services offered by the other partner's affiliate.¹⁵ Moreover, Union confirms that it is willing to agree to a condition of approval that would prohibit Union from requiring its storage customers to contract for service on the Dawn Gateway

¹² NEB Guidelines for the Regulation of The Traffic, Tolls and Tariffs of Group 2 Regulated Companies, at Sched. B, p. 1, Union's Brief of Authorities, Tab 5

¹³ Union's response to Undertaking J2.3

¹⁴ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 81, line 19 to p. 82, line 17

¹⁵ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 176, line 19 to p. 177, line 16

Pipeline as a condition of receiving storage service from Union. Union also consents to a condition of approval that would require Dawn Gateway LP to provide an undertaking to the OEB that it will not require customers on the Dawn Gateway Pipeline to contract for storage services from Union as a condition of obtaining transportation service on the Dawn Gateway Pipeline.

21. Union submits that the OEB's STAR objectives will continue to be met if the St. Clair Line is transferred to the NEB's jurisdiction.
22. Union further submits that it is in the public interest for the Dawn Gateway Pipeline to proceed as an NEB pipeline as described in Union's evidence.

Issue 2.0 Impact on Union's Transmission and Distribution Systems and Union's Customers

2.1 What impact would the proposed change in the ownership and operating control of the St. Clair Line have on the integrity, reliability, and operational flexibility of Union's transmission and distribution systems?

23. The transmission and distribution system in the area around the location of the St. Clair Line is the Sarnia Industrial Line system (SIL). The SIL pipeline network is adequately sized to maintain required pressures for all the residential and industrial customers connected to it on a peak day, based on gas sourced at Union's TCPL / GLTL Courtright station and Union's Vector Courtright station. The SIL would also have the ability to receive gas from the new Dawn Gateway Pipeline at the St. Clair Line station, as it does today. Therefore the change in ownership and operating control of the St. Clair Line would have no adverse impacts on peak day design and no adverse impacts on system integrity or reliability.¹⁶

¹⁶ Union's Response to CME IR # 3(c), Ex. No. K1.7

24. The sale of the St. Clair Line will have no negative impact on Union's security of supply and no negative impact on Union's design day capabilities. There would be no stranded Union facilities as a result of the proposed transaction. Union does not foresee any impact on Union's future expansion opportunities.¹⁷
25. Union's Sarnia system is designed based on Union's TCPL/GLTL Courtright Station and Union's Vector Courtright Station supplying gas to the existing Sarnia Industrial Line. The TCPL Courtright Station has a connection to the TCPL/GLTL Line and the Vector Courtright Station has a connection to the Vector Line, and those connections will not be affected by the proposed sale of the St. Clair Line.¹⁸
26. Union's operational flexibility will be enhanced by the Dawn Gateway Pipeline because it would remove the existing capacity constraint which is limiting the ability to use the St. Clair Line to physically access US storage and supply.
27. Although the capacity on the St. Clair Line, between the St. Clair River Valve Site and the Bickford Compressor Station, is approximately 214,000 GJ/day¹⁹, Union's ability to use the St. Clair Line to physically move gas from the St. Clair River Valve Site to Dawn is limited because the Bickford Pool Line which connects the Bickford Compressor Station to Dawn is not available on a firm basis for this purpose during portions of the year.
28. The Bickford Pool Line is mainly used to transport gas to and from Union's three storage pools – Bickford, Sombra and Terminus and Market Hub Partners' St. Clair storage pool (collectively the "Storage Pools"). During the injection period, April to October, gas flows from Dawn into the Storage Pools, and during the withdrawal period, November to

¹⁷ Union's Pre-Filed Evidence, Ex No. K1.6, para. 39

¹⁸ Union's Pre-Filed Evidence, Ex No. K1.6, para. 40

¹⁹ Union's Response to FRPO IR #6, Ex. No. K1.7

March, the flow is reversed. On peak winter days, the Bickford Pool Line is used exclusively to transport gas from the Storage Pools to Dawn, and during the summer the Bickford Pool Line is used almost exclusively to move injection volumes from Dawn to the Storage Pools.²⁰

29. Currently, all of the firm capacity of the Bickford Pool Line between Bickford and Dawn is used to transport gas between the Storage Pools and Dawn, Union has no physical pipe available that can be dedicated to physically transport firm gas between Bickford and Dawn when gas is being withdrawn from or injected into the Storage Pools. Union is limited to selling a firm capacity of 170,000 Gj/d in the winter and 106,000 Gj/d in the summer through an exchange between the Sarnia market and Dawn.²¹
30. Subject to obtaining the necessary regulatory approvals, the Dawn Gateway joint venture is proposing to combine the St. Clair Line with a new NPS 24 pipeline that Dawn Gateway is proposing to build from Bickford to Dawn. That new segment of pipeline would eliminate the pipeline constraint that restricts the use of the St. Clair Line.²²
31. In comparison to the *status quo*, the proposed Dawn Gateway Pipeline would provide Union and other Ontario gas market participants with a greatly improved connection (and hence security of supply) between Michigan and Ontario's Dawn trading hub. The proposed Dawn Gateway Pipeline would have the capacity to transport approximately 385,000 GJ/d of gas between Belle River Mills, Michigan and Dawn on a firm basis, and its capacity would be expandable to meet future needs.²³

²⁰ Union's Pre-Filed Evidence, Ex No. K1.6, para. 22- 23, and Union's Answer to Undertaking J2.6

²¹ Union's Pre-Filed Evidence, Ex No. K1.6, para. 24-26, see also Route Map at Sched. 1 to Union's Pre-Filed Evidence

²² Union's Pre-Filed Evidence, Ex No. K1.6, para. 32

²³ Union's Pre-Filed Evidence, Ex No. K1.6, para. 33

32. Union used the St. Clair Line as an emergency backstop to supply its Sarnia Industrial Line in the event of a supply failure from the TCPL/GLTL Line. Union's need to have that emergency capacity was reduced in 2005 when the Vector Line interconnected at the Courtright Station. However, in the event that Union were to need supply capacity in the future, the Dawn Gateway Pipeline would provide an additional pipeline connection and additional firm gas supply into Union's Dawn compressor station. Union's Sarnia Industrial Line would also still have the ability to receive gas from the new Dawn Gateway Line at the St. Clair Line Station. This would provide additional backstop supply capability to the Union system. Therefore Dawn Gateway dramatically increases the security of supply into Dawn.²⁴

2.2 How would the proposed sale of the St. Clair Line impact Union's ability to connect future customers that are in proximity to the St. Clair Line?

33. Union has no end use customers who are served directly off the St. Clair Line, and the sale of the St. Clair Line will have no detrimental impact on Union's ability to serve its distribution customers.²⁵
34. Even though the St. Clair line is physically located within Union's franchise area, Union has never connected a customer to this line. Union has a network of gas pipelines distributing gas to customers in the same municipality that is traversed by the St. Clair Line. Union does not anticipate having any problem connecting new customers. Union's process for connecting new residential and industrial customers to its remaining pipeline network will not change. Union will continue to connect customers to the Union Gas system following its New Business Distribution Guidelines.²⁶

²⁴ Union's Pre-Filed Evidence, Ex No. K1.6, para. 41- 42, and Union's Response to Board Staff IR # 4, Ex. No. K1.7

²⁵ Union's Pre-Filed Evidence, Ex No. K1.6, para. 38

²⁶ Union's Response to Board Staff IR # 5, Ex. No. K1.7

2.3 How would the proposed sale impact Union's ability to provide services to its existing customers, and what would be the impact on its rates? How should the proceeds of the proposed sale be treated for future rate making purposes?

Impact on Existing Customers

35. The proposed sale will result in the discontinuation of transportation service between St. Clair and Dawn under the C1 rate schedule, and Hub services such as title transfers and hub balancing at St. Clair. However, Union expects that customers currently served by the St. Clair line will be able to get the equivalent and enhanced service on the Dawn Gateway pipeline. There are no other service impacts to customers.²⁷
36. Currently, shippers are predominantly using the St. Clair Line on a seasonal basis, with some monthly contracts. In the recent past, Union has occasionally had annual contracts on the St. Clair Line, but the only contract that Union has on the St. Clair Line today is one contract that expires at the end of the summer, and there are no contracts yet for next winter.²⁸ Over the last three years, DTE affiliates have shipped 81% of the firm volumes transported on the St. Clair Line.²⁹
37. Under the current structure a customer must negotiate two contracts and two rates (with two different fuel rates) with two separate companies (MichCon and Union) to transport gas between Michigan and Ontario. Currently the two companies and the shippers are separately trying to maximize the value they receive from the transaction relative to the difference between the Michigan and Ontario gas prices (market value). This often contributes to the two rates combining for a total price that is not market competitive. For example, if the difference in price between Michigan and Dawn is \$0.10 per GJ, a

²⁷ Union's Pre-Filed Evidence, Ex No. K1.6, para. 46 and Union's Response to CME IR # 3(e)

²⁸ Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 146, lines 2-8

²⁹ Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 145, lines 14-18

marketer would be willing to pay something less than the \$0.10 per GJ to move gas. In two independent negotiations the marketer is trying to negotiate with MichCon as well as with Union. If the total cost from both MichCon and Union (i.e. the toll and fuel charge from both) is higher than \$0.08 or \$0.09 per GJ, the path would be uneconomic and the shipper will not use the path.

38. Today, shippers have the ability to negotiate a range rate for short term contracts that allow both MichCon and Union to capture market values. It is this flexibility that often results in both MichCon and Union pricing their respective services at an amount that does not work from a shipper's perspective.³⁰
39. Under the current structure, it would be very difficult for Union and MichCon to contractually agree to a system that would eliminate both company's desire and objective to maximize their own revenues from their own pipeline assets. The benefit of the Dawn Gateway proposal is that Spectra and DTE each owns a 50/50 share of the entire pipeline from Belle River to Dawn, and therefore both owners would have an equal interest in maximizing the revenue earned over the entire line, and this should make it easier for shippers to enter into long term contracts at economic rates on this transportation path to the Dawn Hub. Under the Dawn Gateway proposal, there would be one marketer, coordinating marketing efforts and negotiating one price for the point to point service from Michigan to Ontario.
40. Currently, MichCon and Union are charging two separate fuel charges to move gas from Belle River Mills to Dawn that together total about 1.9% of the volume moved. These charges represent the system-wide fuel rates on the MichCon and Union systems, and they make it very expensive to move gas on this path, particularly when gas prices are

³⁰ Union's Response to Undertaking J2.3

high. Another benefit of the Dawn Gateway proposal is that it will likely result in Shippers paying lower fuel charges.³¹

41. The fact that customers on the Dawn Gateway Pipeline will be receiving an enhanced service is demonstrated by the fact none of the customers who are currently using the St. Clair Line have filed any objection to the proposed sale, and the Dawn Gateway joint venture has been able to obtain binding contracts from 5 shippers, with terms ranging from 5 to 10 years, for firm transportation capacity of 280,000 Dthd (295,459 GJ/d). None of the 5 committed shippers on Dawn Gateway are DTE affiliates.³² This is to be contrasted to the current situation where the St. Clair Line is dramatically under-utilized and over the last six years has operated at an average load factor of only 9% of daily capacity.³³
42. In addition to service on the new Dawn Gateway Pipeline, customers who are currently using the St. Clair Line for transportation service from Michigan to Dawn are also able to get similar service today on other pipelines, such as the Great Lakes/TransCanada line, the Vector pipeline, the ANR link to Niagara GT, and the Bluewater line.³⁴

Rate Impact

43. Union is seeking leave to sell the assets at net book value which is the agreed sale price between Union and Dawn Gateway LP. It is estimated that the net book value of the assets in 2010 will be approximately \$5.2 million. The final rate impact of the sale will

³¹ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 9, line 5-17, and p. 73, line 14 to p. 74, line 16

³² Dawn Gateway NEB Application, p. 16 and p. 55, Ex. No. K1.8, and Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, p. 147, lines 14-17

³³ Union's Response to FRPO IR # 6, Ex. No. K1.7, and Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at p. 18, line 24 to p. 19, line 8

³⁴ Testimony of Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 170, lines 5-9

depend on when the sale occurs because the sale price will decline over time as the net book value declines.³⁵

44. However, if the sale proceeds at net book value there would be no material impact on Union's ratepayers as a result of the sale of assets. There would be a reduction in the rates of residential customers in the Southern Operations area (less than one dollar a year per customer) which would be incorporated into Union's rates proposals at the time it rebases under incentive regulation.³⁶

How should the proceeds of the proposed sale be treated for future rate making purposes?

Sale at Net Book Value as Proposed

45. There will be no capital gain on the sale because Union proposes to sell the assets at the net book value of the assets at the time of the sale. As there will be no gain on the sale, there is no reason why the ratepayers should be entitled to share in the proceeds for future rate making purposes. The only impact of the sale on rates should result from the removal of the original cost of the assets from the rate base which will result in a rate reduction.³⁷
46. The net book value represents the remaining value of the capital invested by Union's shareholder to build the pipeline after depreciation. As a result of the Supreme Court of Canada's decision in the *ATCO* case, it is clear that ratepayers do not have an ownership interest in the assets of the utility.³⁸

³⁵ Union's Pre-Filed Evidence, Ex No. K1.6. para. 43

³⁶ Union's Pre-Filed Evidence, Ex No. K1.6, para. 45

³⁷ Union's Response to Undertaking J1.4

³⁸ *ATCO Gas Pipelines Ltd. v. Alberta (Energy & Utilities Board)* 2006 S.C.C. 4 at paras. 68-70, Union's Brief of Authorities, Tab 6

47. Even before the Supreme Court of Canada's decision in *ATCO*, it was recognized that as a matter of good regulatory policy a utility's shareholders should have the right to the return of their capital when an asset is no longer being used for utility purposes.
48. The Board's "*Interpretive Guideline to the Affiliate Relationships Code for Gas Utilities*" states that capital gains and losses on sales of utility assets will generally be allocated equally between ratepayers and shareholders in respect of affiliate transactions,³⁹ and that is also the policy that the Board generally followed pre-*ATCO* in non-affiliate transactions. For example, in 1991, the Board ordered that the gain from a sale of land by Consumers' Gas be allocated equally between ratepayers and the shareholder (EBRO 465, at p. 22⁴⁰); in 2003, the Board accepted a settlement proposal in an Enbridge case where the profits from a sale of land and buildings were divided equally between ratepayers and the shareholder (RP-2002-0133⁴¹); and in 2004, the Board ordered that Natural Resources Gas split the capital gains from the proceeds of a sale of land equally between ratepayers and the shareholder (RP-2002-0147/EB-2002-0446⁴² at para. 45).
49. The cases cited above may well have been decided differently if they had been decided after the *Atco* decision. Nevertheless, these older cases do make it clear that even before *Atco* the proceeds of a sale were not shared with ratepayers if they were equal only to the net book value such that there was no capital gain or loss.
50. The Alberta Court of Appeal described the rationale for such a policy as follows:

36 **The assurance of a reasonable expectation of a return of invested capital** upon termination of the franchise is not just an act of generosity. This, I presume, is the reasoning behind this approach: if it cannot expect return of capital on loss of franchise, then the possibility

³⁹ Union's Brief of Authorities, Tab 4, p. 2

⁴⁰ Union's Brief of Authorities, Tab 7

⁴¹ Union's Brief of Authorities, Tab 8

⁴² Union's Brief of Authorities, Tab 9

of loss of franchise becomes a risk of loss of investment which must be taken into consideration in calculation of the rate of return on the rate base. An investor who might at any moment lose its entire investment will expect a substantially higher rate of return. Yet that risk might be quite remote, and it arguably would be cheaper for consumers in the long run to offer the assurance of return of capital later and a lower rate now. It follows that, for the very reason why any assurance of recompense is offered to the investor, a fair recompense should be offered.⁴³

(emphasis added)

51. In the circumstances of this case where there will be no gain on the sale and the proceeds represent only the return of the shareholder's investment, there is no reason why the ratepayers should share in any part of the proceeds of the sale.

Sale at Greater than Net Book Value

52. During the oral hearing, Mr. Thompson as counsel for CME suggested that he might argue that the Board should only approve the sale on condition that the sale price was increased to replacement value. As further discussed in paragraphs 103-117 below, Union submits that the proper test is whether the proposed transaction at net book value creates no harm. Dawn Gateway's agreement to purchase the St. Clair Line is conditional on the price being equal to net book value, and it is possible that the Dawn Gateway project would not proceed if the sale price increased to replacement value (see paragraphs 111-118 below for further detail). The Board should not be considering such a purely speculative or hypothetical proposal.
53. Even if the St. Clair Line was sold at replacement value, as theoretically posited by Mr. Thompson, the capital gain from any sale of the St. Clair Line above net book value should be entirely for the account of Union's shareholder because the gain would be as a result of an extraordinary transaction out of the ordinary course. If the Dawn Gateway

⁴³ *TransAlta Utilities Corp. v. Alberta Public Utilities Board*, (1986) 1986 CarswellAlta 24, at para 36 (Alta. C.A.), Union's Brief of Authorities, Tab 10

joint venture agreed to purchase the asset at this higher price, the gain would be as a result of the purchaser placing special value on the asset for special purpose use in the Dawn Gateway Pipeline, and not because the original depreciation amount charged on the asset was too high.⁴⁴

54. Union obtained an expert appraisal (the “Valuation Report”) that estimated the fair market value of the St. Clair Line as of November 1, 2008 to be in the range of \$1.6 to \$2.0 million,⁴⁵ which is well below the proposed net book value sale price of approximately \$5.2 million if the assets are sold in 2010. The Valuation Report addressed the fact that the Dawn Gateway joint venture was a possible special interest purchaser as follows:

9. ... The price, which a potential purchaser might pay to acquire a business, is not only a function of the intrinsic value of the particular business to be acquired, but also the opportunities for synergies, economies of scale or other benefits, which the acquisition creates for the potential purchaser. The fair market value attributable to these additional benefits depends upon the unique circumstances of each specific special purchaser. the ultimate price for which a business might be sold may be higher or lower than its notional fair market value.

...

94. Potential opportunities for synergies, economies of scale or other benefits, which an acquisition may create for the Joint Venture, have been excluded from consideration [of the fair market value] on the basis that in a market with a single special interest purchaser the potential purchaser would not be willing to pay in excess of the intrinsic value indicated by the earning power of the existing operations.

55. Given the fact that Union has experienced a negative rate of return on the St. Clair Line in each of the last 6 years after interest and taxes⁴⁶, there is no doubt that any sale price

⁴⁴ Union’s Answer to Undertaking J1.4

⁴⁵ Valuation Report of Marcus & Associates LLP Hoare-Dalton, Ex. K1.5, at p. 2

⁴⁶ Union’s Answer to Undertaking, J1.2.

above the net book value would be as a result of Dawn Gateway having a special interest in the St. Clair Line. A sale of assets to a special interest purchaser is an extraordinary event out of the normal course, and any capital gains from such an extraordinary transaction should be treated as income to the utility.

56. Treating gains from an event not reasonably contemplated in the determination of the provision for depreciation as income for the utility is consistent with the accounting treatment outlined in the OEB's Uniform System of Accounts for Class "A" Gas Utilities in Appendix A section 3A Retirements of Depreciable Plant.⁴⁷
57. Moreover, since the *ATCO* decision, this Board has held in the Union Gas Cushion Gas Decision that ratepayers should only be entitled to share in gains from a sale if there is some justification for sharing other than an allegation that the ratepayers have acquired an ownership interest in the assets.⁴⁸ In this case, there are no facts that justify the ratepayers sharing in any gain.
58. It is sometimes argued that proceeds of the sale of assets by a utility should be allocated to utility customers because the sale of the assets has caused harm to the customers and customers should therefore be compensated. However, in this case there is no factual basis for that argument, because the proposed sale of the St. Clair Line will cause no harm to Union's customers. In fact, the converse is true. The evidence demonstrates that customers will benefit from the sale because an under utilized asset will be removed from Union's rate base to the benefit of Union's ratepayers and Union, and Dawn Gateway will use the asset as part of a transportation path that will benefit customers in Ontario because it will bring more supply and liquidity to the Dawn hub.

⁴⁷ Union's Answer to Undertaking, J1.4

⁴⁸ Union's Cushion Gas decision, EB-2005-0211, at p. 11, Union's Brief of Authorities, Tab 11

59. For the reasons discussed above, Union submits that the ratepayers would have no right to share in any capital gain from the sale of St. Clair Line to Dawn Gateway LP, even if Dawn Gateway LP was willing to agree to pay more than the net book value for the assets.
60. If the ratepayers have no right to share in any gain from the sale, then it makes no difference to the ratepayers whether the sale price is greater than net book value because regardless of how much the price may exceed net book value the ratepayer would not benefit from the increase in price.

Issue 3.0 Land Matters

3.1 How would a change in ownership and regulatory oversight impact the landowners' interests including any land use restrictions, rights under existing agreements, abandonment obligations, and availability of costs awards related to regulatory proceedings?

Land Use Restrictions

61. Both the Ontario and federal government have regulations in place to promote the safe operation of gas pipelines.
62. Ontario Regulation 210, pursuant to the *Technical Standards and Safety Act, 2000*, (the "TSSA Act") requires landowners to call the pipeline company to locate the pipeline before they dig and there is a general regulation against interfering with or damaging the pipeline:
 9. (1) No person shall dig, bore, trench, grade, excavate or break ground with mechanical equipment or explosives without first ascertaining from the licence holder the location of any pipeline that may be interfered with.

(2) The licence holder shall provide as accurate information as possible on the location of any pipeline within a reasonable time in all the circumstances.

No interference with pipeline

10. No person shall interfere with or damage any pipeline without authority to do so.⁴⁹

63. Pursuant to s. 37 of the TSSA Act, every person who fails to comply with Regulation 210 is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, or, if the person is a body corporate, to a fine of not more than \$1,000,000.
64. The general prohibition against interfering with or damaging the pipeline in s. 10 of Ontario Regulation 210 puts the responsibility on individual landowners to decide whether their activities will damage the pipeline. If a landowner makes the wrong decision and does something that damages a pipeline, then the landowner is guilty of an offence under s. 37 of the TSSA Act. In addition, the landowner could also be liable to compensate the pipeline company for any civil damages that the pipeline company may incur as a result of the landowner damaging the pipeline.
65. On the other hand, the federal regulations under s.112 the *National Energy Board Act* (the “NEB Act”) move the responsibility for deciding what activities are safe to the pipeline companies by requiring the landowners to get consent from the pipeline company before they can undertake the following activities:

⁴⁹ Ontario Regulation 210, Ex. K2.2

- excavate using power-operated equipment (including ploughing below a depth of 30 cm⁵⁰) or explosives within thirty metres of a pipeline,
- construct a facility across, on, along or under a pipeline (note this prohibition only applies on the easement, and does not apply within the 30 m control zone),⁵¹
- operation of a vehicle or mobile equipment across a pipeline unless leave is first obtained from the company or the vehicle or mobile equipment is operated within the travelled portion of a highway or public road.⁵²

These are the only three types of landowner activities that require consent pursuant to the NEB Act, and the activities themselves are not banned so long as consent is obtained from either the pipeline company or the NEB.

66. The St. Clair Line Landowners⁵³ are already subject to similar restrictions. In addition to s.10 of Ontario Regulation 210 which puts the burden on the landowners to decide if their activities are going to interfere with or damage the pipes, the landowners are also subject to the TSSA Code Adoption Document (Ex. K2.3) which adopts the following regulations as part of Ontario Regulation 210:

⁵⁰ Activities, other than the construction or installation of a facility, that disturb less than three tenths of a metre (30 cm) of ground below the initial grade and do not reduce the total cover over the pipe are exempted from the regulations pursuant to s. 3(b) of the Pipeline Crossing Regulations, Part 1, Ex. K2.4

⁵¹ Section 112 of the NEB Act prohibits the first two activities (excavation and construction) unless leave is first obtained from the NEB, but sections 4 and 6 of the NEB's *Pipeline Crossing Regulations* (Ex. K2.4) provide that leave of the NEB is not required if written permission is obtained from the pipeline company prior to doing the work.

⁵² s. 112 (2) of the NEB Act.

⁵³ i.e. Landowners who own land that is subject to an easement used by the St. Clair Pipeline running from the St. Clair River Valve Site to the Bickford Compressor Station.

10.6.5 Right-of-Way Encroachment

10.6.5.1 It shall be prohibited to install patios or concrete slabs on the pipeline right-of-way or fences across the pipeline right-of-way unless written permission is first obtained from the operating company.

10.6.5.2 It shall be prohibited to erect buildings including garden sheds or to install swimming pools on the pipeline right-of-way. Storage of flammable material and dumping of solid or liquid spoil, refuse, waste or effluent, shall be also forbidden. [This prohibition is more restrictive than the similar NEB provision because the OEB provision is an outright ban on erecting buildings whereas the NEB regulations allow construction with consent.]

10.6.5.4 No person shall operate a vehicle or mobile equipment except for farm machinery and personal recreation vehicles across or along a pipeline right-of-way unless written permission is first obtained from the operating company or the vehicle or mobile equipment is operated within the travelled portion of a highway or public road. [This prohibition is less restrictive than the NEB provision because it exempts farm machinery and personal recreation vehicles.]

67. The easement agreement between the St. Clair Line landowners and Union also requires the landowners to obtain prior consent from Union before undertaking any construction activity over the pipeline right of way granted in the easement agreement:

7. The Grantor shall have the right to fully use and enjoy the said lands except as may be necessary for any of the purposes hereby granted to the Grantee, provided that without the prior written consent of the Grantee, the Grantor shall not excavate, drill, install, erect or permit to be excavated, drilled, installed or erected in, on, over or through the said lands any pit, well, foundation, pavement, building or other structure or installation. Notwithstanding the foregoing, the Grantee upon request shall consent to the Grantor erecting or repairing fences, constructing or repairing his tile drains and domestic sewer pipes, water pipes and utility pipes and constructing or repairing his lanes, roads, driveways, pathways, and walks across, on and in the said lands or any portion or portions thereof, provided that before commencing any of the work referred to in this sentence the Grantor shall (a) give the Grantee at least five (5) clear days notice in writing pointing out the work desired so as to enable the Grantee to have a representative inspect the site and/or be present at any time or times during the performance of the work, (b) shall follow the instructions of such representative as to the performance of such work without damage to the said pipe line, (c) shall exercise a high degree of

care in carrying out any such work and, (d) shall perform any such work in such a manner as not to endanger or damage the said pipe line.⁵⁴

68. Section 9 of the NEB's Pipeline Crossing Regulations, Part I provides that when a pipeline company receives a request to locate its pipes, the pipeline company may designate a restricted area, which may extend beyond 30 m from the pipeline, as an area in which no excavation may be performed until the pipes are located and marked by the pipeline company or the expiry of three working days after the date of the request. Mr. Mallette, Union's Manager, Projects, testified that the circumstances in which a pipeline company would seek to designate an area beyond 30 m of the pipeline under this regulation would rarely occur, and it would entail something like a major construction project on the property that involved deep excavations that could destabilize the ground in which the pipeline sits. He also testified that if such a major project was proposed in respect of a provincially regulated pipeline Ontario Regulation 210 would apply and the landowner would be responsible to contact the pipeline company so they could ascertain whether or not there was a chance of damaging the pipeline.⁵⁵
69. Landowners get the benefit of *less* risk of liability under the federal regulations than under the provincial regulations. Under Ontario Regulation 210 and s. 37 of the TSSA Act, landowners can be guilty of an offence if they undertake an activity that interferes with or damages the pipeline, and the risk is on the landowners to determine if their proposed activity could interfere with or damage the pipe. On the other hand, it is *not* an offence for a landowner to violate s.112 of the NEB Act or the NEB Pipeline Crossing Regulations. Pursuant to s.112(7) of the NEB Act, compliance with s.112 and the Crossing Regulations is enforced by way of inspection orders issued by Inspection Officers designated by the NEB. Under s. 51(4) of the NEB Act, a landowner can only

⁵⁴ The form of easement agreement between Union and the St. Clair landowners is found as part of Attachment 1 to GAPLO's evidence (Ex. K1.9), as Schedule 12.

⁵⁵ Testimony of G. Mallette, Transcript Vol. 2, June 23, 2009, at p. 10, line 13 to p. 12, line 13

be guilty of an offence if an NEB Inspection Officer issues an order related to an activity and a person who has received written notice of the order violates that order.

70. In an online Questions and Answer document, the NEB has confirmed that there is no penalty prescribed for contravening the Crossing Regulations, and indicated that no landowner has ever been charged with violating an inspection order.⁵⁶
71. The federal regulations can be more inconvenient for landowners who are farmers in that they may be required to get consent from the pipeline companies more often than under the Ontario regulations. However, in some cases a farmer with a federally regulated pipeline on his property may actually experience no additional inconvenience from the NEB Crossing Regulations. One of the farmers who testified on behalf of GAPLO is Mr. Rick Kraayenbrink. He confirmed in an answer to an interrogatory from Union that he is the president of a corporation, J. Rink Farms Ltd., that owns farm property that has been since August 5, 1999 subject to an easement in favour of Vector Pipelines which is an NEB regulated pipeline. Mr. Kraayenbrink stated in his interrogatory answer that no request has been made to Vector by Mr. Kraayenbrink or J. Rink Farms Ltd. for permission and/or consent to cross the Vector Pipeline, and neither Mr. Kraayenbrink nor J. Rink Farms Ltd. has made an application to the NEB under s.112 for leave to conduct farming operations as a result of having a TCPL or Vector pipeline on their property.⁵⁷
72. One way to mitigate the inconvenience that may result from the NEB Crossing Regulations is through the use of blanket crossing approvals. The NEB has indicated in its recent Final Report in respect to its Land Matters Consultation Initiative that it encourages the use of blanket approvals and expects landowners and pipeline companies

⁵⁶ The NEB's Questions and Answers document is Attachment 1 to Union's Response to Board Staff IR #9, Ex. K1.7

⁵⁷ GAPLO's Answer to Interrogatory # 3, Ex.K 2.6

to work together to develop standards for blanket approvals.⁵⁸ Such blanket approvals would pre-approve certain activities that could be undertaken by farmers without any requirement to contact the pipeline company, and thus it would minimize the number of times a landowner has to call the pipeline company for consent while still ensuring safe operation of the pipeline. Dawn Gateway has undertaken discussions with landowners to negotiate a blanket crossing agreement, and Dawn Gateway is committed to providing a blanket approval to the St. Clair Landowners.

73. During the hearing, the Chair of the Panel asked Union to consider whether any conditions of approval could be imposed that would mitigate the landowners' concerns about the additional restrictions imposed by the NEB Crossing Regulations. If the St. Clair Line becomes subject to NEB regulation as part of the Dawn Gateway Pipeline then the pipeline owner must comply with the requirements of the NEB Act, and could not be subject to any conditions of approval from the OEB that could conflict with the NEB's requirements. However, subject to that jurisdictional requirement, Union is willing to agree to a condition of approval that would require Dawn Gateway LP to provide to all landowners whose lands are subject to an easement for the St. Clair Line or who own land that is within 30 metres of the easements used by the St. Clair Line a blanket approval substantially in the form attached hereto as Appendix A that would provide the landowners with consent from Dawn Gateway LP to carry out the activities listed in Appendix A, such consent to remain valid indefinitely except if the NEB orders otherwise or except if it becomes unlawful for any reason for Dawn Gateway LP to consent to any of the activities as listed in Appendix A.

Rights Under Existing Agreements

74. The transfer of the St. Clair Line to the NEB's jurisdiction would have no impact on the landowners' rights under the existing easement agreements. The easement agreements

⁵⁸ LMCI Final Report, at s. 4, and point 1.2 of the Action Table at p. 9, Ex. K2.1

will be assigned to Dawn Gateway LP, and as a result Dawn Gateway LP will be required to abide by all terms and conditions of the easement agreements.⁵⁹

Abandonment Obligations

75. With respect to pipeline abandonment issues, landowner interests have more protection under federal regulation than they have under Ontario provincial regulation.
76. The OEB has no jurisdiction to regulate pipeline abandonments as there is no requirement in the OEB Act for a pipeline company to obtain leave from the OEB to abandon a pipeline that is no longer necessary for serving the public. In contrast, federally regulated pipeline companies are required pursuant to s.74(1)(d) of the NEB Act to obtain leave from NEB prior to abandoning the operation of a pipeline. The NEB has issued Onshore Pipeline Regulations⁶⁰ that contain requirements for the abandonment of pipelines. Pursuant to s.50 of the Onshore Pipeline Regulations, a company seeking leave from the NEB to abandon a pipeline must include in the application for leave the reasons and the procedures that are to be used for the abandonment.
77. Moreover, as part of its Land Matters Consultation Initiative, the NEB has recently adopted a report on pipeline abandonment issues that will require pipeline companies to set aside funds to cover future abandonment costs. The Report and Recommendations follows a January 2009 hearing held by three NEB Board Members into the financial matters of pipeline abandonment. All pipeline companies regulated under the NEB Act will be required to comply with the report's framework and action plan. This calls for companies to submit estimates of funds needed for abandonment as well as proposals for how they will collect and set aside those funds. The NEB also adopted several principles

⁵⁹ Union's Response to Board Staff IR # 9, Ex. K1.7

⁶⁰ Ex. K2.5

which are to provide guidance to the NEB's future decisions with respect to the financial matters related to pipeline abandonment, including the following three principles:

1. It is in the public interest that all pipelines regulated by the NEB be abandoned safely and effectively.
2. Abandonment costs are a legitimate cost of providing service and are recoverable upon Board approval from users of the system.
3. Landowners will not be liable for costs of pipeline abandonment.⁶¹

Ontario regulated pipelines are not subject to any provisions similar to the NEB requirements.

78. Federally regulated pipelines must be abandoned in accordance with the requirements of CSA Standard Z662 pursuant to s. 4(1)(d) of the Onshore Pipeline Regulations. Similarly, Ontario regulated pipelines must also be abandoned in compliance with CSA Z662 pursuant to s. 2(1) of the TSSA Code Adoption Document⁶² (which is part of Ontario Regulation 210).
79. The NEB has held that it no longer has jurisdiction to regulate a pipeline once it has fulfilled all the conditions of approval related to its abandonment and been removed from service because the pipe in the ground would no longer qualify as a pipeline under the NEB Act, but such an abandoned pipeline would automatically become subject to all applicable provincial laws.

The NEB Act vests jurisdiction over pipelines in this Board. A pipeline is defined by that Act to be "a line that is used or to be used for the transmission of oil or gas...". A pipeline which has been abandoned in accordance with the procedures mandated by the law is not used or to be used for the transmission of oil or gas and is therefore not a pipeline within the meaning of the Act. Thus, following the execution of an abandonment order, the NEB will cease to exercise jurisdiction over the

⁶¹ Reasons for Decision, Land Matters Consultation Initiative Stream 3, RH-2-2008, Appendix I thereto, at p. 32-33, Union's Brief of Authorities, Tab 21.

⁶² Ex. K2.3

abandoned line as a physical pipeline within the meaning of the Act. However, the definition of a pipeline includes "real and personal property and works connected therewith". An abandoned pipeline can thus continue to constitute property connected to a pipeline authorized under the Act and therefore it is possible for the abandoned facility to continue to be regulated by the National Energy Board, so long as it falls within the extended definition of "pipeline" in the NEB Act.

...

Once a pipeline company has obtained an abandonment order, it is open to that company to determine that the real and personal property upon which the abandoned facilities are located are now surplus to the requirements of the certificated pipeline. Following that determination, the company is free to dispose of its interest in the property containing the abandoned facilities, as it deems appropriate. Thereafter, **the abandoned property ceases to form part of the jurisdictional assets of the pipeline company, as it is held by the company as lands outside the statutory definition of a pipeline and is thereafter subject to all applicable provincial laws.** At that point, federal jurisdiction over the surplus pipeline property, including the abandoned line, ceases.⁶³

(emphasis added)

80. The finding that an abandoned pipeline that was once part of a federal undertaking continues thereafter to be subject to all applicable provincial laws is consistent with the findings of the Pipeline Abandonment Legal Working Group Discussion Paper which is attached at Tab 4 to the Report of George Brinkman (Ex. K1.9). That discussion paper states, at p. 11 of 82:

At the federal level, the NEB has determined, in the case of a line abandoned in place coupled with a determination by the pipeline company that the line and the related land are unnecessary for the purpose of the pipeline, that NEB jurisdiction over the line comes to an end. **Any continuing legal responsibility for the line would be determined under any applicable provincial legislation,** contractual agreement, or principles of tort liability.

(emphasis added)

⁶³ NEB Reasons for Decision, Manito Pipelines Ltd., MH-1-96, at p. 21, Union's Brief of Authorities, Tab 12

81. An abandoned pipeline that is no longer subject to federal jurisdiction automatically becomes subject to all applicable provincial laws as a result of the requirements of the Constitution. Pursuant to ss. 91(29) and 92(10) of the Constitution, the federal Parliament has exclusive jurisdiction to make laws in relation to works and undertakings that connect a province with any other or others of the provinces, or extending beyond the limits of the province. Once a pipeline is abandoned, it is no longer a work or undertaking that extends beyond the limits of the province, and thus the pipe is no longer subject to the jurisdiction of the parliament of Canada. As a result, the abandoned pipe is simply property located within a province, and it would be subject to the exclusive jurisdiction of the provincial legislature and be subject to all applicable provincial laws.
82. Accordingly, any regulations or laws that would apply to an abandoned pipeline that was formerly regulated by the OEB would also apply to an abandoned pipeline that was formerly regulated by the NEB.

Availability of Costs

83. Union agrees that the NEB currently has no jurisdiction to grant costs to landowners for participation in NEB cases except for detailed route hearings. This issue has been raised with the NEB by landowner groups, and in the Land Matters Consultation Initiative (LMCI) Final Report the NEB stated:

As a result of LMCI, the Board is committed to the following:

...

- Continuing to work with Natural Resources Canada (NRCan) to identify opportunities to develop and implement a more complete participant funding program for NEB hearings related to facilities.⁶⁴

84. In this case, an OEB order granting leave to sell the St. Clair Line will only affect the specific group of landowners that already have the St. Clair Line on their property. This

⁶⁴ Ex. K2.1, at p. 3-4

group of landowners will only be personally affected by a very small number of NEB proceedings.

Issue 4.0 First Nation Consultations

4.1 Have all Aboriginal Peoples whose existing or asserted Aboriginal or treaty rights may be affected by the proposed sale been identified, have appropriate consultations been conducted with these groups, and if necessary, have appropriate accommodations been made with these groups?

85. Appropriate consultations have been conducted with Aboriginal Peoples. In addition to written correspondence, communications with identified First Nations included a meeting with representatives from the Walpole Island First Nation. Union is not aware of any First Nation group having an objection to the proposed sale. See Union's Response to Board Staff IR #10 for further details.

Issue 5.0 Appropriate Test

5.1 Will the proposed transaction have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives?

86. Section 2 of the *Ontario Energy Board Act 1998*, delineates the Board's statutory objectives in relation to gas and states:
2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
 1. To facilitate competition in the sale of gas to users.
 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
 3. To facilitate rational expansion of transmission and distribution systems.
 4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers.

87. The proposed transaction will have a positive impact on all of the Board's statutory objectives, except for objectives 5 and 6 which will not be affected by the transaction.

The proposed sale will facilitate competition in the sale of gas to users.

88. The sale of the St. Clair line is an integral and necessary part of the proposed plan to develop the Dawn Gateway Pipeline as a new international pipeline expansion linking Michigan and Ontario markets. The development of this additional firm year round transmission capacity into Ontario would facilitate competition in the sale of gas to users in Ontario because it would provide customers greater diversity and access to emerging sources of supply from the US Rockies, US shale basins and Gulf coast LNG. This new pipeline would also provide Ontario customers with a supply option to address the projected impacts associated with declining supply from the Western Canadian Sedimentary Basin.

89. Dawn Gateway commissioned ICF International to conduct an examination of the market impact of the Dawn Gateway Pipeline (the "ICF Report"). The ICF Report projects a decline of 3,119 mmcf/d (between 2007 and 2015) of gas leaving the Western Canadian Sedimentary Basin heading towards Ontario, Quebec and U.S. N.E. markets, with most of this decline occurring before 2011.⁶⁵ To put that decline in perspective, 3,119 mmcf/d is equal to 1,138 bcf per year, or almost equal to the total gas consumed in 2008 in

⁶⁵ On Figures 4 and 5 at p. 11-12 of the ICF Report, Appendix D of Dawn Gateway's NEB Application, Ex. K1.8

Quebec and Ontario combined (ICF Figure 2, p. 10). New infrastructure is required to connect Dawn to growing supply sources and to become less dependant on the Western Canadian Sedimentary Basin.

90. The Dawn Gateway Pipeline would also improve the reliability, diversity, depth and liquidity of the Ontario Dawn hub, which in turn will facilitate competition in the sale of gas to users. Additional firm transportation capacity interconnecting gas storage in the Great Lakes Basin will provide additional competitive options for customers competing in the regional gas storage market. Enhanced access to supply markets and storage will benefit all Ontario gas customers.⁶⁶

The proposed sale will protect the interests of consumers with respect to prices and the reliability and quality of gas service.

91. The sale of the St. Clair line and the associated development of the Dawn Gateway Pipeline will have a positive impact on the interest of consumers with respect to prices, and the reliability and quality of gas service.
92. Union's operational flexibility and the security of supply for all Ontario gas customers will be enhanced by the Dawn Gateway pipeline as discussed above.⁶⁷ The increased interconnection of storage within the Great Lakes basin will provide Ontario consumers with additional options to manage price volatility.⁶⁸ The Dawn Gateway Pipeline will also improve access to other sources of gas supply in the US (regardless of whether

⁶⁶ Union's Response to Board Staff IR #11(i), Ex. K1.7

⁶⁷ Union's Response to Board Staff IR #11(i), Ex. K1.7, and also Union's Prefiled Evidence, Section 3, pp.. 6 -7, Ex. K1.6

⁶⁸ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 65, lines 3-8,

shippers contract for US storage), and this will also make Dawn a more liquid trading hub thus helping to manage price volatility.⁶⁹

93. As explained above in paragraphs 35-42, the proposed sale will have no negative impact on Union's ability to serve its regulated customers.
94. There would be no material impact on Union's ratepayers as a result of the proposed sale of assets. There would be a reduction in the rates of residential customers in the Southern Operations area (less than one dollar a year per customer) which would be incorporated into Union's rates proposals at the time it rebases in 2013 under incentive regulation.⁷⁰

The proposed sale will facilitate rational expansion of transmission and distribution systems.

95. Shippers have indicated that they value the integrated point-to-point nature of the proposed Dawn Gateway Pipeline as an important feature for attracting shippers to use the proposed line, and Shippers wanted a fixed, long-term toll. The fact that Dawn Gateway has been able to obtain binding contracts from 5 shippers, with terms ranging from 5 to 10 years, for firm transportation capacity of 280,000 Dthd (295,459 GJ/d) indicates that there is market demand for the integrated service that Dawn Gateway is offering.⁷¹
96. The OEB's Natural Gas Electricity Interface Review Decision with Reasons (the "NGEIR Decision") resulted from the Board's Natural Gas Forum Report and the OEB staff report, Natural Gas Electricity Interface Review. These proceedings focused on resolving the rates and services for natural gas-fired generators and on storage regulation

⁶⁹ Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 69, lines 6-26

⁷⁰ Union's Prefiled Evidence, Section 6. pp. 8 – 9, Ex. K1.6

⁷¹ Dawn Gateway NEB Application, p. 16 and p. 55, Ex. No. K1.8

in Ontario. The competitive nature and geographic location of the storage market serving Ontario was the subject of extensive evidence during the NGEIR hearing. The Board subsequently determined “that Ontario storage operations compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania” (NGEIR decision, p. 3). The Board also concluded “that the geographic market [for storage] extends beyond Ontario, even though there is a lack of uncontracted firm pipeline capacity” connecting Ontario customers to the other parts of the geographic market, including Michigan (NGEIR, p. 37).⁷² The Dawn Gateway Pipeline significantly increases the pipeline capacity interconnecting Dawn to Michigan storage, thus addressing one of the issues raised in NGEIR.

97. In addition, in the Storage and Transportation Access Rule (STAR) proceedings, the Board recently referred to the likely increase in demand for transportation connecting Ontario to Michigan storage:

“... the Board concludes that open seasons are the best means of ensuring that all potential customers have the opportunity to purchase existing long-term transportation capacity in an open and fair manner. This is especially important for the C1 and Rate 331 transportation paths which connect the Ontario market to the competitive storage markets in Michigan (and other states in the relevant geographic market as outlined in the NGEIR Decision). **The Board believes that interest in these paths is likely to increase over time.**”⁷³

(emphasis added)

98. The ICF Report projects significant growth in demand for transportation from Michigan to Dawn, with demand for pipeline flows growing by 900 mmcf/d (approx 945,000 GJ/d) between 2008 and 2018 during peak winter months of February and March, and an

⁷² Natural Gas Electricity Interface Review, Decision with Reasons, EB-2005-0551, Union’s Brief of Authorities, Tab 13

⁷³ Notice of Proposal to Make a Rule, EB-2008-0052, p. 6, Union’s Brief of Authorities, Tab 14

additional 300 mmcf/d by 2021. ICF refers to these as average daily use growth, and ICF expects that growth in contracted firm capacity would be higher.⁷⁴

99. These facts demonstrate that there is a need for more transmission capacity from Michigan, and the proposed sale to Dawn Gateway would facilitate a rational expansion of the transmission system.

The proposed sale will facilitate rational development and safe operation of gas storage.

100. The creation of the Dawn Gateway Pipeline will facilitate rational development and safe operation of gas storage because it will provide Ontario's market participants with firm access to existing and new storage in Michigan, and this will further enhance the level of competition in the storage market.⁷⁵
101. The ICF report concluded that the Dawn Gateway Pipeline will provide access to Michigan storage during peak winter periods, and access to supply to fill Ontario storage during non peak periods. Access to these additional sources of supply is particularly important given declining supply from the Western Canadian Supply Basin (WCSB) which has traditionally served the Ontario market. This new expanded path will create enhanced security of supply, reduced volatility and increased reliability at Dawn.⁷⁶

⁷⁴ The ICF report is Appendix D to Dawn Gateway's NEB Application, Ex. K1.8, at p. 15 -16 of the report.

⁷⁵ Union's Pre-Filed Evidence, para. 33-34, Ex. K1. 6, and Testimony of Steve Baker, Transcript Vol. 1, June 22, 2009, at p. 11, lines 1-6

⁷⁶ Union's Pre-Filed Evidence, para. 35, Ex. K1. 6, and ICF report, Appendix D to Dawn Gateway's NEB Application, Ex. K1.8, at p. 4, and p. 19 of the report.

The proposed sale will facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

102. Transferring the St. Clair Line to become part of the Dawn Gateway Pipeline will result in a more efficient use of an under-utilized asset. There has been a negative rate of return on the St. Clair Line in each of the last 6 years after interest and taxes are considered.⁷⁷ The proposed sale would remove the costs of an under used asset from Union's rate base to the benefit of Union's ratepayers, and put the asset to more efficient use with no risk to rate payers. All the previously stated benefits flow to the consumers of Ontario at no cost and no risk.

5.2 What is the appropriate test to be applied by the Board in this application?

103. Union submits that that the appropriate test should be similar to the no harm test that the Board applies to applications for leave to sell electricity transmission or distribution systems under s. 86(1)(a) of the OEB Act. In the Great Lakes Power Limited proceeding and in the Terrace Bay Superior Wires proceeding, the Board articulated the following test:

Section 86(1)(a) of the Act states that no transmitter or distributor shall sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety without first obtaining an order from the Board granting leave.

In determining this application, the Board is guided by the principles set out in the Board's decision in the combined MAADs proceeding (Board File Numbers RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257). In that decision, the Board found that the "no harm" test is the relevant test for the purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. **The Board finds that this test should also be applied to asset acquisitions under section 86(1)(a) of the Act. The "no harm" test consists of a consideration as to whether the proposed transaction would have an adverse effect relative to the status quo in relation to the Board's statutory objectives. If the proposed transaction would have a positive or neutral effect on the**

⁷⁷ Union's Answer to Undertaking, J1.2.

attainment of the statutory objectives, then the application should be granted.⁷⁸

(emphasis added)

104. In this case, Union is applying for leave to sell a part of its transmission system under s.43(1) of the OEB Act. Both s. 86 and s. 43 of the Act were introduced in 1998. Section 43 deals with gas distributors, while s. 86 deals with electricity distributors. The provisions are identical. It is reasonable to assume that the intent of s. 86 was the same as s. 43⁷⁹, and that the same test should therefore be applied under both sections.
105. Under the no harm test the Board should weigh the overall impact of the proposed transaction on all of its statutory objectives. The Board should grant the application if, on balance, the positive effects of the transaction exceed or are equal to any negative effects on the statutory objectives. The test should therefore include a consideration of all factors relevant to the Board's statutory objectives, including, but not limited to, economic considerations, operational flexibility and security of supply.
106. Union notes that protection of the interests of landowners is not one of the Board's statutory objectives. The Board's mandate is to protect the interests of the consumers of gas and the rationale development of the transmission, distribution and storage of gas for the benefit of all Ontarians. The development of the Dawn Gateway Pipeline is in the public interest as it relates to the Board's mandated objectives, and the benefits to the gas system outweighs any inconvenience that may result to the landowners from different regulatory requirements.

⁷⁸ Great Lakes Power Limited, Decision and Order, EB-2007-0647, EB-2007-0649, EB-2007-0650, EB-2007-0651, EB-2007-0652, at p. 5, Union's Brief of Authorities, Tab 15; and also Terrace Bay Superior Wires, Decision and Order, EB-2007-0666, EB-2007-0688, EB-2007-0726, EB-2007-0727, at p. 7-8, Union's Brief of Authorities, Tab 16.

⁷⁹ The Board came to this conclusion in the Town of Essex, Decision and Order, EB-2008-0310, at p. 9, Union's Brief of Authorities, Tab 17

107. Subsection 43(6) of the OEB Act says that an application for leave under s. 43 shall be made to the Board “*which shall grant or refuse leave*”. The Board’s jurisdiction is to examine the transaction that the applicant is proposing, and the Board does not have the authority to re-write the applicant’s deal. The Board described the extent of its mandate in the combined MAADs proceeding as follows:

The Board believes that the “no harm” test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. **The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board’s statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties.** In that sense, in section 86 applications of this nature the Board equates “protecting the interests of consumers” with ensuring that there is “no harm to consumers”.⁸⁰

(emphasis added)

108. Accordingly, Union submits that the Board should confine its review to whether the actual transaction proposed by Union will on balance have an adverse effect on the Board’s statutory objectives, and no consideration should be given to whether other speculative or theoretical possibilities (like a sale at replacement costs) could have a more positive effect.
109. There are good policy reasons for limiting the analysis to whether the actual transaction proposed by the applicant results in harm. If the Board was entitled to impose a new purchase price on the applicant, or to deny an application for leave to sell because it thought an applicant might be able to obtain a higher purchase price, that would necessarily mean that the Board could review every commercial term of the agreement and override the business judgments made by management. Such a detailed review of

⁸⁰ Combined MAADs proceeding, Decision with Reasons, RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257, at p. 6-7, Union’s Brief of Authorities, Tab 18

every commercial term of a deal would create considerable commercial uncertainty for utility companies, and discourage the rational development of utility systems.

110. Under the "business judgment rule" courts will generally not interfere with directors' business decisions, in the absence of evidence which calls in question the bona fides and reasonableness of those decisions.⁸¹ Similarly, it is an accepted principle of regulatory policy that management of utility companies should be allowed a broad discretion in conducting their business affairs. For example, in RP-2001-0032, the Board agreed that decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.⁸²
111. Refusing to grant leave for a transaction that does no harm to the Board's statutory objectives on the grounds that the Board believes that a better deal might be had would constitute second-guessing of management's decision making. In this case, second-guessing management by imposing a requirement that the sale price be in excess of net book value could itself result in harm to the Board's statutory objectives.
112. In its answer to Confidential Undertaking X1.1, Union provided the Board with an estimate of what it would cost to build a replacement for the 11.7 km St Clair Line. The replacement cost is significantly in excess of the net book value of the St. Clair Line.
113. The Purchase and Sale Agreement⁸³ between Union and Dawn Gateway LP stipulates that the St. Clair Line is to be sold at net book value (See sections 2.1 and 6.3 of the agreement). Pursuant to s. 3.1(c) and (d)(ii) of the agreement, Dawn Gateway LP is under no obligation to purchase the St. Clair Line at any higher price (see also s. 6.3 of

⁸¹ *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.) at para. 64-65, Union's Brief of Authorities, Tab 19

⁸² Enbridge Gas, RP-2001-0032, at para. 3.12.2, Union's Brief of Authorities, Tab 20

⁸³ Provided in response to Confidential Undertaking X1.2

the agreement which is another provision that evidences price sensitivity). Similarly, the precedent agreements that Dawn Gateway LP signed with the 5 shippers are conditional on Union receiving leave to sell the St. Clair Line “in a form and substance acceptable to each Sponsor [i.e. DTE Pipeline Company and Westcoast Energy Inc.] in its sole and reasonable discretion” (see section 3(c) and 6(b)(iv) of the Precedent Agreement, Ex. K1.8, Appendix Q).

114. Both TCPL and Vector have conducted non-binding open seasons for other competing pipelines.⁸⁴ An increase in the cost of purchasing the St. Clair Line could negatively impact the competitiveness of the Dawn Gateway Pipeline as compared to TCPL’s and Vector’s alternatives.
115. If the sale price of the St. Clair Line was to increase to beyond net book value, that would give rise to the possibility of DTE refusing to proceed with the Dawn Gateway Pipeline. DTE could instead choose to do an entirely different venture (on its own or with a joint venture partner) such as building a shorter pipeline on a direct route connecting the St Clair river crossing to Dawn. If DTE built such a shorter pipeline it would likely further reduce the already low use on the St Clair Line because shippers would likely choose to use that new pipeline instead of the St. Clair Line.
116. The inter-relationship between the many factors that could affect whether a project (such as the Dawn Gateway project) proceeds is another reason why the Board should only examine whether the proposed transaction meets the no harm test and not speculate on whether management could have achieved a better deal.
117. In any event, the sale of the St. Clair Line for a price above net book value would not result in a better deal for ratepayers. As submitted in paragraphs 53-60 above, even if Union were able to negotiate a sale price in excess of net book value, there is no reason

⁸⁴ Union’s Response to FRPO IR # 8, Ex. No. K1.7

why the ratepayers should be entitled to share in any gain from the sale. If the ratepayers are not entitled to share in any gain from the sale then whether the purchase price exceeds the net book value and by how much is clearly not relevant to any of the Board's statutory objectives.

118. The proposed sale at net book value not only does no harm, but it would also result in positive benefits for the Board's statutory objectives as a result of the development of the Dawn Gateway Pipeline. A transfer at net book value is above fair market value for the assets as determined in the Valuation Report of Marcus & Associates LLP Hoare Dalton (Ex. K1.5), and is fair and reasonable to ratepayers since there will be no loss on the sale, and there will be a positive impact in terms of a reduction to the rate base and corresponding rate reduction.
119. Union therefore submits that the proposed transaction meets the no harm test, and leave to proceed with the proposed sale should be granted.

POSSIBLE CONDITIONS OF APPROVAL

120. As stated above, should the Board decide to grant leave for the proposed sale at net book value, Union is willing to agree to the following conditions of approval:
 - i) Union would be prohibited from requiring its storage customers to contract for service on the Dawn Gateway Pipeline as a condition of receiving storage service from Union, and Dawn Gateway LP would be required to provide an undertaking to the OEB that it will not require customers on the Dawn Gateway Pipeline to contract for storage services from Union as a condition of obtaining transportation service on the Dawn Gateway Pipeline.

- ii) Dawn Gateway LP would be required to provide to all landowners whose lands are subject to an easement for the St. Clair Line or who own land that is within 30 metres of the easements used by the St. Clair Pipeline a blanket approval substantially in the form attached hereto as Appendix A that would provide those landowners with consent from Dawn Gateway LP to carry out the activities listed in Appendix A, such consent to remain valid indefinitely except if the NEB orders otherwise or except if it becomes unlawful for any reason for Dawn Gateway LP to consent to any of the activities as listed in Appendix A.

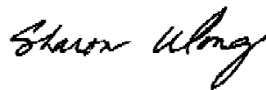
ORDER REQUESTED

121. Union requests an order:

- (a) granting Union leave to sell the St. Clair Line, being 11.7 km of NPS 24 pipeline running from Union's St. Clair Valve Site to the Bickford Compressor Site, Union's assets at the St. Clair Valve Site, and related measurement and control equipment located within Union's St. Clair Line Station to Dawn Gateway Pipeline Limited Partnership at a price equal to the net book value of the assets once all other steps necessary to put the Dawn Gateway Pipeline into service have been completed, including obtaining all required regulatory approvals, and
- (b) Union requests that leave to complete the sale to Dawn Gateway Pipeline Limited Partnership be extended until December 31, 2013.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 6, 2009



Sharon S. Wong
Lawyer for Union Gas Limited

Appendix “A”

For the purposes of this Appendix A:

“Easement” means the lands over which the pipeline company has an easement for the operation of a pipe line for the transmission of gas as more particularly described in the Grant of Easement document registered on title.

“Control Zone” means the thirty (30) meter area that extends from the outside edges of both sides of the Easement.

The following chart provides for:

- (i) activities that the landowner may undertake with respect to the Easement and/or Control Zone **without seeking further permission** from Dawn Gateway Pipeline Limited Partnership (indicated on the chart as “No”);

and

- (ii) activities with respect to the Easement and/or Control Zone that **require the landowner to seek further permission** of Dawn Gateway Pipeline Limited Partnership in order to conduct that activity (indicted on the chart as “further permission required”).

Activity	Control Zone	Easement
Tiling and Tile Repair	No	further permission required
Fence Construction	No	further permission required
Laneway Construction	No	further permission required
Farming Activities		
<ul style="list-style-type: none">farming activities with equipment in dry conditions (other than ripping or ploughing)	No	No
<ul style="list-style-type: none">farming activities with equipment (chisel ploughing, ripping or paratilling at depths greater than 46 cm (18.1 inches))	No	further permission required
<ul style="list-style-type: none">manure injection greater than 30.5 cm (12 inches)	No	further permission required
Crossing Easement and Control Zone		
<ul style="list-style-type: none">crossing Easement and/or Control Zone with tracked equipment	No	No

<ul style="list-style-type: none"> crossing Easement and/or Control Zone with agricultural equipment used in a manner that does not exceed the manufacturer's specified load limits 	No	No
<ul style="list-style-type: none"> crossing Easement and/or Control Zone with agricultural equipment used in a manner that exceeds the manufacturer's specified load limits 	No	further permission required
<ul style="list-style-type: none"> crossing Easement and/or Control Zone with wheeled non-agricultural equipment (such as semi tractor trailers) loaded in accordance with provincial highway standards or in loaded accordance with manufacturer's specified load limits 	No	No
<ul style="list-style-type: none"> crossing Easement and/or Control Zone with wheeled non-agricultural equipment (such as semi tractor trailers) if not loaded in accordance with provincial highway standards or loaded in excess of manufacturer's specified load limits 	No	further permission required
Working in Wet Conditions		
<ul style="list-style-type: none"> working in wet conditions where rutting is greater than 15.2 cm (6 inches) 	No	further permission required
Mechanical Excavations		
<ul style="list-style-type: none"> mechanical excavations other than tiling at a depth greater than 30.5 cm (12 inches) but less than 61 cm (24 inches) 	No	further permission required
<ul style="list-style-type: none"> mechanical excavations other than tiling at a depth greater than 61 cm (24 inches) 	further permission required	further permission required
Blasting	further permission required	further permission required
Tree cutting	No	No
Tree spading	No	further permission required
Stump removal	No	further permission required
Building construction	further permission required	further permission required