

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.

**NOTICE OF CONSTITUTIONAL QUESTION**

The question of the constitutional applicability of the *Ontario Energy Board Act, 1998* has arisen in this proceeding.

The question is to be argued in written submissions to the Ontario Energy Board (the "OEB"). The applicant has already filed its Argument in Chief, and the OEB has set the following timetable for other arguments: Board Staff, August 11, Intervenors, August 21 and the Union Reply Argument, August 28, 2009. Arguments are to be filed with the OEB Secretary at the following address:

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto ON M4P 1E4

Attention: Kirsten Walli  
Board Secretary  
Tel: 1-888-632-6273 (toll free)  
Fax: 416-440-7656  
E-mail: BoardSec@oeb.gov.on.ca

The following are the material facts giving rise to the constitutional question:

1. Union Gas Limited (“Union Gas” or the “Applicant”) filed an application with the OEB, dated December 23, 2008, under section 43(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (the “OEB Act”). The application seeks an order from the OEB granting leave to sell 11.7 km of natural gas pipeline (the “St. Clair Line”) running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. A copy of the Notice of Application issued by the OEB is attached at Tab 1, and a copy of Union’s Application to the OEB is at Tab 2.
2. The proposed purchaser of the St. Clair Line is a limited partnership known as Dawn Gateway Pipeline Limited Partnership (“Dawn Gateway LP”). Dawn Gateway LP is owned equally by Spectra Energy Corp (“Spectra”) and DTE Pipeline Company (“DTE”) through their respective affiliates. Union Gas is a subsidiary of Spectra.
3. Spectra and DTE have formed a joint venture (the “Dawn Gateway JV”) through their respective affiliates to develop a 34 km pipeline (the “Dawn Gateway Pipeline”) that will commence at the Belle River Mills Compressor facility in Michigan, owned by a DTE subsidiary, Michigan Consolidated Gas Company (“Michcon”), and terminate at the Dawn Compressor Site in Ontario owned by Union Gas.
4. The Dawn Gateway Pipeline will, if the proposed transactions are completed, have four components. The first three components are existing pipelines. The last component is a new section of pipeline to be constructed by the Dawn Gateway JV.
5. The first component is a 4.74 km pipeline owned by Michcon which runs from the Belle River Mills Compressor station in St. Clair County, Michigan and terminates at the international border between the United States and Canada in the middle of the St. Clair River. Known as the Belle River Mills Pipeline, this pipeline is currently regulated by the Michigan Public Service Commission.
6. The second component of the Dawn Gateway Pipeline is .873 km of pipe presently owned by St. Clair Pipelines LP which commences at the international border between the

United States and Canada in the St. Clair River and terminates at Union Gas' St. Clair valve site in Lambton County, Ontario. Known as the St. Clair River Crossing, this line is currently regulated by the National Energy Board (the "NEB"), the federal government energy regulator.

7. The third component is 11.7 km of pipe known as the St. Clair Line which is the subject of this proceeding. The St. Clair Line is owned by Union Gas and is currently regulated by the OEB.

8. The last component of the Dawn Gateway Pipeline is a new 17 km pipeline running from the St. Clair Line near Union Gas' Bickford Station to the Dawn Compressor Station in Lambton County, Ontario. This will be constructed by Dawn Gateway LP, as part of the Dawn Gateway JV.

9. Dawn Gateway JV plans to develop the four components into one dedicated 34 km natural gas transmission pipeline connecting Belle River Mills in Michigan to the Dawn Compressor Site in Ontario which will be called the Dawn Gateway Pipeline.

10. This plan proposes that the 11.7 km St. Clair Line which is the subject of this application would be incorporated into and become part of the 34 km Dawn Gateway Pipeline.

11. In its Application to the OEB for leave to sell the St. Clair Line, Union Gas stated that it expected that the Canadian portion of the Dawn Gateway Pipeline would be regulated by the NEB, rather than the Ontario Energy Board. On May 6, 2009 Dawn Gateway LP filed an application with the NEB requesting the necessary consents and approvals to construct and operate the Dawn Gateway Pipeline.

12. On March 16, 2009, the OEB issued Procedural Order No. 1, a copy of which is attached at Tab 3, with *inter alia* a proposed Draft Issues List. The OEB invited the Applicant and the intervenors to file written submissions regarding any proposed changes to the Draft Issues List. The Draft Issues List included the following issues proposed by the OEB:

## 1.0 Jurisdiction

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

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

13. Union Gas requested that draft issues 1.1 and 1.2 be removed from the Issues List, and one intervenor, a landowner group named GAPLO, submitted that the jurisdiction issues should stay on the list.

14. On April 6, 2009 the OEB issued a Decision and Order in which it set out the approved Issues List for the Application. A copy of this Order is attached at Tab 4. With respect to the jurisdiction issue, the OEB made the following ruling:

... 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. The Board has certain current responsibilities with regard to the St. Clair Line, and it will allow questions and submissions on the jurisdictional issues in this proceeding.

The Board therefore concludes that draft issues 1.1 and 1.2 will form part of the final Issues List, with two minor edits as follows:

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

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

15. An oral hearing was held before the OEB with respect to Union Gas’ Application for leave to sell the St. Clair Line on June 22 and 23, 2009 during which witnesses from Union Gas gave testimony and witnesses from the GAPLO landowners group also gave testimony. The transcripts of the testimony is available online at the following address:

[http://www.rds.oeb.gov.on.ca/webdrawer/webdrawer.dll/webdrawer/search/rec&sm\\_udf10=e b-2008-0411&sm\\_udf16=transcripts&bool=and&sortd1=rs\\_dateregistered&rows=200](http://www.rds.oeb.gov.on.ca/webdrawer/webdrawer.dll/webdrawer/search/rec&sm_udf10=e b-2008-0411&sm_udf16=transcripts&bool=and&sortd1=rs_dateregistered&rows=200)

In addition, Union Gas and GAPLO also filed written evidence prior to the hearing which is available from the parties' lawyers.

16. Union Gas filed its Argument in Chief with the OEB on July 6, 2009, a copy of which is attached at Tab 5. In response to Issue 1.2 on the Issues List, Union Gas submitted, in paragraphs 10 – 12 of its Argument in Chief that the Canadian portion of the Dawn Gateway Pipeline should be subject to regulation by the NEB based on the following facts:

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 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.

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.

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

17. On July 9, 2009, the OEB received a letter from Counsel to the Canadian Manufacturers & Exporters (“CME”), one of the registered intervenors in this proceeding, raising an issue with respect to the service of Notices of Constitutional Question on the Attorney General of Canada and the Attorney General of Ontario pursuant to section 109 of the *Courts of Justice Act*. On July 10 the OEB issued a Procedural Order inviting comments from all intervenors on this question. Submissions on the issue of Constitutional Notice were received from six parties. CME, GAPLO-Union and CAEPLA2 argued that notice was required. Union Gas, OEB Board staff and Dawn Gateway LP argued that notice was not required.

18. On August 5, 2009, the OEB issued a Decision and Order, a copy of which is attached at Tab 6, requiring Union Gas to serve a Notice of Constitutional Question and giving the Attorneys General 15 days to respond. This Notice is being served in compliance with that Order.

The following is the legal basis for the constitutional question:

19. The applicable legal principle with respect to whether the Dawn Gateway Pipeline should be subject to the regulatory jurisdiction of the NEB is whether the Dawn Gateway Pipeline will operate as a single enterprise providing international service between the Belle River Mills, Michigan in the US and Dawn, Ontario in Canada, on a continuous and regular basis and subject to common management and control, and thus be a federal undertaking within the meaning of section 92 (10) (a) of the *Constitution Act, 1867*.

20. Union Gas’ Argument in Chief, at Tab 5, contains the Applicant’s submissions regarding why it is appropriate for the Canadian portion of the Dawn Gateway Pipeline to be regulated by the NEB as it relates to the ultimate issue in this Application which is whether the OEB should grant leave to sell the St. Clair Line to be used as part of the Dawn Gateway Pipeline.

21. Union Gas submits, however, that the OEB should not be making a decision in this case on the question of whether Dawn Gateway Pipeline will actually be subject to the jurisdiction of the NEB. Dawn Gateway LP is not an applicant in this proceeding, and Union

Gas submits that the proper forum for determining whether the Dawn Gateway Pipeline will be subject to regulation by the National Energy Board is Dawn Gateway LP's application to the National Energy Board.

August 6, 2009

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EB-2008-0411

**NOTICE OF APPLICATION AND HEARING  
UNION GAS LIMITED  
LEAVE TO SELL 11.7 KILOMETERS NATURAL GAS PIPELINE**

Union Gas Limited ("Union Gas" or the "Applicant") has filed an application with the Ontario Energy Board (the "Board") dated December 23, 2008, under section 43(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B). The application seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. A map depicting the location of this pipeline is attached as Schedule A to this Notice.

The purchaser of the pipeline is a proposed limited partnership known as Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway LP"). The Dawn Gateway LP will be owned by Spectra Energy Corp ("Spectra") and DTE Pipeline Company ("DTE").

Spectra and DTE plan to develop a dedicated 34 kilometer 24 inch diameter steel natural gas transmission pipeline connecting Belle River Mills (owned by DTE) in Michigan and the Dawn Compressor Site in Ontario. This plan proposes that the 11.7 kilometer pipeline which is the subject of this application would be incorporated into and become part of that 34 kilometer natural gas pipeline, and that there would be construction of a new 17 km 24 inch diameter steel natural gas transmission pipeline connecting the Bickford and Dawn Compressor Stations. The application further indicates that the entire pipeline in Ontario (the existing portion which is the subject of this application and the proposed new construction) is expected to be regulated by the National Energy Board, the Federal Government Regulator rather than the Ontario Energy Board.

### **How to see Union Gas' Pre-filed Evidence**

Copies of the application and pre-filed evidence will be available for public inspection at the Board's offices and the Applicant's offices.

### **How to Participate**

You may participate in this proceeding in one of three ways:

You may send the Board a letter of comment. Your letter should include any request to make an oral presentation to the Board, and must be received by the Board no later than **30 days** from the publication date of this notice, or, if you have been served this notice personally, no later than **10 days** from the date of service

You may request observer status in order to receive documents issued by the Board in the proceeding. Your request must be made by letter received by the Board no later than **10 days** from the publication date of this notice, or, if you have been served this notice personally, no later than **10 days** from the date of service.

You may request intervenor status if you wish to actively participate in the proceeding. Your request must be made by letter of intervention received no later than **10 days** from the publication date of this notice, or, if you have been served this notice personally, no later than **10 days** from the date of service. Your letter of intervention must include a description of how you are, or may be, affected by the proceeding; and if you represent a group, a description of the group and its membership. The Board may choose to hold either a written or an oral hearing. Your letter of intervention should indicate your preference for a written or oral hearing, and the reasons for that preference. The Board may order costs in this proceeding. You must indicate in your letter of intervention whether you expect to seek costs from the applicant and the grounds for your eligibility for costs. You must provide a copy of your letter of intervention to the applicant.

### **How to File Documents with the Board**

All filings to the Board must quote file number EB-2008-0411, be made through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address.

Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca). If the web portal is not available you may e-mail your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

### **Need More Information?**

Further information on how to participate may be obtained by visiting the Board's Web site at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca) or by calling our Consumer Relations Centre at 1-877-632-2727.

### **IMPORTANT**

**IF YOU DO NOT REQUEST TO PARTICIPATE IN ACCORDANCE WITH THIS NOTICE, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE OF THESE PROCEEDINGS.**

### **Addresses**

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**DATED** at Toronto, February 3, 2009

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli  
Board Secretary

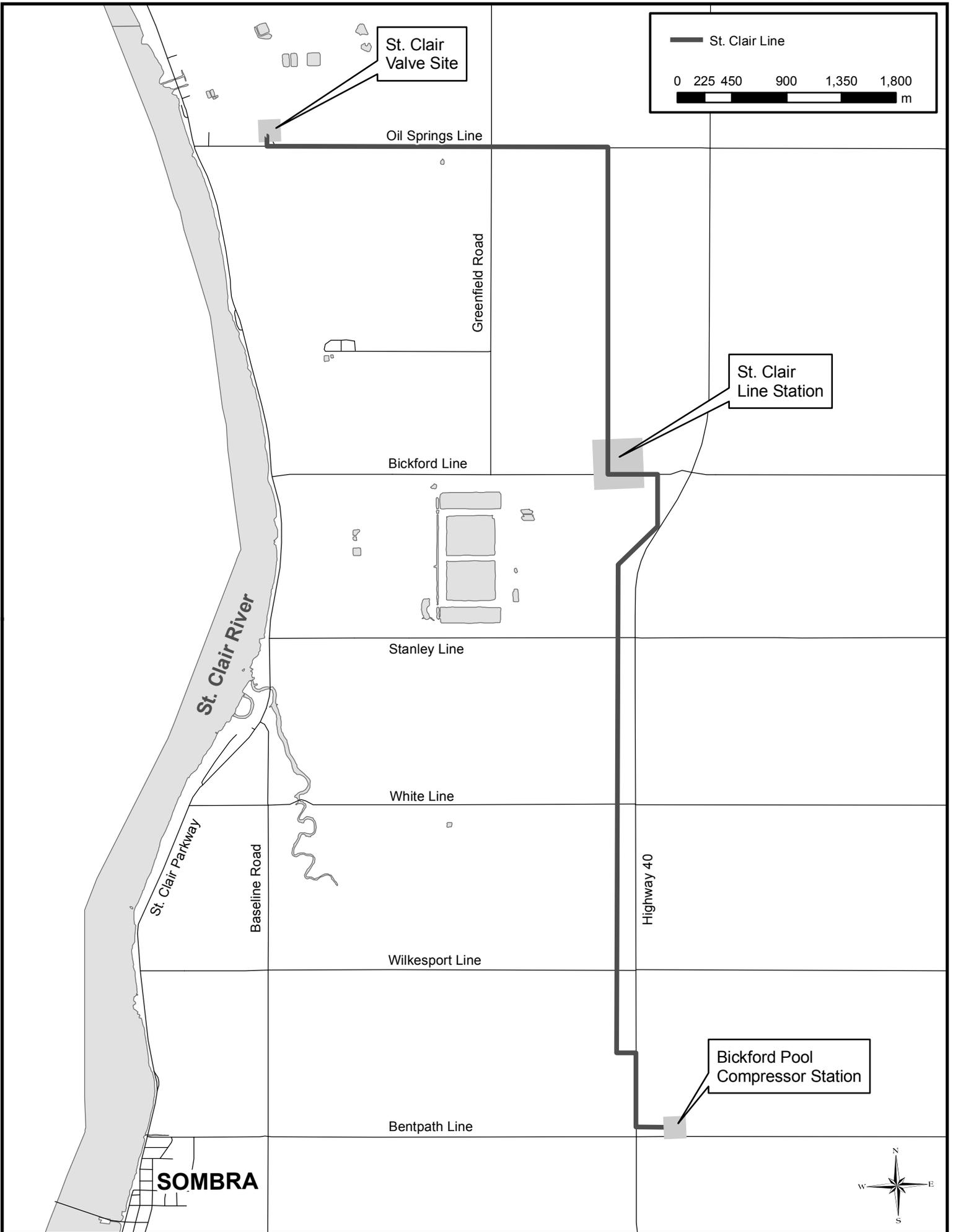
**SCHEDULE A**

**TO THE NOTICE OF APPLICATION AND HEARING**

**BOARD FILE NO. EB-2008-0411**

**DATED: February 3, 2009**

**MAP OF THE PROPOSED 11.7 KILOMETERS PIPELINE TO BE SOLD**



**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** *The Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B, and in particular, s. 43(1)(b) thereof;

**AND IN THE MATTER OF** an Application by Union Gas Limited for an order granting Union leave to sell 11.7 km of NPS 24 pipeline running from Union's St. Clair Valve Site to the Bickford Compressor Site and related measurement and control equipment.

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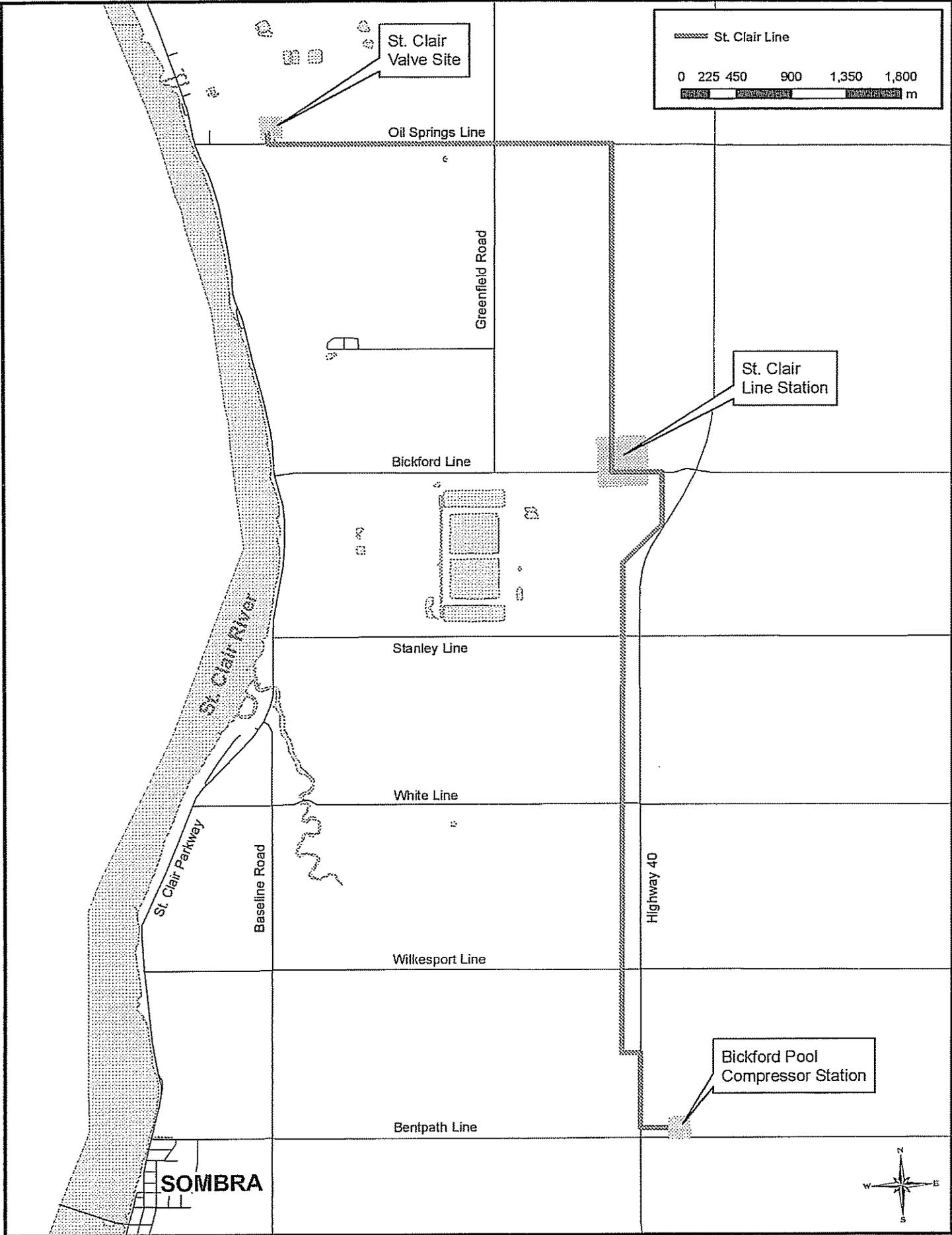
**UNION GAS LIMITED**

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1. Union Gas Limited ("Union") hereby applies to the Ontario Energy Board (the "Board"), pursuant to section 43(1)(b) of the *Ontario Energy Board Act, 1998* (the "Act") for an order granting Union leave to sell 11.7 km of NPS 24 pipeline running from Union's St. Clair Valve Site to the Bickford Compressor Site (the "St. Clair Line"), Union's assets at the St. Clair Valve Site, and related measurement and control equipment located within Union's St. Clair Line Station to a limited partnership yet to be created and which will likely be named Dawn Gateway Pipeline Limited Partnership (the limited partnership to be created will hereinafter be referred to as "Dawn Gateway LP").
2. Dawn Gateway LP will be owned jointly by Spectra Energy Corp. ("Spectra") and DTE Pipeline Company ("DTE") through various affiliates.
3. Attached hereto as Schedule 'A' is a map showing the general location of the St. Clair Valve Site, the St. Clair Line, the St. Clair Line Station, Bickford Compressor Station and the municipalities, highways, and navigable waters through, under, over, upon or across which the St. Clair Line and St. Clair Line Station are located.
4. Spectra and DTE are proposing to form a joint venture (the "Dawn Gateway JV") to develop a new dedicated 34 km NPS 24 international natural gas transmission pipeline (the "Dawn Gateway Line"). It is intended that the Dawn Gateway Line will commence at the Belle River Mills natural gas storage facility in Michigan that is owned by DTE's subsidiary, Michigan Consolidated Gas Company, and will terminate at the Dawn Compressor Site in Ontario, that is owned by Union which is a subsidiary of Spectra.

5. The purpose of the proposed transfer of the St. Clair Line to Dawn Gateway LP is to enable the 11.7 km St. Clair Line to be incorporated into and become part of the 34 km Dawn Gateway Line. Dawn Gateway LP will own all of the Canadian assets of the Dawn Gateway JV.
6. Currently, the St. Clair Line runs from the St. Clair Valve Site, near the US border, to Union's Bickford Compressor Site where it interconnects with Union's Bickford Pool Line which runs from the Bickford Compressor Site to the Dawn storage facility.
7. Union uses the St. Clair Line to provide its customers with transportation service for natural gas from the St. Clair River border crossing to Union's Dawn Hub. However, in recent years there has been very minimal use of the St. Clair Line.
8. Union has no end use customers who are served directly off the St. Clair Line. The proposed sale will have no impact on Union's ability to serve its distribution customers, and it will not result in any increase in Union's regulated rates.
9. If and when the Dawn Gateway Line goes into service, it will have the ability to offer customers a much greater capacity of firm transportation service from Michigan to Dawn. The proposed Dawn Gateway Line will have sufficient capacity to transport approximately 385,000 GJ/d from the US into Ontario, whereas during 2008 it is expected that Union's customers will use the St. Clair Line to transport on average only 28,779 GJ/d from the US into Ontario.
10. Transfer of the St. Clair Line to the Dawn Gateway LP for use as part of the Dawn Gateway Line will be in the public interest as it will increase the firm interconnectivity between Michigan and Ontario and increase the ability of Ontario customers to access gas storage and gas supply in the US. The ability to access more sources of supply in Ontario would improve the security of supply, and the depth and liquidity of the Dawn trading hub.
11. Union therefore requests that it be granted leave to sell the St. Clair Line, Union's assets at the St. Clair Valve Site and the associated measurement and control equipment to Dawn Gateway LP in the future, once the Dawn Gateway JV has completed all other steps necessary to put the Dawn Gateway Line into service, including obtaining all required regulatory approvals.

Schedule A





**EB-2008-0411**

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

**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

#### **PROCEDURAL ORDER NO. 1**

Union Gas Limited ("Union Gas" or the "Applicant") has filed an application with the Ontario Energy Board (the "Board") dated December 23, 2008, under section 43(1) of the *Ontario Energy Board Act, 1998* ("the Act"). The application seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. The Board assigned file No. EB-2008-0411 to this application.

A Notice of Application and Hearing dated February 3, 2009, was served and published by Union Gas as directed by the Board.

Nine parties applied for intervention status by the specified deadline: (1) Blue Water Gas Storage, LLC ("BGS"); (2) St. Clair Pipeline L.P ("St. Clair"); (3) Market Hub Partners Canada L.P. ("MHP Canada"); (4) Canadian Manufacturers & Exporters ("CME"); (5) Shell Energy North America (Canada) Inc. ("Shell Energy"); (6) Federation of Rental Housing Providers of Ontario ("FPRO"); (7) TransCanada Pipelines Limited ("TransCanada"); (8) Enbridge Gas Distribution Inc. ("Enbridge"); and (9) GAPLO-Union (Dawn Gateway), the Canadian Alliance of Pipeline Landowners' Association (CAPLA), and certain landowners who are affected directly by the current application ("GAPLO-Union").

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A late application for intervention was received on March 6, 2009 from Spectra Energy Corporation ("Spectra") and DTE Pipeline Company ("DTE"), on behalf of the soon to be formed Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway Pipeline L.P").

The Board accepts the ten applicants listed above for intervention subject to Union Gas Limited's right of reply to each of the requests within 10 days of the date of issuance of this Procedural Order.

Three of the ten applicants for intervention also applied for eligibility for cost awards: CME; FPRO; and GAPLO-Union. The Board finds that these three parties are eligible for cost awards, subject to the Union Gas's right to reply to each of the requests within 10 days of the issuance of this Procedural Order. Parties are reminded that matters concerning cost awards are set out in the Board's Practice Direction on Cost Awards, which is available on the Board's Web site at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca).

BGS, Enbridge, and GAPLO-Union requested that the Board conduct an oral hearing. GAPLO-Union outlined various issues of concern and indicated that it and CAPLA intend to file expert evidence. The Board intends to conduct an oral proceeding.

The Board received applications to participate as observers from Nexen Marketing and Ontario Power Generation Inc., and grants these two parties observer status in this proceeding.

A list of participants in this proceeding is attached as Appendix A to this Procedural Order No. 1.

A Draft Issues List is attached as Appendix B to this Procedural Order. The Board invites the Applicant and the intervenors to file written submissions regarding any proposed changes to this Draft Issues List. Following review of the submissions, the Board will issue a Final Issues List in advance of the filing of interrogatories.

The Board considers it necessary to make provision for a number of procedural matters for the Application.

**THE BOARD ORDERS THAT:**

1. The Applicant or Intervenors wishing to make submissions on the Draft Issues List, attached as Appendix B to this Procedural Order No. 1, shall file such submissions with the Board, and send a copy to all other parties no later than **Monday, March 23, 2009**.
2. Intervenors who wish information and material from Union Gas Limited that is in addition to its application, and that is relevant to the proceeding, shall request it by written interrogatories filed with the Board and delivered to Union Gas Limited and all intervenors on or before **Monday, April 13, 2009**. All interrogatories must identify the relevant Issue by Issue Number.
3. Union Gas Limited shall file complete responses to the interrogatories with the Board and deliver all the responses to all the Intervenors on or before **Monday, April 27, 2009**.
4. Intervenors or Board staff who wish to present evidence which is relevant to the proceeding, shall file that evidence with the Board and deliver it to Union Gas Limited and the other Intervenors on or before **Monday, May 4, 2009**.
5. Any party (Intervenor, Board staff or Union Gas Limited) who requires additional information related to an Intervenor's filed evidence, which is relevant to the proceeding, shall request it by written interrogatories filed with the Board and delivered to the parties on or before **Monday, May 11, 2009**.
6. Responses to the interrogatories shall be filed with the Board and delivered to Union Gas Limited and the other Intervenors on or before **Tuesday, May 19, 2009**.
7. All filings to the Board must quote file number EB-2008-0411, be made through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca). If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit

all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file seven (7) paper copies. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

**DATED** at Toronto, March 16, 2009

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary

**APPENDIX A**

**to**

**Procedural Order No. 1**

**IN THE MATTER OF**

**Leave to Sell Application by Union Gas Limited**

**EB-2008- 0411**

**DATED March 16, 2009**

**List of Participants**

**UNION GAS LIMITED**

**EB-2008-0411**

**APPLICANT & LIST OF INTERVENTIONS**

**March 16, 2009**

**Applicant**

**Rep. And Address for Service**

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Counsel for applicant

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AND

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L.P.

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6. GAPLO-Union (Dawn Gateway) and Canadian Alliance of Pipeline Landowners' Associations (CAPLA)

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**APPENDIX B  
to**

**Procedural Order No. 1**

**IN THE MATTER OF**

**Leave to Sell Application by Union Gas Limited**

**EB-2008- 0411**

**DATED March 16, 2009**

**Draft Issues List**

**Union Gas Limited**  
**Leave to Sell 11.7 kilometers Natural Gas Pipeline**  
**(EB-2008-0411)**

**1.0 Jurisdiction**

- 1.1 If the proposed sale is approved, will the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?
- 1.2 If the proposed Dawn Gateway Line is ultimately completed, will it be under the jurisdiction of the OEB or the NEB?

**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?
- 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?
- 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?

**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, and abandonment obligations?

**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?



**EB-2008-0411**

**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.

## **ISSUES DECISION AND ORDER**

### **Application**

On December 23, 2008, Union Gas Limited ("Union Gas" or the "Applicant") filed an application with the Ontario Energy Board (the "OEB") under section 43(1) of the *Ontario Energy Board Act, 1998* ("the Act"). The application seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair. The Board assigned file No. EB-2008-0411 to this application.

A Notice of Application and Hearing dated February 3, 2009, was served and published by Union Gas as directed by the Board.

Union Gas proposes to sell the pipeline to Dawn Gateway LP, a yet to be created limited partnership. Dawn Gateway LP will be owned jointly by Spectra Energy Corp. ("Spectra") and DTE Pipeline Company ("DTE") through various affiliates.

Spectra and DTE are proposing to form a joint venture (the “Dawn Gateway JV”) to develop a new dedicated 34 km NPS 24 natural gas transmission pipeline (the “Dawn Gateway Line”). It is intended that the Dawn Gateway Line will commence at the Belle River Mills natural gas storage facility in Michigan that is owned by DTE’s subsidiary, Michigan Consolidated Gas Company, and will terminate at the Dawn Compressor Site in Ontario, that is owned by Union Gas, which is a subsidiary of Spectra. The existing St. Clair Line is intended to form a portion of the Dawn Gateway Line.

### **Procedural Order No.1 and Draft Issues List**

Procedural Order No. 1 was issued on March 16, 2009 and contained a draft issues list. Submissions were received from the following parties on the proposed issues list:

- Federation of Rental-housing Providers of Ontario (“FPRO”)
- GAPLO-Union, the Canadian Alliance of Pipeline Landowners’ Association (CAPLA), and certain landowners who are affected directly by the current application (“GAPLO”)
- Dawn Gateway Pipeline Limited Partnership (“Dawn Gateway LP”)
- Union Gas Limited (“Union Gas”)

The Board has considered these submissions in establishing a final issues list which is attached as Appendix A to this Decision. The requested changes and clarifications from the parties on the proposed issues list are reviewed below along with the Board’s rationale in addressing each of these requests.

### **Jurisdiction (Draft Issues 1.1 and 1.2)**

#### Position of Union Gas

Union Gas in its March 26, 2009 submission requested that the Jurisdiction Issues, and in particular Issue 1.2, be removed from the Issues List.

Regarding draft issue 1.1, Union Gas indicated that its application “is for leave to transfer the St. Clair Line in the future, once the Dawn Gateway JV has completed all other steps necessary to put the Dawn Gateway Line into service”. At that time, the jurisdictional issue can be considered. In the meantime, Union Gas intends to continue

owning and operating the St. Clair Line until the sale actually takes place, and acknowledges that the St. Clair Line will continue to be under OEB jurisdiction.

In regards to draft issue 1.2, Union Gas submitted that it is not relevant, as the application is predicated on the National Energy Board (“NEB”), granting approvals. If the NEB approvals are not obtained, then the sale to Dawn Gateway JV will not occur. Union Gas suggested that questions about the NEB’s jurisdiction can be addressed when the Dawn Gateway JV applies to the NEB regarding the Dawn Gateway Line.

In addition Union Gas questioned whether the OEB has jurisdiction to make a ruling on the future regulatory status of the Dawn Gateway Line in this application, given that the Dawn Gateway JV is not an applicant and is not seeking any approvals from the OEB.

#### Position of GAPLO

GAPLO submitted that the elimination of the jurisdiction issues may serve to deny the opportunity of the landowners to address their concerns about the Union Gas proposal to the OEB. GAPLO disagreed with Union Gas’s view that jurisdictional issues can be more appropriately addressed as part of Dawn Gateway JV’s future NEB proceedings regarding the Dawn Gateway Line.

#### Position of Dawn Gateway L.P.<sup>1</sup>

In a submission dated March 27, 2009 Dawn Gateway L.P. agreed with Union Gas that no jurisdictional issues arise in connection with the Union Gas application. Accordingly, it was Dawn Gateway L.P.’s submission that Issues 1.1 and 1.2 should be deleted.

Dawn-Gateway L.P. also indicated that it anticipates filing applications before the NEB shortly seeking approval to construct and operate a federal pipeline. One of those applications will request NEB approval to purchase the Union Gas St. Clair Line thereby incorporating it into the new international pipeline connecting Michigan and the Dawn Hub.

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<sup>1</sup> Spectra Energy Corporation and DTE Pipeline Company, on behalf of the soon to be formed Dawn Gateway Pipeline Limited Partnership (“Dawn Gateway Pipeline L.P”).

## Board Finding

Union Gas' application is for approval of the sale of the St. Clair Line. The ultimate purpose of the sale is to allow Dawn Gateway L.P. to create a new international pipeline, of which the St. Clair Line will form one portion. The St. Clair Line is currently under OEB jurisdiction and is considered integral to Union Gas' 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. The Board has certain current responsibilities with regard to the St. Clair Line, and it will allow questions and submissions on the jurisdictional issues in this proceeding.

The Board therefore concludes that draft issues 1.1 and 1.2 will form part of the final Issues List, with two minor edits as follows:

- 1.1 If the proposed sale is approved, ~~will~~ should the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?
- 1.2 If the proposed Dawn Gateway Line is ultimately completed, ~~will~~ should it be under the jurisdiction of the OEB or the NEB?

## **Land Matters (Draft Issue 3.1)**

### Position of GAPLO

GAPLO expressed concerns related to the "regulatory oversight" aspect of draft issue 3.1, which deals with Land Matters. In particular, GAPLO identified two problems with waiting until Dawn Gateway JV chooses to initiate proceedings before the NEB :

- (1) it is the OEB that determined that the construction and operation of the St. Clair pipeline 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; and

- (2) directly affected landowners will have no recourse to cost recovery in NEB processes e.g., proposed transfer of jurisdiction or even with respect to the approval of any new pipeline facilities.

GAPLO concluded that the Draft Jurisdictional Issues are relevant to the Board's consideration of the public interest on this application, and that draft issue 3.1 should be amended as follows:

- 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?

#### Union Gas Position

Union Gas responded to GAPLO's submission, indicating that the OEB can consider the implications for the landowners of the transfer of the St. Clair Line to an NEB regulated entity. Union Gas indicated however, that this can be done without the OEB ruling on whether the NEB will in fact have jurisdiction.

#### Board Finding

The Board agrees with GAPLO that draft issue 3.1 should be modified as stated, and notes that Union Gas was not opposed to the proposed revision.

#### **Union Gas Proposed No Harm Test**

#### Position of Union Gas

Union Gas proposed that a new issue be added, "No Harm Test", as follows:

#### 5.0 No Harm Test

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

Union Gas indicated that this test is relevant for regulated entities in making an application for leave to sell assets.

### Position of FPRO

In regard to the No Harm Test, FPRO submitted that the Issue should be the broader public interest.

FPRO, suggested to include two sub-issues to the proposed issue 5.0 No Harm Test, to address the policy and precedent implications of the proposed project. The two sub-issues are:

- 5.1 What are the impacts of a four-year option provided to a utility affiliate on the rational expansion and development of transmission and storage in the market?
- 5.2 What are the rate impacts of moving assets between affiliates depending upon their rate of return?

### Reply Submission of Union Gas

Union Gas disagreed with FRPO's concern that the No Harm Test would fetter the OEB's ability to consider the public interest. Union Gas stated that the "No Harm Test" will promote regulatory efficiency without unduly fettering OEB's discretion to consider all relevant matters.

Union Gas described the wording of the two questions proposed by FPRO as inappropriate because they are too generic. Union Gas agreed however that the issues raised by FRPO in those questions as they relate to this application specifically would be acceptable.

### Board Finding

The Board agrees that the issue to be addressed is whether the proposed transaction will have an adverse effect on balance relative to the status quo in relation to the Board's statutory objectives. However, the Board also believes it is appropriate to consider whether the no harm test is the appropriate one in these circumstances. The

Board finds that the issue should be titled the “Appropriate Test” rather than the “No Harm Test” and is revised as follows:

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

Although the issues raised by FRPO’s proposed sub-issue 5.1 and 5.2 are relevant to this proceeding, in the Board’s view these issues are subsumed under issues 2.1, 2.2 and 2.3 and more generally under issue 5. The Board therefore considers it unnecessary to add sub-issues 5.1 and 5.2.

**Other Issues**

The Board received no submissions on any of the other issues in the Draft Issues List.

**THE BOARD THEREFORE ORDERS THAT:**

- 1. The Board approved Final Issues List shown as Appendix A to this order, be used by intervenors of record and Union Gas Limited in all phases of this proceeding.

**ISSUED** at Toronto, April 6, 2009

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli  
Board Secretary

**APPENDIX A**

**LEAVE TO SELL APPLICATION BY UNION GAS LIMITED**

**EB-2008-0411**

**FINAL ISSUES LIST**

## **Final Issues List**

### **Union Gas Limited**

#### **Leave to Sell 11.7 kilometers Natural Gas Pipeline (EB-2008-0411)**

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

##### **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?
- 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?
- 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?

##### **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?

##### **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?

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

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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**Sharon S. Wong**  
**Lawyer for the Applicant**  
**Union Gas Limited**

## 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*<sup>1</sup> (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:

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<sup>1</sup> 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).<sup>2</sup> (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**

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<sup>2</sup> *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.<sup>3</sup>**

(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

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<sup>3</sup> *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.<sup>4</sup>

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.<sup>5</sup>
  
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.<sup>6</sup> 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

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>
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.<sup>9</sup>
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

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<sup>7</sup> 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.

<sup>8</sup> 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 103m<sup>3</sup>/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.

<sup>9</sup> 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.<sup>10</sup>

***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.<sup>11</sup>

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.

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<sup>10</sup> 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)

<sup>11</sup> 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.<sup>12</sup>
  
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.<sup>13</sup> 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.<sup>14</sup>
  
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.<sup>15</sup> 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

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<sup>12</sup> 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

<sup>13</sup> Union's response to Undertaking J2.3

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

<sup>15</sup> 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.<sup>16</sup>

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<sup>16</sup> 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.<sup>17</sup>
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.<sup>18</sup>
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/day<sup>19</sup>, 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

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

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

<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>
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.<sup>22</sup>
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.<sup>23</sup>

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

<sup>21</sup> 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

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

<sup>23</sup> 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.<sup>24</sup>

**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.<sup>25</sup>

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.<sup>26</sup>

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<sup>24</sup> 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

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

<sup>26</sup> 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.<sup>27</sup>
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.<sup>28</sup> Over the last three years, DTE affiliates have shipped 81% of the firm volumes transported on the St. Clair Line.<sup>29</sup>
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

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

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

<sup>29</sup> 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.<sup>30</sup>
  
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

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<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup>
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.<sup>34</sup>

### **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

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<sup>31</sup> 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

<sup>32</sup> 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

<sup>33</sup> 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

<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup>

**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.<sup>37</sup>
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.<sup>38</sup>

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

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

<sup>37</sup> Union's Response to Undertaking J1.4

<sup>38</sup> *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,<sup>39</sup> 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. 22<sup>40</sup>); 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-2002-0133<sup>41</sup>); 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-2002-0446<sup>42</sup> 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

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<sup>39</sup> Union's Brief of Authorities, Tab 4, p. 2

<sup>40</sup> Union's Brief of Authorities, Tab 7

<sup>41</sup> Union's Brief of Authorities, Tab 8

<sup>42</sup> 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.<sup>43</sup>

(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

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<sup>43</sup> *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.<sup>44</sup>

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,<sup>45</sup> 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 taxes<sup>46</sup>, there is no doubt that any sale price

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<sup>44</sup> Union’s Answer to Undertaking J1.4

<sup>45</sup> Valuation Report of Marcus & Associates LLP Hoare·Dalton, Ex. K1.5, at p. 2

<sup>46</sup> 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.<sup>47</sup>
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.<sup>48</sup> 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.

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<sup>47</sup> Union's Answer to Undertaking, J1.4

<sup>48</sup> 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.<sup>49</sup>

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:

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<sup>49</sup> Ontario Regulation 210, Ex. K2.2

- excavate using power-operated equipment (including ploughing below a depth of 30 cm<sup>50</sup>) 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),<sup>51</sup>
- 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.<sup>52</sup>

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 Landowners<sup>53</sup> 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:

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<sup>50</sup> 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

<sup>51</sup> 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.

<sup>52</sup> s. 112 (2) of the NEB Act.

<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup>
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

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<sup>54</sup> 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.

<sup>55</sup> 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.<sup>56</sup>
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.<sup>57</sup>
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

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

<sup>57</sup> GAPLO's Answer to Interrogatory # 3, Ex.K 2.6

to work together to develop standards for blanket approvals.<sup>58</sup> 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

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<sup>58</sup> 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.<sup>59</sup>

***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 Regulations<sup>60</sup> 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

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

<sup>60</sup> 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.<sup>61</sup>

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 Document<sup>62</sup> (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

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<sup>61</sup> 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.

<sup>62</sup> 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.<sup>63</sup>

(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)

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<sup>63</sup> 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.<sup>64</sup>

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

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<sup>64</sup> 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.<sup>65</sup> 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

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<sup>65</sup> 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.<sup>66</sup>

***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.<sup>67</sup> The increased interconnection of storage within the Great Lakes basin will provide Ontario consumers with additional options to manage price volatility.<sup>68</sup> The Dawn Gateway Pipeline will also improve access to other sources of gas supply in the US (regardless of whether

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

<sup>67</sup> 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

<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

***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.<sup>71</sup>
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

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

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

<sup>71</sup> 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).<sup>72</sup> 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.**”<sup>73</sup>

(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

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

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

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

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.<sup>75</sup>
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.<sup>76</sup>

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

<sup>75</sup> 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

<sup>76</sup> 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.<sup>77</sup> 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**

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<sup>77</sup> Union's Answer to Undertaking, J1.2.

**attainment of the statutory objectives, then the application should be granted.**<sup>78</sup>

(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. 43<sup>79</sup>, 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.

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<sup>78</sup> 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.

<sup>79</sup> 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”.<sup>80</sup>

(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

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<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>
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 Agreement<sup>83</sup> 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

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<sup>81</sup> *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

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

<sup>83</sup> 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.<sup>84</sup> 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

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<sup>84</sup> 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



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

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



**EB-2008-0411**

**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.

**BEFORE:** Gordon Kaiser  
Vice Chair and Presiding Member

Cynthia Chaplin  
Member

Cathy Spoel  
Member

## **DECISION AND ORDER**

[1] This Decision concerns a specific issue that has arisen in the course of this proceeding namely whether the Board should direct that a Notice of Constitutional Question should be served on the Attorneys General for Canada and Ontario pursuant to section 109 of the Courts of Justice Act. For the reasons set out below the Board is of the view that the Notice should be served.

[2] This proceeding arises from an application by Union Gas Ltd. ("Union") under section 43(1) of the Ontario Energy Board Act, 1998 for an Order of the Board granting leave to sell 11.7 km of natural gas pipeline running between the St. Clair Valve Site

and Bickford Compressor Site in the Township of St. Clair in Ontario. The pipeline is known as the St. Clair Line.

[3] Union proposes to sell the St. Clair Line to Dawn Gateway LP, a limited partnership. Dawn Gateway LP is owned jointly by Spectra Energy Corp. (“Spectra”) and DTE Pipeline Company (“DTE”) through various affiliates. Union is a subsidiary of Spectra.

[4] Spectra and DTE have also formed a joint venture (the “Dawn Gateway JV”) to develop a 34 km pipeline (the “Dawn Gateway Line”) that will commence at the Belle River Mills storage facility in Michigan, owned by a DTE subsidiary, Michigan Consolidated Gas Company (“Michcon”), and terminate at the Dawn Compressor Site in Ontario owned by Union.

[5] The Dawn Gateway Line will, when the transactions are completed, have four components. The first three components are existing pipelines. The last component is a new pipeline to be constructed by a joint venture between Spectra and DTE.

[6] The first component is a 4.74 km pipeline owned by Michcon which runs from the Belle River Mills compressor station in St. Clair County, Michigan and terminates at the international border between the United States and Canada in the middle of the St. Clair River. Known as the Belle River Mills Pipeline, this pipeline is currently regulated by the Michigan Public Service Commission. As part of this transaction this pipeline will be purchased or leased by Dawn Gateway Pipeline LLC.

[7] The second component of the Dawn Gateway Line is .873 km of pipe presently owned by St. Clair Pipelines LP which commences at the international border between the United States and Canada in the St. Clair River and terminates at Union’s St. Clair valve site in Lambton County, Ontario. Known as the St. Clair River Crossing, this line is currently regulated by the NEB.

[8] The third component is 11.7 km of pipe known as the St. Clair Pipeline which is the subject of this proceeding. The St. Clair Pipeline which is owned by Union is currently regulated by the Ontario Energy Board.

[9] The last component of the Dawn Gateway Line is a new 17 km pipeline running from the St. Clair Pipeline near Union’s Bickford station to the Dawn Compressor

Station in Lambton County, Ontario. This will be constructed by Dawn Gateway LP, a joint venture between Spectra and DTE Energy. DTE Energy is the parent of Michcon and Spectra is the parent of Union.

[10] Of particular significance to this proceeding is Union's position that the Canadian segment of the Dawn Gateway Pipeline will be subject to Federal jurisdiction and regulated by the National Energy Board including the existing 11.7 km St. Clair Pipeline currently regulated by the Ontario Energy Board. On May 6, 2009 DTE and Spectra through Dawn Gateway GP filed an Application with the National Energy Board which, inter alia, would give effect to this change in jurisdiction.<sup>1</sup>

[11] On Thursday, July 9, 2009, the Board received a letter from Counsel to the Canadian Manufacturers & Exporters ("CME"), one of the registered intervenors in this proceeding, raising an issue with respect to the service of Notices of Constitutional Question on the Attorney General of Canada and the Attorney General of Ontario pursuant to section 109 of the Courts of Justice Act.

[12] On July 10 the Board issued a Procedural Order inviting comments from all intervenors on this question. The Board indicated it would rule on this matter after receiving submissions and would then reschedule the dates for the filing of remaining written arguments by Board staff and the Intervenors. The Argument in Chief of Union Gas was filed with the Board on July 6 prior to receipt of the motion by CME.

[13] Submissions on the issue of Constitutional Notice were received from six parties. CME, GAPLO-Union and CAEPLA<sup>2</sup> argued that notice was required. Union, Board staff and Dawn Gateway LP argued that notice was not required.

[14] Section 109 of the Ontario Courts of Justice Act states:

Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

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<sup>1</sup> The Belle River Mills pipeline will remain under the jurisdiction of the Michigan Public Service Commission; see paragraph 6 above.

<sup>2</sup> CAEPLA is the Canadian Alliance of Pipeline Landowners Association. GAPLO-Union (dawn Gateway) is a group of landowners affected by the application

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(2) If a Party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

[15] On April 6 the Board issued a Decision which established the final issues list for this proceeding. Issue 1.2 was “if the proposed Dawn Gateway line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?”

[16] Union in its argument of July 6, 2009 answered that “the Dawn Gateway pipeline should at all times be under the jurisdiction of the NEB.” Paragraphs 8, 9, 10 of the Union argument sets out the legal reasoning for this position citing different Supreme Court of Canada authorities as well as a reference to Prof. Hogg’s well known constitutional law text. Union also filed a brief of authorities.

[17] The intervenors and Board staff have yet to file their arguments. It is conceivable that they may disagree with Union and argue that the Dawn Gateway Pipeline should not be under the jurisdiction of the NEB. And it is always open to the Board not to agree with Union on this issue.

[18] The Board agrees with CME that issue 1.2 has clearly put in play the question of whether the Dawn Gateway line should be under the jurisdiction of the OEB or the NEB. The Board believes that one of the issues before the Board as contemplated by issue 1.2 is whether the regulatory authority the Ontario Energy Board currently has over the St. Clair Line should change as a result of the of transactions proposed.

[19] The Legislation requires that a Notice of a Constitutional Question shall be served on the Attorney General where the constitutional validity or the constitutional applicability of an Act of the Legislature is in question. No one in this proceeding is

questioning the validity of the OEB Act but the applicability of the OEB Act to the St. Clair Line is certainly a question. It's true that in some provinces the test is limited to constitutional validity but Ontario is not one of those.<sup>3</sup> And the statute is mandatory; the OEB does not have an option if Notice is required.

[20] Board staff states that “a consideration of the jurisdictional issue is relevant to the application before this Board within the context of considering whether to approve the proposed sale of the St. Clair Line.” We agree. But Board staff goes on to say that they do not believe that notice is required unless a decision of the Board would result in the effective transfer of jurisdiction.

[21] The concept of “effective transfer” of jurisdiction presumably means that there must be an actual change in ownership or control. We see no basis in the legislation for that conclusion.

[22] To add a condition to the statute that the requirement for constitutional notice arises only if the transaction is completed and there is a change in ownership or control goes well beyond the clear language of section 109.

[23] In the facts of this case the simple question is whether the constitutional applicability of Ontario legislation is an issue. If it is, then Notice is required. There is a reason why all the Canadian provinces and the Canadian Government<sup>4</sup> have notice requirements similar to those found in section 109 of the Courts of Justice Act in Ontario. Constitutional decisions can have implications beyond the interests of private parties in private litigation.

[24] As Prof. Hogg states, the Attorneys General have the incentive, expertise and resources to present an argument that would usually be superior to argument presented

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<sup>3</sup> While all Provinces have statutes that require notice to be given to the Attorney General, of any proceeding in which the constitutionality of a statute is an issue there is some variation in the definition of issues that give rise to the obligation to give notice. Constitutional validity is an issue in all jurisdictions but the constitutional applicability is not a ground in New Brunswick and Newfoundland. See Peter Hogg, *Constitutional Law of Canada* 5<sup>th</sup> (Toronto: Thomson Carswell, 2007) at 59-23.

<sup>4</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 27

by a private party.<sup>5</sup> Union, Dawn Gateway and Board staff have attempted to define narrowly the notice requirement in section 109; the Board believes that a broader interpretation is warranted.

[25] For the reasons stated, Union is directed to issue the required constitutional notice pursuant to section 109 of the Courts of Justice Act, along with a copy of this Decision and Order. The Attorney General shall be given 15 days to respond.

[26] There is one outstanding matter the Board wishes to address in this decision. It is apparent from the submissions that the constitutional issue is driven by Union's desire to obtain a "lighter" regulatory treatment for the service to be offered on the proposed line. Union wants to be able to negotiate long term rates with shippers as opposed to having rates set on a cost of service basis. That regulatory regime is currently available from the National Energy Board and not available from the Ontario Energy Board.

[27] Constitutional issues such as the one before us are necessarily determined by the principles of constitutional law. Those principles apply regardless of whether the project is in the public interest.

[28] It is conceivable in this proceeding that the Board might find that the Dawn Gateway Line is in the public interest and will benefit Ontario consumers but the constitutional jurisdiction over the 11.7 km St. Clair line remains with the Province of Ontario. In these circumstances the project would not proceed because Union has clearly indicated that unless Federal jurisdiction applies the investment will not be made.

[29] In the circumstances the Board asks the parties to this proceeding to make submissions on whether the Board should add the following issue to the issues list in this proceeding;

"Should the Board consider establishing a form of regulatory treatment for the Dawn Gateway Line similar to the regulatory treatment that would be available to the pipeline under Federal jurisdiction and if so, what steps should the Board take to obtain the necessary evidence?"

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<sup>5</sup> Peter Hogg, *Constitutional Law of Canada* 5th ed. (Toronto: Thomson Carswell, 2007) at 59-22

Submissions on this issue should be made within 10 days of the date of this Decision and Order. All parties will have an opportunity to reply 7 days after the initial submissions.

**THE BOARD ORDERS THAT:**

1. Union shall provide a Notice of Constitutional Question to the Attorney General of Canada and the Attorney General of Ontario regarding this proceeding pursuant to section 109 of the Courts of Justice Act, along with a copy of this Decision and Order.
2. The outstanding arguments of the parties in this proceeding must now be filed with the Board on the following dates: Board Staff, August 11, Intervenors, August 21 and the Union Reply Argument, August 28.
3. Those Parties wishing to make submissions regarding the potential new issue identified in paragraph 29 of this Decision shall make these submissions within 10 days of the date of this Decision. All parties to this proceeding will have an opportunity to reply to those submissions seven days after the initial submissions are received by the Board.
4. All filings to the Board must quote file number EB-2008-0411, be made through the Board's web portal at [www.errr.oeb.gov.on.ca](http://www.errr.oeb.gov.on.ca), and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.oeb.gov.on.ca](http://www.oeb.gov.on.ca). If the web portal is not available you may email your document to [boardsec@oeb.gov.on.ca](mailto:boardsec@oeb.gov.on.ca). Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file three (3) paper copies. All communications should be directed to the attention of the Board Secretary and be received no later than 4:45 p.m. on the required date.

**DATED** at Toronto, August 5, 2009

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli  
Board Secretary