

By E-mail



July 10, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
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Dear Ms Walli,

Union Gas Limited ("Union")
Dawn Gateway Limited Partnership ("Dawn Gateway LP")
Board File No.: EB-2008-0411
Our File No.: 339583-000036

We are writing to reply to the submissions made by counsel for Union in her letter to the Board of earlier today.

Union's submissions can be summarized as follows:

- (a) Its Application raises no question pertaining to the constitutional applicability of any Act because the prayer for relief is limited to a request for an Order approving the sale of the St. Clair Line; and
- (b) In its Decision and Order on April 6, 2009, pertaining to the Issues List, the Board deferred a determination of questions of jurisdiction to the National Energy Board ("NEB").

Our response follows.

Matters in Issue in the Application

The specific sale approval relief requested by Union does not determine the scope of matters in issue in the Application. Rather, the scope of matters in issue is prescribed by the Board's Final Issues List which includes the jurisdictional questions.

The Issues the Board has framed under the heading "Jurisdiction" clearly raise the question of whether the Ontario components of the proposed Dawn Gateway Pipeline system should be subject to provincial or federal regulation. One cannot consider these questions without considering the constitutional applicability of the provisions of the *Constitution Act, 1867* pertaining to local works and undertakings and federal undertakings. Union refers to these provisions of that *Act* in paragraphs 8, 9 and 10 of its Argument-in-Chief.

In its evidence and its Argument, Union characterizes the proposed Dawn Gateway Pipeline as a "new" international pipeline. On the facts, this characterization is

questionable. There is another view and that is that the proposed Dawn Gateway Pipeline is not a "new" international pipeline like the Alliance, Vector or Brunswick Pipelines.

On the facts in this case, it is arguable that, from a physical, operational and ownership perspective, the only thing substantively "new", with respect to the proposed Dawn Gateway Pipeline system, is an extension of the provincially regulated St. Clair Line component of the existing Belle River-Bickford Pipeline from Bickford to Dawn. The existing Belle River-Bickford Pipeline system is currently being operated as a single pipeline system by the same parties which will effectively be owning and operating the proposed Dawn Gateway system.

The Michigan and Ontario segments of the existing Belle River-Bickford Pipeline, interconnecting the two very large state and provincially regulated integrated transmission, distribution and storage systems of Michigan Consolidated and Union, have already been determined to be subject to state and provincial jurisdiction. On the facts of this case, it is open to the Board to conclude that the jurisdictional character of the proposed Dawn Gateway Pipeline is the same as the jurisdictional character of the Belle River-Bickford Pipeline system.

The jurisdictional questions the Board has posed in the Issues List cannot be answered without considering the constitutional applicability of the federal undertaking provisions of the *Constitution Act, 1867* to these and all other facts in this particular case relevant to jurisdiction.

Questions of Jurisdiction were not Deferred to the NEB

In its Decision and Order of April 6, 2009, the Board did not defer questions of jurisdiction to the NEB as counsel for Union contends. The Board clearly rejected the submissions of counsel for Union and counsel for Dawn Gateway to that effect and refused to remove the jurisdictional issues from the Issues List. Counsel for Union's submissions purporting to interpret the April 6, 2009 Decision and Order as deferring questions of jurisdiction to the NEB are without merit and should be rejected.

Service of Notices and Further Process

We believe that, on a plain reading of section 109 of the *Courts of Justice Act*, service of the Notices on the Attorneys General are required when jurisdictional issues of the type which this case raises are being considered. We urge the Board to reject the submissions made by counsel for Union to the effect that serving such Notices is unnecessary and to consider the suggestions we made in our earlier letter with respect to service of the Notices and the establishment of reasonable time allowances for responses.

Yours very truly,



Peter C.P. Thompson, Q.C.

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c. Intervenor EB-2008-0411

Paul Clipsham (CME)

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