

L. E. Smith, Q.C.
Direct Line: 403.298.3315
e-mail: smithl@bennettjones.com
Our File No.: 11870-23

July 17, 2009

Ms. Kristen Walli
Board Secretary
Ontario Energy Board
P O Box 2319
Suite 2700
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Union Gas Limited ("Union")
Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway LP")
Board File No.: EB-2008-0411**

Dawn Gateway LP is an intervenor in the subject proceedings. It wishes to make the following submissions in response to Procedural Order No. 3.

(a) The OEB Application

The application properly before the OEB seeks approval of the conditional sale of the Union St. Clair line. No one disputes the OEB's jurisdiction to approve that application. Both before and after the approval of the Union application, the OEB retains jurisdiction over the Union St. Clair pipeline. Approval of that application, as requested, does not change the jurisdiction character of the Union St. Clair line. No constitutional issue, therefore, arises before the OEB.

There is no application to construct and operate any pipeline before the Ontario Energy Board ("OEB") much less an international or interprovincial pipeline. Accordingly, no constitutional issue arises in this proceeding.

With respect, neither the intervenors nor the OEB can create an application of this kind on behalf of Union or any other entity. Indeed only one piece of that three-piece project is before the OEB. The Chairman noted as much on several occasions where, for example, he questioned the relevance of data requested relating to new capacity required to implement the Dawn Gateway project which was not before the OEB (1T18; 1T27). Moreover, he cautioned as well against the need to consider proposals not before the OEB (1T109-10).

(b) The NEB Application

The issue of federal jurisdiction over the Union St. Clair pipeline (and the balance of the Dawn Gateway Project) arises before the National Energy Board ("NEB") in the context of the Dawn Gateway application now on file with it. It is only NEB approval of the Dawn Gateway application and completion of the sale which change the existing constitutional status of the Union St. Clair pipeline. The constitutional issue, therefore would, arise only before the NEB, not the OEB

The application for, *inter alia*, approval to construct and operate the Dawn Gateway pipeline has properly been filed with the NEB. A copy of that application was provided in this proceeding only as context and for the convenience of the Board and parties. The mere fact of that informational filing does not invite the OEB to approve or deny an application made to a different regulator. Nor would the information filing of a FERC or NYPSC application with the OEB confer such jurisdiction.

Conclusion

The OEB now has ample context and jurisdiction to make the decision requested of it by Union – to approve ordering the conditional sale of the Union St. Clair line. No constitutional issue arises in connection with that application. The potential approval by the NEB of a new, large volume pipeline connection between Michigan and Ontario storage and transportation hubs may be a relevant consideration to the OEB in deciding whether to grant or deny approval of the proposed sale, but that does not give rise to a constitutional issue either.

With respect, the Board does not have the jurisdiction to approve an application before a different regulator to construct or operate an international or interprovincial work or undertaking. Those applications are not before the OEB.

Accordingly, we are in agreement with Board Staff, there is no need to provide notice to Attorney's General or to engage section 109(1) of the *Courts of Justice Act*.

Yours truly,

BENNETT JONES LLP



L. E. Smith

LES/lk