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July 17, 2009

Filed via RESS

Ontario Energy Board
2300 Yonge Street, F27
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Madam Secretary:

Re: EB-2008-0411: GAPLO/CAEPLA's Submissions on CME Request

Pursuant to the Board's Procedural Order No. 3 dated July 10, 2009, GAPLO/CAEPLA supports CME's request that Union be required to serve notice of a constitutional question upon the Attorneys-General of Canada and Ontario in this matter pursuant to the provisions of Section 109 of the *Courts of Justice Act*. In this regard, GAPLO/CAEPLA provides the following submissions.

In Union's application, Union has asserted that "[a]s the Dawn Gateway Line would cross the international border it is expected that the portion of the Dawn Gateway Line that would be located in Ontario would be regulated by the NEB ..." (Union's pre-filed evidence, paragraph 9). In its Issues Decision and Order in this proceeding dated April 6, 2009, the Board concluded:

"The St. Clair Line is currently under OEB jurisdiction and is considered integral to Union Gas's transmission and distribution provincial pipeline system. If ultimately successful, Union Gas indicated that the end result will be that the St. Clair Line will be subsumed into the proposed Dawn Gateway JV, and shift from provincial (i.e. OEB) jurisdiction to NEB jurisdiction. Although this ultimate shift in jurisdiction would happen later and be the subject of an NEB proceeding, the Board is convinced that these issues have relevance to the current proceeding."

With respect to this issue of “regulatory oversight”, in that same decision the Board noted that “it is the OEB that determined that the construction and operation of the St. Clair pipeline [in the provincial jurisdiction] was in the public interest, taking into consideration landowner impacts. To the extent that these impacts will change as a result of the project, it should be for the determination of the OEB and not the NEB as to whether the changes are in the public interest of Ontario and Ontario landowners”.

Union has been clear on this application that the requested approval of the sale of the St. Clair Line is only required if the St. Clair Line is transferred to the federal jurisdiction. Accordingly, in determining whether to grant the requested approval, the issues for the Board’s determination include:

- Firstly, whether Union has satisfied the Board that there will be any material change in the use and operation of the St. Clair Line under Union’s Dawn Gateway proposal so as to eliminate it as integral to Union’s provincial system and justify its approval for sale and transfer to the federal jurisdiction; and
- Secondly, even if the Board should determine that the St. Clair Line should be operated in the federal jurisdiction as part of Dawn Gateway, whether approval of the sale for that purpose is in the public interest considering the further negative impacts on landowner interests which will result from the proposed jurisdiction transfer.

Resolution of these issues will require this Board to consider and determine on this application whether the St. Clair Line as part of Dawn Gateway should continue in the provincial jurisdiction on the basis of its constitutional character or as a matter of public interest. Such a determination by this Board will necessarily involve a determination of the constitutional applicability of federal legislation (the *NEB Act*) and provincial legislation (the *OEB Act*) to the proposed operation of the St. Clair Line as a part of Dawn Gateway. Therefore, GAPLO/CAEPLA respectfully submits that the provisions of Section 109 of the *Courts of Justice Act* require service of notice of a constitutional question on the Attorneys-General of Canada and Ontario and, as indicated, GAPLO/CAEPLA supports CME in its request for a procedural order in this regard.

In submissions dated July 15, 2009 with respect to this issue, Board Staff have referenced Macauley and Sprague “Practice and Procedure before Administrative

Tribunals” to the effect that absence of notice of a constitutional question does not prohibit an agency from “**upholding the constitutional validity [or applicability]** of a legislative provision or from determining a matter with constitutional overtones **which does not require ruling that legislation is constitutionally invalid or inoperative**” (emphasis added). Accordingly, in the absence of the requisite notice on this application, it is open to the Board to **uphold** the constitutional applicability or continuing operability of the *OEB Act* to the St. Clair Line under Union’s Dawn Gateway proposal on the basis of the constitutional character of the St. Clair Line as determined by the Board in 1988.

However, GAPLO/CAEPLA further submits that Union’s current failure to provide such notice precludes the Board under Section 109(2) from determining on this application that there will be any change in the constitutional character of the St. Clair Line as part of Dawn Gateway from the Board’s 1988 determination so as to render **constitutionally inapplicable or inoperative** continuing provincial regulation under the *OEB Act*. In other words, in the absence of the requisite notice, the Board cannot on this application determine that the *OEB Act* will be **inapplicable or inoperative** with respect to the continuing operation of the St. Clair Line as part of Dawn Gateway – the Board cannot approve the sale of the St. Clair Line for transfer to the federal jurisdiction as requested by Union. Since the sale approval requested by Union is required only for operation of the St. Clair Line if in the federal jurisdiction as part of Dawn Gateway, unless Union now completes service of the requisite notice to allow the Board consideration of this issue on this application, this application should be dismissed.

As provided in Procedural Order No. 3, in conjunction with the disposition of CME’s request, GAPLO/CAEPLA respectfully awaits further direction from the Board with respect to the scheduling for filing of written argument in this proceeding by Board staff and intervenors and reply argument by Union Gas.

Yours very truly,

COHEN HIGHLEY LLP

A handwritten signature in black ink, consisting of several loops and a final downward stroke, likely representing the name Paul Vogel.

Paul Vogel

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c.c. Parties to EB-2008-0411 *via email*

PGV/lm