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.

BOARD STAFF SUBMISSION

UNION GAS LIMITED

Application for Leave to Sell 11.7 km Gas Pipeline (St. Clair Line)

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")?

1. Board Staff submits that, if the proposed sale of the St. Clair Pipeline is approved and the current use of the line is continued, the line would remain under the jurisdiction of the OEB. Its current use is part of Union's distribution system and absent any change in the use, it remains under OEB jurisdiction regardless of ownership. Accordingly, in Board Staff's view ,the proposed transfer does not have any impact on the Board's jurisdiction which flows from section 36 of the OEB Act and grants the Board jurisdiction over gas transmitters and distributors in Ontario.

1.2 IF THE PROPOSED DAWN GATEWAY LINE IS ULTIMATELY COMPLETED, SHOULD IT BE UNDER THE JURISDICTION OF THE OEB OR THE NEB?

In this section, the following is a summary of Board staff submission:

- In this proceeding, Union has submitted that the proposed new pipeline (Dawn Gateway Line) should be regulated federally by the National Energy Board (NEB). Union argues that the Dawn Gateway Line would be operated as a "seamless service between Canada and the U.S." and would therefore be a "federal undertaking" under section 92(10)(a) of the Constitution Act.
- In Board Staff's submission, the Dawn Gateway Line will not meet the legal test to characterize it as an interprovincial or international pipeline as it will not be "functionally integrated and subject to common management, control and direction" or "operated as a single enterprise" any more than the current "Belle River – Bickford Line" between Michigan and Ontario, of which the St. Clair Line forms part. Furthermore, the St. Clair Line, if it becomes part of the Dawn Gateway Line, is not "integral" to an inter-provincial undertaking and if anything, is integral to an intraprovincial function, namely gas storage.

Legal Test and Onus for asserting federal jurisdiction

2. In support of its position Union relies on a leading case of the Supreme Court of Canada, *Westcoast Energy v. Canada (National Energy Board)*[1] which held that facilities or operations constitute a federal undertaking if they are "functionally integrated and subject to common management, control and direction" and "operated in common as a single enterprise".[2] Board Staff agrees that the *Westcoast* decision is the legal test for determining whether an activity comes within federal jurisdiction.

3. Pipelines and distribution companies have historically been within provincial jurisdiction long before inter-provincial carriers came into existence.[3] Federal competence is an exception to the general rule of provincial competence such that the onus is on the party seeking to assert federal jurisdiction over a "local work" that had previously been a matter of exclusive provincial competence.[4]

4. Board Staff submits that the subject pipeline has been within provincial jurisdiction since this Board granted leave to construct it in 1988 and that Union has failed to demonstrate that there is a significant change in the ownership, management, control, direction and operation of the pipeline to justify that transfer to federal jurisdiction is proper. Accordingly, in Board Staff's submission, exclusive provincial competence over the Ontario portion of the proposed Dawn Gateway Line should prevail.

1988 Application for Leave to Construct

5. The St. Clair Line was built following an application to this Board for leave to construct a line from the St. Clair Valve Site to Union's Bickford Storage Pool compressor station and that would connect to a small portion of pipeline from the Valve Site to the Canada – U.S. border.[5] The stated purposes of the line were:

    - the prime purpose of the proposed facilities was to enable Union to enter into arrangements with MichCon to access Michigan storage space and

[1] [1998] S.C.J. No. 27 ("Westcoast")
[2] *Westcoast* at para 49
[3] *Re Ontario Energy Board and Consumers Gas* [1987] O.J. No. 281 (Div.Court) ("Bypass Case") at paragraphs 9-12
[4] Northern Telecom Ltd. v. Communications Workers of Canada 147 D.L.R.(3d) 1 at page 11(1983, S.C.C.)
[5] Application by Union Gas Limited for leave to construct a natural gas pipeline and ancillary facilities in the Townships of Moor and Sombra, both in the County of Lambton, E.B.L.O. 226 / E.B.L.O. 226-A, September 1, 1988 ("E.B.L.O. 226")

to meet Union's immediate storage requirements for its domestic markets and to provide other LDCs with access to Michigan storage; [6]

- to access competitively priced U.S. gas supplies and to enable other Eastern Canadian LDCs which had expressed interest in contracting for services on the line to acquire such supplies as well;[7]
- to enhance Ontario's security of gas supply due to increased access to Michigan storage and to reduce vulnerability to interruptions in the supply of Alberta gas delivered by Nova, Great Lakes Transmission Co. and TCPL;[8]
- to integrate Michigan and Ontario storage facilities which would give additional flexibility to Union and its transportation customers when they purchase U.S. gas;[9]

6. In the 1988 application Union argued that the proposed line should come under **provincial** jurisdiction and not, as TCPL argued in an interlocutory motion, under federal jurisdiction.[10]

7. In the present case, Union has submitted that the proposed Dawn Gateway Line should come under federal jurisdiction. Union's submissions rely heavily on the *Westcoast* decision and the factors of "management, control and direction" and "functional integration".[11]

8. For the reasons discussed further below, Board Staff submits that there is not a substantial change in the "management, control and direction" or the "functional integration" in the proposed use of the Dawn Gateway Line compared to its original and current use so as to justify a transfer from provincial to federal jurisdiction. Hence in Board Staff's view, Union has not discharged the legal onus for transfer of jurisdiction from the status quo.

Common management, control, direction

9. Union submitted that the proposed portion of the Dawn Gateway Line ("DGL") in Ontario is to be owned, managed and controlled by a limited partnership Dawn Gateway Limited Partnership ("DGLP").

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[6] E.B.L.O. 226 at pages 7 and 62
[7] E.B.L.O. 226 at page 7
[8] E.B.L.O. 226 at page 8
[9] E.B.L.O. 226 at page 62-63
[10] TCPL had made a specific motion that the Ontario Energy Board did not have the jurisdiction to decide the proposal before it. The Board's findings on the jurisdiction issue are addressed at pages 118-129 of E.B.L.O. 226.
[11] Union Argument in Chief, paragraphs 9-12

10. The most significant difference between the Dawn Gateway Line and the existing Michigan to Ontario line, according to Union, would be the managing of the marketing and contracting for service on the proposed new line and that would be carried out by DTE and not the DGLP.

11. On cross-examination, Union's witness, Mr. Baker, indicated that DTE would be the point of contact or the selling agent because it had the ability to address some issues upstream of Belle River Mills.[12] Mr.Baker stated:

> MR. BAKER: "The gas is still obviously physically flowing across that interconnect…But I think that the significant change that is being proposed with Dawn Gateway is that the individual pipelines would no longer be operated separately and individually…So that what we would offer is a point-to-point service on an integrated transportation path from Belle River Mills to Dawn. *So that's really the main difference and that would be marketed in the marketplace as an integrated and a single path*, as opposed to a separate service on MichCon and a separate service on the St. Clair River crossing, then a separate service on Union.. So that is the significant change to how it had operated historically".[13]
> (emphasis added)

Mr. Baker also stated:

> MR. BAKER: "I think from a marketing perspective and a contracting perspective, it will be marketed as an integrated path by DTE…. DTE will have primary accountability for marketing the transportation on the path." [14]

12. In Board Staff's view, there is a clear division of roles such that DTE and not the DGLP will be responsible for marketing service on the proposed line and there is insufficient "common management or control" of what Union has asserted is the most significant aspect of the proposed line: marketing and contracting.

13. With respect to the physical management and control of the proposed pipeline, Board Staff submits that, just as in 1988, there is a clear division of roles between Union and DTE (MichCon) functions, each retaining responsibility for their respective portions of the line.

14. The 1988 Construction Agreement envisaged that Union and MichCon would build a pipeline from St. Clair county in Michigan to Lambton County, Ontario known as the "Belle River – Bickford Pipeline". The parties would collaborate on

[12] Transcript Vol 1 page 141 and 156
[13] Transcript Vol 1 page 156
[14] Transcript Vol. 1 page 157

the shared section of the pipeline but otherwise each was responsible for the portions they respectively owned. MichCon constructed the American facilities, St. Clair Pipelines was to construct the river crossing portion and Union was responsible for the portion from the St.Clair Valve Site to Bickford. Union assumed St. Clair Pipelines' obligations for construction so that Union constructed all of the Canadian facilities. [15]

15. The 1988 Operating Agreement states that Union and MichCon "desire to provide for the operation of these *three individual pipelines as a single pipeline system*" (emphasis added) but the parties were each responsible for their own maintenance, repair and replacement of their own portion of the pipelines. [16]

16. In the current application, almost all of the pre-development work, land management and landowner relations as well as many day-to-day operations with respect to the Ontario side of the operations will be carried out by Union.[17] Union will be responsible for integrity management services on the Ontario facilities and for putting structures and controls around the key processes to maintain and operate the pipeline.[18] Meanwhile DTE would be responsible for field services on the US side.[19]

17. If the transfer of the St. Clair Line to the DGLP is approved, the only significant feature the St. Clair Line will have with the other portions of the Dawn Gateway Line is that they would all be owned by a single entity, the DGLP. However, as stated in several leading cases, common ownership is not determinative of whether a work or undertaking comes under provincial or federal jurisdiction.[20]

18. The Dawn Gateway scenario may be contrasted with the case of *Dome Petroleum* where the court was satisfied that there was common *beneficial ownership* even though the individual parts were owned by various joint ventures. The court stated:

> "Common ownership is not determinative,…In my opinion, it is not material that, while their ultimate beneficial ownership is common, the storage caverns in Cochin are, in fact, owned by joint ventures not identically constituted.." [21]

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[15] Union Response to GAPLO IR #2, Attachment #1, pages 1-3
[16] Union Response to GAPLO IR #2, Attachment #1 at page 38 and Transcript Vol 1 page 132-33
[17] Transcript Vol. 1 pages 135-36, Board Staff IR #1, GAPLO IR #5
[18] Union Response to Board Staff IR #1 and Transcript Vol 1 page 135-36
[19] Transcript Vol. 1 page 136, 157
[20] *Canadian Pacific Rly. V. A.G. for British Columbia* [1950] A.C. 122 (P.C.)
[21] *Dome Petroleum v. Canada (National Energy Board)*[1987] F.C.J. No. 135 (F.C.A) at pages 4-5

19. In the present case, the beneficial ownership of the DGLP is divided equally between Spectra (Union's parent company) and DTE each of which has a 50% interest in the DGLP joint venture. There is no common beneficial ownership in either Spectra or DTE. Common ownership is attributed to one entity, DGLP, but the members of the DGLP are not subsidiaries or related entities of each other. As Mr. Baker confirmed on cross-examination, Union has no subsidiary or corporate relationship with DTE apart from commercial relationships.[22]

"Functional Integration" and whether the proposed pipeline is "Integral to an inter-provincial undertaking

20. As discussed above, Union has submitted that the key operational integration of the proposed pipeline as compared to its present use is that transportation service would be marketed and contracted for as a single, continuous service from Belle River Mills to Dawn.

21. In the 1988 application the "Belle River – Bickford Pipeline" was a "contiguous pipeline system" capable of being operated as a "single pipeline system". [23] Hence, in Board Staff's view, the St. Clair Line has, since its construction, been considered to be part of a single system with MichCon but it was not necessary for it to be under federal jurisdiction for that reason.

22. As for the "integrated" functions of procurement, marketing and contracting, as discussed above, in reality that will be controlled by DTE and not DGLP.

23. In the 1988 case, in response to TCPL's motion that the proposed line should come within federal jurisdiction, Board Counsel submitted that neither the *procurement of gas nor the international marketing* issues raised by TCPL were relevant since these factors did not change the nature of the undertaking, which was transportation.[24]

24. In the 1988 application, Union also stated that, only insofar as Union engages in imports and exports, "*which it had been doing for a long time",* is it federally regulated.[25] The Board agreed and stated:

> 5. The NEB will control gas exports out of Canada and gas imports into Canada, including tolls and service, totally, whether the link is 100 feet or 100 miles in length. The jurisdiction of the NEB is served and reserved

[22] Transcript Vol 1 page 136
[23] Transcript Vol 1 pages 131-32 and GAPLO IR#1, Attachment 1, page 38
[24] E.B.L.O. 226 at page 108-109
[25] E.B.LO 226 at page 106

> by limiting its jurisdiction between two points: the international border near the centre of the St. Clair River and the St. Clair Valve Site as proposed by Union.
>
> ……..
>
> 7. If the NEB were to have jurisdiction easterly beyond the short, river crossing link, where would its jurisdiction end, and for what reason? If not at the proposed valve site, then where? How far east into the bowels of the Union system should the NEB's jurisdiction extend?
>
> In the Board's view, any attempt to extend the jurisdiction of the NEB east of the proposed valve site will cause serious and unnecessary economic, legal, political and jurisdictional problems…"[26]

25. Board Staff submits that there are no substantial changes to the intended use of the St. Clair Line that would justify transferring it to federal jurisdiction. In the present application, just as in the 1988 application, Union has confirmed that Dawn Gateway will continue to use the St. Clair Line to provide its customers with transportation service from the St. Clair River border to the Dawn Hub and that the purpose for the line will continue to be to increase access for Ontario customers to gas and storage supply in the U.S.[27]

26. In determining the degree of operational integration necessary to convert a *prima facie* local work or undertaking to a work or undertaking that is within the "Classes" identified in clause 92(10)(a) of the *Constitution Act,* the courts have generally required that the integration be vital or essential to the operations of the interprovincial undertaking.[28]

27. In a series of cases referred to as the "Bypass Cases" this Board considered whether bypass lines which were connected to the TCPL interprovincial pipeline came under federal jurisdiction by virtue of the connection to a federally regulated pipeline. The Board found that the bypass pipeline would have no direct effect on the operational ability of the TCPL pipeline or the quantity of product that can be transported by that pipeline.[29] The Board requested the opinion of the Divisional Court which also found that jurisdiction remains with the province.[30] At about the same time, the Federal Court of Appeal reviewed a decision of the NEB that purported to authorize construction and operation of a

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[26] E.B.LO. 226 at pages 126-127
[27] Transcript Vol 1. pages 119-20
[28] *Reference re Validity of the Industrial Relations and Disputes Investigation Act (Stevedore Reference), 1955 S.C.R. 529,* and relied upon by the Ontario Energy Board in the Bypass Case E.B.R.O. 410-I / E.B.R.O. 411-I / E.B.R.O. 412-I., December 12, 1986 at para 8.16
[29] Bypass Case at para 8.18
[30] *Re Ontario Energy Board and Consumers' Gas Co. et al* [1987] O.J. No. 281 (Div. Court)

bypass pipeline and that court also held that the NEB had no jurisdiction over the bypass pipeline on constitutional grounds.[31]

28. In another decision of the Divisional Court considering whether or not the OEB had jurisdiction over the proposed construction of an LNG facility by Consumers Gas, a provincially regulated natural gas distributor, that required an interconnection with the federally regulated TCPL pipeline, the court held that the proposed facility was a local work because it would not become an integral part of the TCPL system.[32]

29. The present application may also be contrasted with a recent application before the National Energy Board in which TCPL sought to have the TCPL Alberta System recognized as within federal jurisdiction and subject to regulation by the NEB as part of a single federal undertaking. Unlike the St. Clair Line the Alberta System delivers approximately 80% of its volumes to pipelines removing the gas from Alberta. The Alberta System is functionally and operationally integrated with TCPL's Mainline and Foothills systems both of which are federally regulated, such that all three facilities are managed and operated together by TCPL as a single enterprise.[33]

30. In the TCPL case, the NEB confirmed that the primary factor in determining jurisdiction is functional integration, common management, control and direction and determining whether a pipeline is *"part of or integral to a federal pipeline".* [34] In the TCPL case the NEB found that the Alberta System, although wholly located within Alberta, was part of and integral to the single federal undertaking for the transportation of natural gas and therefore should be federally regulated.

31. In the present case, the inquiry would be whether the St. Clair Line is "integral" to an interprovincial undertaking and in Board Staff's view it is not. The only existing interprovincial undertaking is the St. Clair River interconnect which has been under NEB jurisdiction even while the St. Clair Line was under OEB jurisdiction.

32. The primary purpose of the proposed Dawn Gateway Line had been, and in Board staff's view continues to be, to integrate storage with Michigan, increase liquidity at Dawn Hub and increase diversity of supply. There is no interprovincial undertaking to which the St. Clair Line is integral. It is however integral to

[31] *Reference re National Energy Board Act (1987)F.C.J. No. 1060 at para. 28*
[32] *Re Ontario Energy Board and The Queen in Right of Ontario et al* [1986] O.J. No. 1140 at pages 9-11
[33] National Energy Board, Reasons for Decision – TransCanada PipeLines Limited, GH-5-2008, February 2009 ("TCPL Case") at page 2
[34] TCPL Case at page 4

Union's storage activities and distribution activities which come within provincial jurisdiction. Indeed the important integration of transportation and storage is the driving force behind the OEB's Storage and Transportation Access Rule (STAR) which the proposed Dawn Gateway Line could avoid complying with if it was transferred to NEB jurisdiction.

33. The present case can be contrasted with another case dealing with the connection between transportation and storage, *Dome Petroleum*, where the court found that storage caverns connected to an interprovincial pipeline were transferred from provincial to federal jurisdiction because they were an "integral and essential part of the (federally regulated) Cochin Pipeline system". The court stated:

> "The terminalling facilities of a pipeline, whoever provides them and whatever the ultimate destination of shipments, are provided solely for the benefit of shippers on the line. In my opinion, when they are provided by the owner of the transportation undertaking, they are part and parcel of that undertaking. That is the case here. The joint venture's storage caverns are an integral and essential part of its Cochin system." [35]

34. In the circumstances Board Staff is of the view that the Ontario portion of the proposed Dawn Gateway Line would be integral to *intraprovincial works,* namely storage and distribution, and not federal undertakings.

[35] *Dome Petroleum* at page 6

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?

In this section, Board staff has the following concerns:

- The ability to offer backup supply to the Sarnia Industrial Line, if needed, may not be available on the proposed Dawn Gateway Line;
- If backup supply to the Sarnia Industrial Line is needed and capacity is available on the Dawn Gateway Line, it would be at negotiated prices (i.e., the cost of this service would be uncertain).

35. Board staff disagrees with Union's submission[36] that the proposed Dawn Gateway Line would provide back up service to the Sarnia Industrial Line, as it does today. Union stated that (underlining added for emphasis):

> *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.*[37]

Board staff submits that as the Dawn Gateway pipeline proposes to offer a fixed long-term toll, and to the extent that capacity on the line can be potentially fully contracted for, there would be no room available for back-up to the Sarnia Industrial Pipeline should the need arise. Additional space, if available for back-up service, would be based on negotiated market-based prices rather than on cost-based rates (i.e., the cost of this service would be uncertain).

[36] Union's Argument in Chief, July 6, 2009, Paragraphs 23, page 9
[37] Union's Response to CME IR # 3(c), Ex. No. K1.7

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?

In this section, Board staff has the following concern:

- A large consumer requiring high pressure service in the vicinity of the St. Clair Line would not be able to connect to that line once it is sold.

36. Union in its Argument in Chief[38] emphasized that it 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.[39] Union also indicated that even though the St. Clair Line is physically located within Union's franchise area, Union has never connected a customer to this line. Union further indicated that it has a network of gas pipelines distributing gas to customers in the same municipality that is traversed by the St. Clair Line. Union also stated that it does not anticipate having any problem connecting new customers.

37. Board staff is concerned that a large consumer requiring high pressure service in the vicinity of the St. Clair Line would not be able to connect to that line once it is sold. Further, the cost of this alternative supply for such a customer would be uncertain (i.e., it would be at market-based rates) while currently the cost to connect to the St. Clair Line is known (i.e., it is at cost-based rates). Board staff concludes that lack of availability for potential customers requiring such a service is in that regard viewed as limiting to future in-franchise customers.

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 Customer Rates – Existing and New Transportation Services

In this section, Board staff has the following concerns:

- The lack of service availability for market participants as Union's C1 transportation service and Hub services would no longer be available at cost-based rates (i.e., there would no longer be price certainty for this service);

[38] Union's Argument in Chief, July 6, 2009, Paragraphs 33 and 34, page 12
[39] Union's Pre-Filed Evidence, Exh No. K1.6, paragraph. 38

- The new transportation services on the proposed Dawn Gateway Line are similar to the existing C1 transportation services on Union's St. Clair Line except these new services would be at a negotiated price (i.e., the price for these services are uncertain i.e., not known in advance of negotiations); and
- No Market Power Assessment was conducted even though Dawn Gateway LP is requesting market-based rates for long-term firm transportation services.

38. Currently, Union provides transportation service between St. Clair and Dawn under the C1 rate schedule where the C1 long-term firm transportation service is a cost-based rate and the short-term firm transportation service is a market-based rate (i.e., a negotiated price). Further, Union provides Hub services such as title transfers and hub balancing at St. Clair[40]. With the proposed sale of the St. Clair Line and the resulting change in ownership, the C1 transportation service and Hub services would be discontinued.

39. Union stated that at this time Dawn Gateway LP is still developing the tolls and tariffs but it expects that the new transportation service on the proposed Dawn Gateway Line would be *" a fairly simple service…a firm service and interruptible service"*[41].

    These new transportation services also would be at a negotiated rate. Specifically, the negotiated rate would be at a fixed rate as customers will not commit to long-term transportation contracts unless they receive a *"guarantee of a fixed rate and variable fuel charge so they could manage their risks and their commercial options on that capacity"*[42].
    This may be contrasted with the assertion that *"under cost-of-service, under OEB cost-of-service, that rate will and can fluctuate over time*[43]*"*.

40. In addition, Union confirmed that Union and Dawn Gateway LP did not conduct a market power assessment[44] (for long-term firm transportation services) regarding the proposed Dawn Gateway Line for this application or for its NEB application.

41. Board staff has four concerns with the proposed sale and the resulting change in transportation services between St. Clair and Dawn. These concerns are as follows:

[40] Union's Prefiled Evidence, Exh K1.6/Sec 6/page 8 of 9/para 46
[41] Transcript Vol. 1, June 22, 2009, p 170
[42] Transcript Vol. 1, June 22, 2009, p 11
[43] Transcript Vol. 1, June 22, 2009, p 61
[44] Transcript Vol. 1, June 22, 2009, p 144

(i) The lack of service availability for market participants as the C1 transportation service and Hub services would no longer be available. As a result, market participants would no longer have the opportunity to purchase C1 transportation service under cost-based rates (i.e., there would no longer be price certainty for this transportation service). This may impact existing customers and potential customers.

(ii) The new transportation services on the proposed Dawn Gateway Line are similar to the existing C1 transportation services on Union's St. Clair Line except these new services would be at a negotiated price. As with the existing C1 transportation services, a shipper that wants to move gas from Michigan storage to Dawn storage would have to obtain capacity on:
   (a) the pipelines that are upstream from the Belle River Mills Line and these pipelines are regulated by the Michigan Public Service Commission ("MPSC") or the Federal Energy Regulatory Commission ("FERC"); and
   (b) the proposed Dawn Gateway Line.

(iii) Union is currently under a five-year incentive regulation (IR) plan not cost-of-service regulation where transportation rates can fluctuate year-to-year. Union's IR mechanism is a price cap. Unlike cost-of-service regulation, a price cap ensures that transportation rates are stable and predictable over the plan term and provides an environment where the natural gas utility and customers are better able to plan and make decisions.

(iv) Regulators typically require an applicant to conduct a market power assessment when requesting market-based rates for long-term firm transportation services. This is to ensure that the applicant cannot:
   (a) Withhold or restrict services and therefore, increase the price by a significant amount for a significant period of time; and
   (b) Discriminate in terms of price and/or terms of service.

Impact on Customer Rates – Proposed Regulatory Framework

In this section, Board staff has the following concern:

- The NEB's complaint-based regulation may not meet the objectives established in the OEB's proposed STAR with regards to transparency and non-discriminatory access.

42. In its NEB application, Dawn Gateway LP is *"seeking to be regulated as a Group 2 company and regulated on a complaint basis for the purpose of toll and tariff regulation"*[45].

    Dawn Gateway LP is also requesting relief from filing financial statements[46], the only reporting requirement for a Group 2 Gas Pipeline.

43. The proposed regulatory framework would mean that the NEB approves tolls and tariffs that result from arm's length negotiations, rather than cost-of-service regulation, and these tolls, traffic and tariffs would be subject to challenge only when a customer files a complaint with the NEB.

44. Board staff notes that complaint-based regulation is different when compared to the regulatory frameworks of the FERC, the Board and other transportation pipelines regulated by the NEB. Also, complaint-based regulation is not used to regulate the other pipelines in and around Dawn such as:

    (i) TransCanada Pipelines; and

    (ii) Union's Bluewater and Dawn-Trafalgar pipelines.

    With respect to Vector Pipelines, the international portion coming into Ontario is under complaint-based regulation, however the rest of Vector Pipelines is under FERC regulation. The FERC has strict regulatory oversight in terms of transparency and non-discriminatory access (e.g., standard terms of service, standards of conduct, market power assessment requirements).

45. As Union confirmed, the proposed Storage and Transportation Access Rule ("STAR") would not apply to the proposed Dawn Gateway Line (the Ontario portion) if it was regulated by the NEB.[47] The objectives established in the proposed STAR[48],are:

    (i) To ensure open, fair and non-discriminatory access to transportation services for customers and storage providers;

    (ii) To provide customer protection within the competitive storage market; and

[45] Exh. No. K1.8, NEB application/Sec 7/p 21
[46] Exh. No. K1.8, NEB application/Sec 15/p 56
[47] Transcript Vol. 1, June 22,2009, p 70
[48] Union's Argument in Chief, July 6, 2009, p.7, para. 16

(iii) To support transparent transportation and storage markets.

46. In its NEB application, Dawn Gateway LP is *"seeking to be regulated as a Group 2 company and regulated on a complaint basis for the purpose of toll and tariff regulation".*[49]. As indicated above, Dawn Gateway LP is also requesting relief from filing financial statements[50], the only reporting requirement for a Group 2 Gas Pipeline. Furthermore, Board staff notes that Union has indicated that its open season[51] has led to the execution of five confidential transportation contracts with different parties for periods between 5 to 10 years. However, because of the confidentiality of these contracts, including the name of the shipper, the terms of service, the volume and the fixed negotiated tolls[52] , there is a lack of transparency[53] on the proposed Dawn Gateway Line.

Board staff submits that a complaint-based regulatory framework within which Union may enter into confidential contracts with a resulting lack of transparency in the transportation market, would not appear to be consistent with the objectives of the STAR.

47. Board staff is also concerned about ensuring non-discriminatory access to transportation services in that there may be potential for Dawn Gateway LP to tie transportation services to competitive storage services. Union has stated that this would not occur[54] and has agreed

> *"to a condition of approval that would prohibit Union from requiring its storage customers to contract for service on the Dawn Gateway Line as a condition of receiving storage services from Dawn".*[55]

However, in Board staff's view, if jurisdiction of the Ontario portion of the Dawn Gateway Line is transferred to the NEB, this Board would no longer have the jurisdiction to enforce conditions of orders made by this Board. Hence, absent comparable regulatory requirements under the NEB regime, there remains the potential for Dawn Gateway LP to tie transportation services on the proposed Dawn Gateway Line to affiliate competitive storage services in Ontario and Michigan.

[49] Exh. No. K1.8, NEB application/Sec 7/p 21
[50] Exh. No. K1.8, NEB application/Sec 15/p 56
[51] Transcript, Vol. 1, pages 62-64 & pages 70-71
[52] Transcript, Vol. 1, page 22-23
[53] Transcript, Vol. 1, pages 63-64 & pages 70-71
[54] Transcript Vol. 1, June 22, 2009, p 177
[55] Union's Argument in Chief, July 6, 2009, p 8, para 20

48. The proposed STAR ensures non-discriminatory access by also requiring the transmitter to use standard terms of service for each of its transportation services. This requirement prevents a transmitter from discriminating between customers so that all customers would be treated fairly.[56]

    However, Board staff notes that transportation services under market-based rates usually mean that the terms of services are also negotiated, that is, not standardized, such that customers could be treated differently.

49. Furthermore, the proposed STAR ensures a transmitter cannot use non-public transportation information to enhance its position in the competitive storage market by requiring the transmitter to develop and maintain protocols.[57]

Conclusion
[Existing and New Transportation Services & Proposed Regulatory Framework]

50. Board staff believes that the conditions of sale of the St. Clair Line including transfer of jurisdiction of the Dawn Gateway Line to the NEB would not benefit ratepayers for the following reasons:

    (i) The new transportation services on the proposed Dawn Gateway Line are similar to the existing C1 transportation services on Union's St. Clair Line except these new services would be at market-based rates (i.e., the price for these services is not known in advance of negotiations). Union is also under a five-year incentive regulation (IR) plan not cost-of-service regulation, where the IR plan provides customers with stable and predictable rates over the plan term;

    (ii) Union and Dawn Gateway LP did not conduct a market power assessment even though they are requesting market-based rates for long-term firm transportation services;

    (iii) There is a lack of transparency on the proposed Dawn Gateway Line. New transportation services would not have standard terms of service which may allow the Dawn Gateway LP to discriminate between customers (e.g., preferential terms of service for its competitive storage customers). Dawn Gateway LP may be able to use non-public transportation information to enhance its position in the competitive storage market. Furthermore, there may be a potential for Dawn Gateway LP to tie transportation services on the proposed Dawn

[56] Notice of Proposal to Make a Rule regarding STAR dated April 9, 2009

Gateway Line to its affiliate competitive storage services in Ontario and Michigan. These concerns, all or in part, may impact non-discriminatory access to the new transportation services on the proposed Dawn Gateway Line.

Impact on Customer Rates – St. Clair Line Sale Price

In this section, the following are areas of concern to Board Staff:

- If the Board approves sale of the St. Clair Line, ratepayers would be disadvantaged if Union sells the pipeline at a predetermined price that will automatically equate it to the net book value at the time;
- If, the sale takes place, it will be to Dawn Gateway LP, an entity in which Union's parent company, Spectra, has a significant (50%) interest such that the proposed sale is not an arm's length transaction;
- Had the sale been to a 3rd party that was not related to Union or Spectra, the sale price would likely have been considerable higher; ,
- If the Board approves sale of the St. Clair Line, Market Value or Proxy thereof should be the basis for selling the St. Clair Line.

Impact on Customer Rates – Sale at Net Book Value

51. Board staff notes that in the pre-filed evidence, Union stated[58] that
> *Although the agreement of purchase and sale for the St. Clair Line and related assets has yet to be fully negotiated, Union and DTE and Spectra have agreed that* ***the sale price for the assets will be equal to the net book value of the assets at the time of the sale****. It is estimated that the net book value of the assets in 2010 will be approximately $5.2 million and that it will decline to approximately $4.3 million by 2013.*
> (emphasis added):

52. Board staff is of the view that the proposed sale of the St. Clair Line from Union to the Dawn Gateway LP is a transaction with a related entity in that Union's parent company, Spectra, has a 50% interest in the DGLP. Based on the record, Board staff expects that the net present value of the long-term forecasted revenues of the proposed Dawn Gateway Line will be a substantial amount. That net present value of revenues of the proposed Dawn Gateway Line when apportioned to the St. Clair Line would be markedly higher than the proposed sale price set at Net Book Value.

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[57] Ibid
[58] Exhibit K1.6, Union's pre-filed evidence, section 6, paragraph 43

53. Board staff's view in this matter is captured in the cross examination of Union's Panel 1 by Counsel for CME[59]. CME outlined a hypothetical situation where a company unrelated to Union Gas was involved in a similar project and whether Union Gas would sell the St. Clair Line for Net Book Value to that company?

54. In Board Staff's view the fact the proposed sale is not an arm's length transaction makes it appear that Union is giving preferential treatment to DGLP which it would not do if the sale was to a 3rd party with no connection to Union or Spectra.

Impact on Customer Rates – Alternative Market Value Approaches

55. Through cross examination a number of alternative ways to assess the value of the St. Clair Pipeline were explored by CME and FRPO. These were replacement cost[60] and basing the valuation on discounted prospective transmission revenues[61] of the proposed Dawn Gateway Line.

56. Board staff does not agree with Union's argument that its Valuation Report represents a fair market assessment of the St. Clair Line. Board staff agrees with the views expressed by CME and FRPO during cross examination of Union's Panel 1. A fair market assessment should reflect the prospective transmission revenues of the proposed Dawn Gateway Line and should not be based on the continued historical under performance of the St. Clair Line.

57. Union, in the response to undertaking X.1.1, provided a current replacement value of the pipeline that is well in excess of the price at which Union proposes to sell it to Dawn Gateway LP.

58. Board Staff submits that, absent putting the pipeline up for sale, replacement value provides a practical and reasonable approach to determining market value.

59. Union Gas confirmed that the Dawn Gateway pipeline, if regulated under the NEB Group 2 Regulation[62], would offer its services on a "negotiated" price rather than "cost of service" basis. Board staff believes that under this pricing regime, Dawn Gateway LP would have the opportunity to realize earnings in excess of what would be possible under a cost of service regime, where the asset would be valued at book. This is attributable in part to the net book value-replacement cost differential. An alternative service provider, who would have to incur the full

[59] Transcript, Vol.1, June 22, 2009, page 104
[60] Transcript, Vol. 1, June 22, 2009, pages 32 to 34
[61] Transcript, Vol. 1, June 22, 2009, pages 101 to 104
[62] Transcript, Vol. 1, pages 55-56

replacement cost, would not have the benefit of this differential. This would provide room for the "negotiated" price to rise to the level as if the St. Clair Line were costed at its replacement value.

60. Union argues that the ratepayers would be better off by removing an underperforming asset from rate base. This forms part of Union's justification for selling the St. Clair Line at Net Book Value[63].

Impact on Customer Rates

61. Union ratepayers have been subsidizing the St. Clair Pipeline. As indicated in the pre-filed evidence and the responses to Board staff interrogatory No. 8 and Undertaking J1.2, gas quantities transported on the pipeline have been minimal and the pipeline has been experiencing a negative rate of return since 2003. Further evidence shows that the Bickford to Dawn Line has been constrained for 10-15 years which also constrained the St. Clair Line for that same period. It appears that the pipeline has largely failed to meet the business and service objectives that Union advanced when the pipeline was approved by the Board and added to rate base in 1989. As a result, the impact on rates is that ratepayers have paid more for gas transportation than they would have if the St. Clair pipeline had not been constructed.

62. Board staff notes Union's assertion[64] 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. Board staff agrees that in instances where an asset is not being used or is not useful, shareholders may have the right to those returns. However Board staff submits that this is not the case for the St. Clair Line.

63. Union argued[65] that if the Board ordered that the sale price be based on replacement cost, that it is possible the Dawn Gateway Project would not proceed. Board staff is of the view that the Board, if it chooses, has the authority to balance the claimed advantages associated with the proposed project and at the same time being equitable to ratepayers. The ratepayers have paid higher rates in the past and continue to pay for a pipeline that would have, under this proposal, much higher prospective transmission revenues as part of the new Dawn Gateway Pipeline.

[63] Exh No. K1.6, Union's Pre-filed Evidence, paragraphs 43-45
[64] Union Argument in Chief, July 6, 2009, Paragraph 47, page 17

[65] Union Argument in Chief, July 6, 2009, Paragraph 52, page 18

64. In the event the Board approves the sale at net book value or does not direct that ratepayers benefit from a sale at more than net book value, Board staff submit that ratepayers be granted relief from the underperformance of the St. Clair Pipeline between the date the Board's EB-2009-4111 decision is issued and the date the pipeline is actually sold to Dawn Gateway LP.

Treatment of the Proceeds of the Sale for Future Ratemaking Purposes

In this section, Board staff has the following concern:

- If the Board approves the sale of the St. Clair Line, the shareholder should not be entitled to all the proceeds in excess of net book value from this sale and ratepayers should be allocated some or all of the proceeds in excess of net book value;

Extraordinary Event Determination - Treatment of the Proceeds of the Sale for Future Ratemaking Purposes

Extraordinary Event Determination

65. Union claimed[66] that a sale, under Board direction to sell the St. Clair Pipeline at a price above book value, would constitute an extraordinary event out of the ordinary course and as such any gain would be to the account of the shareholder.

66. Union characterized the sale at more than net book value as an extraordinary event because of the special value placed on it by the purchaser[67], Dawn Gateway LP, and not because the original depreciation amount charged on the asset was too high.

    Union also indicated that according to the Natural Gas Uniform System of Accounts, gains or loses, if extraordinary, from the sale of "group" assets are recorded to income while gains or losses under normal circumstances are recorded as an adjustment to accumulated depreciation.

67. With respect to the accounting treatment of any gain or loss associated with the sale of the St. Clair Pipeline, Board staff disagrees with Union's assertion[68] that a

[66] Undertaking No. J1.4, page 1, 3rd paragraph.
[67] Undertaking No. J1.4, page 1, 3rd paragraph and page 2, 1st paragraph including quotes from the Uniform System of Accounts 9 3 paragraphs from Class "A", Appendix A.
[68] See Undertaking No. J1.4

Board decision directing that the sale price be higher than net book value would cause the gain to be an extraordinary transaction, and recorded as such.

68. The evidence does not indicate that the sale of the St. Clair Pipeline is anything other than a totally voluntary decision by Union. It is not an action or event outside of Union's control. The sale by Union to Dawn Gateway LP is totally voluntary and controllable.

69. Board staff also disagrees with Union's view in this case that a gain on the retirement of an asset resulting from an event not reasonably contemplated in the determination of the provision for depreciation that unduly decreases the accumulated depreciation balance should be credited to income as an extraordinary item. Union indicated that this is consistent with the accounting treatment outlined in the Boards' Uniform System of Accounts for Class "A" Gas Utilities in Appendix A section 3 Retirements of Depreciable Plant which states that:

> *Extraordinary Retirements - result from causes not reasonably assumed to have been anticipated or contemplated in prior depreciation or amortization provisions. Such causes include unusual casualties due to fire, storm, flood, etc., sudden and complete obsolescence, or unexpected and permanent shutdown of an operating assembly or plant. An extraordinary retirement results in a loss (or gain) to the extent that the net charges (or credits) would unduly deflate (or inflate) the accumulated depreciation or amortization accounts.*
> *A loss (or gain) is comprised of the difference between the book value of the plant plus cost of removal less salvage and insurance recoveries and the related depreciation or amortization determined in an equitable manner. Losses as a result of an extraordinary retirement shall be charged to Account No. 171, "Extraordinary Plant Losses". Gains, if any, as a result of an extraordinary retirement shall be credited to income as an extraordinary item."*

70. Board staff is of the view that the depreciation schedule for pipelines is based on statistical studies to determine expected useful life, and that Appendix A section 3 of Board's' Uniform System of Accounts for Class "A" Gas Utilities does not refer to business transactions such as the proposed sale of the St. Clair Line.

71. In the event that Board accepts that a sale price in excess of net book value can be viewed as an extraordinary event, Board staff submits that, at any rate, the resulting "accounting" outcome is not material. According to the evidence filed in EB-2005-0520 (Union's 2007 Rates Case) the transmission group assets in rate base total approximately $650 million. A gain from a sale above Net Book Value would be reasonably accommodated and would not unduly inflate the

accumulated depreciation or amortization accounts for the Group assets to which St. Clair Line belongs.

72. Contrary to Union's assertion, the sale price of the St. Clair Pipeline makes a difference to ratepayers since Board staff believes that the ratepayers should share in the proceeds in excess of net book value.

Legal Considerations – Treatment of the Proceeds of Sale for Future Ratemaking Purposes

In this section:

- Board staff submits that it is within the Board's jurisdiction to allocate some or all of the proceeds of sale above net book value, if any, to ratepayers where it finds that there may be harm resulting from the proposed transaction in the context of the new owner's intention to seek NEB regulation.
- However even if the Board does not find that harm would result from the transaction, it is within its rate-setting jurisdiction and statutory objectives to impose a condition that allocation of the proceeds of sale be addressed in Union's next rate application

Whether ratepayers are entitled to be allocated some or all of the net gain on a sale or transfer of a utility asset?

73. In its submissions Union states that, as a result of the Supreme Court of Canada decision in the *ATCO* case, ratepayers do not have an ownership interest in the assets of the utility.[69]

74. Board Staff does not dispute Union's submission that the proceeds of sale do not need to be shared with ratepayers if the proceeds only equal net book value such that there is no capital gain or loss. However, as set out above, Board Staff believes that the transfer of the asset to DGLP should be at more than net book value such that gains would result and those gains should be allocated to ratepayers.

This would be consistent with the Board's decisions both before and after the *ATCO* case. In its submissions Union referred to several decisions of this Board pre-*ATCO* in which the gains from sales of land and buildings in non-affiliate transactions were allocated equally between ratepayers and shareholders.[70]

[69] Union Argument in Chief , page 16 at para 46. *ATCO Gas Pipelines, at paras. 68-70*
[70] Union Argument in Chief , page 17 at para 47, and cases in Union's Brief of Authorities. EBRO 465 (Consumers Gas), RP-2002-0133 (Enbridge), RP-2002-0147 / EB-2002-0446 (NRG), RP-2002-0130 (Union Cushion Gas #1)

However this Board has made such decisions even *after* the *ATCO* decision, namely in the second of the "Union Cushion Gas" cases[71], which the Board deferred in deciding until the Supreme Court of Canada gave its decision in the *ATCO* case. In the Union Cushion Gas #2 case, in response to Union's submission that ratepayers were not entitled to share in the proceeds of sale because they acquired no property interest in the capital property of the utility, this Board stated:

> "...The distribution of proceeds from the sale (in the *ATCO* case) was entirely dependent on a finding that ratepayers acquired a property interest in the divested asset which demanded recognition – even in the absence of a finding of harm. Finding no property interest lead inexorably to a finding that the AEUB lacked jurisdiction to do what it did.
>
> This Board is not dependent on implicit powers in its consideration of rate applications, nor is it dependent on a finding that ratepayers acquire a property interest in utility assets through the payment of rates." [72]

75. Unlike the ATCO decision which was based on the AEUB's erroneous finding that ratepayers acquire a 'property interest', decisions of this Board both before and after *ATCO* have not relied on a finding of a 'property interest' but upon the Board's broad authority to fix just and reasonable rates.

76. In another decision of this Board, recently upheld by the Divisional Court[73] , the Board allocated 100% of the net gain to ratepayers from the utility's sale of certain real estate. The Board ordered the utility to employ a variance account to record any differences in the gains reflected in rates and the actual gains achieved from the sale of the properties. [74]

77. Union's submissions also refer to Union Cushion Gas #2 and the Board's finding in that case that ratepayers should only be entitled to share in gains from a sale if there is some justification other than an allegation that ratepayers have acquired an ownership interest in the assets. Union's submission is that there is no such justification in the present case.[75] As discussed above, Board Staff respectfully disagrees and submits that harm to ratepayers that would result from the

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[71] Application by Enbridge Gas Distribution Inc. for approval to establish a deferral account to capture the proceeds from sale of land etc. (EB-2005-0211 / EB-2006-0081) ("Union Cushion Gas #2")
[72] Union Cushion Gas, # 2 at page 10
[73] Application by Toronto Hydro-Electric System Limited for rates effective May 1, 2008 EB-2007-0680 and *Toronto Hydro-Electric System Ltd. V. Ontario Energy Board* [2009] O.J. No. 1872 (Div.Court), application for leave to appeal to Court of Appeal filed May 2009
[74] Toronto Hydro EB- 2007-0680 at page 28
[75] Union's Argument in Chief at para 57

proposed sale of the asset and transfer to NEB jurisdiction are justification for allocating some or all of the net gain to ratepayers.

Whether the Board's exercise of its jurisdiction to allocate proceeds of sale should depend on whether it finds that harm would result from the proposed transaction?

78. In the *ATCO* case, the AEUB had found that there was 'no harm' to ratepayers from the proposed sale and there was no basis for that board to exercise its public interest jurisdiction. The majority of the Supreme Court pointed out,

> 84 "In my view, as I have already stated, the power of the Board to allocate proceeds does not even arise in this case. *Even by the Board's own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm.* But the Board was clear: there was no harm or risk of harm in the present situation.
> …….
> After declaring that the customers would not, on balance, be harmed, the Board maintained that, on the basis of the evidence filed, there appeared to be a cost savings to the customers. There was *no legitimate customer interest which could or needed to be protected by denying approval of the sale,* or by making approval conditional on a particular allocation of the proceeds.
> …..
> 85 In consequence, I am of the view that, in the present case, the *Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale…."* [76]
> (emphasis added)

79. If the Board was to consider the proposed transaction outside of the context of its rate-setting jurisdiction and to find that there was **no harm** as a result of Union's proposed sale of the St. Clair Line, then the principles enunciated in *ATCO* seem to dictate that there would be no jurisdiction to impose a condition allocating any gains from the sale to ratepayers. Had the AEUB in the *ATCO* case found that the proposed transaction did not meet the 'no harm' test, that is, that harm *would* result to ratepayers, the courts may have upheld the AEUB's decision to impose the condition it did. Alternatively, had the AEUB considered the proposed transaction in a rate-setting context, it may have been entitled to impose the condition *even if there was no finding of harm.*

[76] ATCO at paras 84-85

80. The present case is distinguishable from *ATCO,* on the basis that, in Board staff's view, there is a harm to ratepayers that results from the proposed transaction such that the Board would be within its jurisdiction to exercise its discretion to protect the public interest.

81. As this Board stated in Union Cushion Gas #2, in comparing it to the *ATCO* decision,

> "The AEUB subsequently ruled that the ratepayers were entitled to a portion of the proceeds from the sale. In doing so, the AEUB relied upon Section 15 of its enabling legislation which provides as follows:
>
> Section 15(3)(d): with respect to any order made by the Board, the ERCB or the PUB in respect of matters referred to in clauses (a) to (c), [may] make a further order and impose any additional conditions that the Board considers necessary in the public interest.
>
> *….In the Court's view, the general power bestowed by Section 15 could not be relied upon by the AEUB to give it the jurisdiction to graft a condition "in the public interest on its earlier finding that no harm had been visited upon the ratepayers as a result of the sale to create just such a distribution of proceeds.*
>
> The Court also held that the doctrine of implied jurisdiction could not be applied so as to fill the gap between the AEUB's finding of "no harm" with respect to the sale, on the one hand, and its order to distribute a portion of the proceeds of the sale on the other. In the Court's view, if the AEUB wanted to impose conditions on the sale it should have done so attendant with its initial finding on the reference. Given the initial finding of "no harm", no public interest could be found to support an order for the allocation of some of the proceeds to ratepayers." [77]
> (emphasis added)

82. As Board staff has submitted above, and further below in submissions with respect to the appropriate test to be applied to the proposed transaction, there is harm that would result to ratepayers and vis-à-vis the Board's statutory objectives and the Board should therefore exercise its jurisdiction and allocate any net gains that may result from the sale.

Whether the Board can impose conditions on a proposed sale outside of a general rate review?

[77] Union Cushion Gas Case #2 at pages 6-7

83. The present application is made under section 43(1) of the *OEB Act* which states:

> 43.(1) No gas transmitter, gas distributor or storage company, without first obtaining from the Board an order granting leave, shall,
> (a) sell, lease or otherwise dispose of its gas transmission, gas distribution or gas storage system as an entirety or substantially as an entirety;
>
> (b) sell, lease or otherwise dispose of that part of a system described in paragraph (a) that is necessary in serving the public;
>
> (6) An application for leave under this section shall be made to the Board, which shall grant or refuse leave.

However, subsection 43(6) should not be construed as limiting the Board's jurisdiction to only granting or refusing leave, as this Board has in the past granted leave for a proposed transaction but imposed certain conditions. In another recent application by Union and its affiliate, Westcoast Energy Inc. ("Westcoast")[78], Union and Westcoast made an application under section 43(2) of the *OEB Act* to transfer a controlling interest in Union from Westcoast to a limited partnership. In that case, the Board found that savings resulting from substituting preferred shares with third party debt would reduce Union's revenue requirement and therefore the rates to its customers. The dispute in that case was whether the reduction to revenue requirement (and corresponding reduction in rates) should take effect at the time the transaction was supposed to be concluded (January 1, 2009) or at Union's next rebasing in 2012. The Board decided that that Union's rates should be reduced $1.3 million per year effective January 1, 2009.

84. The Board has the authority to impose conditions on an order generally, pursuant to section 23(1) of the *OEB Act* which states:

> 23.(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

85. In *ATCO*, the Supreme Court does not indicate that a condition could *never* be imposed on a proposed sale of assets, and states:

[78] EB-2008-0304 ("Union / Westcoast")

> "77 …The Board has other options within its jurisdiction which do not involve the appropriation of the sale proceeds, the most obvious one being to refuse to approve a sale that will, in the Board's view, affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future. ***This is not to say that the Board can never attach a condition to the approval of a sale.*** For example, the Board could approve the sale of the assets on the condition that the utility company gives undertakings regarding the replacement of the assets and their profitability. It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system so that it achieves optimal growth of the system."[79] (emphasis added)

86. The conditions referred to above are not exhaustive, but examples only, and in the appropriate circumstances, where there is a concern about some ratepayer harm or inequity, a Board may still approve the sale on certain conditions.

Relation to the Board's rate-making jurisdiction

87. In ATCO, the Supreme Court indicated that the AEUB could have exercised its jurisdiction in the context of a rate review application and states,

> "81. Under the regulatory compact, customers are protected through the rate-setting process, under which the Board is required to make a well-balanced determination. The record shows that the City did not submit to the Board a general rate review application in response to ATCO's application requesting approval for the sale of the property at issue in this case. Nonetheless, if it chose to do so, this would not have stopped the Board, on its own initiative, from convening a hearing of the interested parties in order to modify and fix just and reasonable rates to give due consideration to any economic data anticipated as a result of the sale." [80]

In other words, it would seem that the Supreme Court's decision in *ATCO* would not apply to a rate-setting context, a conclusion that has been upheld by the Ontario Divisional Court in the *Toronto Hydro* case, where this Board's decision to allocate net gains from the sale of properties to the rate-setting formula was found reasonable and upheld.[81] Furthermore, the court in *ATCO* did not indicate that a finding of harm would have to be found in the context of a rates exercise.

The court in *Toronto Hydro* refers to the above-referenced section of the *ATCO* decision, and goes on to state,

[79] ATCO at para 77
[80] ATCO at para 81
[81] *Toronto Hydro* (Divisional Court) at para 21

> "In fixing rates, the OEB considers a distributor's revenue requirement for the period. … If property is sold, the amount required to provide a return on investment as part of the revenue requirement is reduced. If the capital gains on proceeds of sale are deducted from the utility's revenue requirement, it further tends to result in lowering the amount ratepayers would be charged." [82]

88. In Board staff's submission, had the proposed sale been considered as part of Union's general rate review application, the Board would be entitled to consider the proceeds of the sale of the St. Clair line and if there were net gains, to allocate some or all of the gain to ratepayers by a corresponding reduction in revenue requirement and rates. It would not necessarily have to find that there is harm to ratepayers or *vis a vis* the Board's statutory objectives. The fact that Union has brought the proposed transaction in the context of a s.43 application, and not a general rate application, should not serve to avoid having the net gain from the transaction considered as part of Union's revenue requirement in its next rate application.

89. Board Staff submits that the Board may consider approving the transaction subject to a condition, among others, that the net gain, if any, from the proposed sale of the St. Clair Line be accounted for in a deferral account to be addressed in Union's next rate application. This would be consistent with the Board's practice in dealing with an affiliate transaction, pursuant to section 2.3.12 of the "Affiliate Relationships Code for Gas Utilities" ("ARC"). The Board's "Interpretive Guidance to the Affiliate Relationships Code for Gas Utilities" ("Interpretive Guidance") states:

> "The final disposition of a capital gain or loss on the sale of utility assets to an affiliate will be dealt with *at a subsequent rate hearing.* In order to provide stakeholders guidance, the Board will generally expect that any capital gains or losses on the transfer of utility assets to an affiliate should be shared 50/50 between ratepayers and utility shareholders. Panels on rate cases will determine if there are exceptional circumstances justifying different treatment." [83]
> (emphasis added)

Whether the sale from Union to DGLP should be at above net book value or another value?

[82] *Toronto Hydro* (Divisional Court) at para 25
[83] "Interpretive Guidance to the Affiliate Relationships Code for Gas Utilities", December 9, 2004 ("Interpretive Guidance") at page 2

90. Union's position is that the proposed sale by Union to the DGLP is not a sale to an 'affiliate' within the meaning of the *OEB Act* and the *OBCA*[84] because neither Union, nor its parent company Spectra, will have more than a 50% interest in the limited partnership. Accordingly in Union's view, it is not *required* to sell the asset at more than book value.

91. Board Staff submits that Union's position in that regard is untenable. The ARC which deals with *affiliate* relationships, by definition, is silent about a sale or transfer to a non-affiliate, i.e., a third party or arm's length purchaser. In Board staff's view, in a non-affiliate transaction, the ARC does not preclude the Board from exercising its discretion to find that a sale or transfer should have been made at a value other than net book value. In any event, as Board Staff submitted above, the transfer is to a related entity since Spectra has a 50% interest in the DGLP. Accordingly, Union's parent company stands to benefit considerably from acquiring the St. Clair Line at a more favourable price, such as net book value. In Board Staff's view the transaction is not a true arm's length transaction with an independent 3rd party.

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?

In this section, Board staff has the following concern:

- There are different rights and obligations for landowners and for pipeline companies under federal jurisdiction compared to those under provincial regulation. It is unfair to change these rights and obligations when there would be no physical change to the pipeline that has been on the landowners' property for 20 years;

92. Union currently holds the land rights for the St. Clair Line and, if Union's proposal to sell is approved, these rights would be assigned to Dawn Gateway LP. The St. Clair Line is presently operated under Provincial jurisdiction and is regulated by the OEB. Union has been clear in its application that it expects the Dawn Gateway Line to be regulated by NEB which includes the St. Clair Line portion. The regulations governing an NEB regulated pipeline differ from those under Provincial regulation.[85]

[84] *Ontario Business Corporations Act,* R.S.O. 1990, chapter B.16, section 1(1)
[85] Transcript. Vol. 2, June 23, 2009, p.12

93. There are different rights and obligations for landowners and for pipeline companies who operate under federal jurisdiction compared to those under provincial regulation. There was considerable discussion of these differences which included issues such as construction in the vicinity of the pipeline, land-use controls, pipeline abandonment and the availability to recover costs as part of a regulatory proceeding.[86]

94. Board staff is not making a submission regarding which jurisdiction may be seen as more favorable to landowners or the owners of the pipeline. The fact is that there are different rules, rights and obligations on all the parties. The landowners on the St. Clair Line have operated under existing agreements and under provincial jurisdiction for 20 years. Board staff suggests that changing those rights and obligations when there is no physical change to the pipeline that has been on their property for 20 years is unfair.

95. Board staff notes that Union in its Argument in Chief[87] indicated that it would agree to a condition of approval that would allow the landowners affected by the proposed transaction to continue with certain activities substantially in the same manner as they have under Provincial jurisdiction. Board staff submits that in the event that the Board approvals the sale of the St. Clair Line as sought by Union in its application, that such a conditions be imposed as part of the Board's order.

[86] Transcript. Vol. 2, June 23, 2009, pp. 12-17
[87] Union's Argument in Chief, July 6, 2009, para 73

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?

96. As part of the proposed sale Union indicated it would seek to assign the land rights that Union obtained for the construction and operation of the St. Clair Line (e.g., easements, licences and crossing agreements) to Dawn Gateway LP. In response to a Board staff interrogatory[88] , Union provided a response that Board staff considers adequate in terms of meeting the Board's objectives in regard to the proposed project.

97. In regard to the future plan to build the 17 km pipeline between Bickford Station and Dawn Station, which is part of the 34 km proposed Dawn Gateway Pipeline, Union provided copies of four letters[89] in its response to questions a) and b) of Board staff Interrogatory No. 10. Union indicated that three First Nations have been contacted with respect to this application, that were identified by its consultant (Stantec Consulting Ltd., author of the above referenced four letters), and by correspondence received from Indian and Northern Affairs Canada. Union also further listed the meetings it held to cover the various aspects of the project .

98. Responding to questions g), h) and i) of Board staff interrogatory No. 10, Union indicated that there have been no discussions with any government departments or agencies, and that there was no written documentation received to indicate support or objection to the proposed sale proceeding. Union also stated that it is not aware of any Crown involvement in consultations with Aboriginal Groups in respect of the applied-for proposed sale.

[88] Exhibit No. K1.7, Union's Response to Board staff Interrogatory No.10, response to questions a) to i) inclusive
[89] Exhibit No. K1.7, Union's Response to Board staff Interrogatory No.10, Attachement #1

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?

99. Board staff submits that while the proposed transfer of the St. Clair Line to DGLP will not necessarily have an adverse effect in relation to the Board's objectives, when considered as part of a series of contemplated actions, including a change of jurisdiction from OEB to NEB regulation, the combined effect is adverse to the Board's statutory objectives.

The Board's statutory objectives in respect of gas are:

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 ransmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2.

Will the proposed sale facilitate competition in the sale of gas to users?

In this section, Board staff has the following concerns:

- The lack of transparency and issues regarding non-discriminatory access will not facilitate the competition in the sale of gas to users.

100. Board staff has reviewed Union's Argument in Chief and disagrees with its views expressed in paragraphs 88 to 90[90]. Paragraph 90 of Union's submission states in part that:

> "*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".*

Board staff is of the view that the *"additional firm transportation capacity*" will provide customers with competitive options in the storage market only if the transportation services on the proposed Dawn Gateway Line are provided on a non-discriminatory basis.

101. Board staff submits that non-discriminatory access to transportation services is essential to a competitive storage market. This ensures that all potential customers have non-discriminatory access to transportation services regardless of where or from whom they purchase storage services. This is of particular importance especially in the situation where a transmitter owns and operates competitive storage in Michigan and Ontario.

102. Board staff notes that Union has indicated that its open season[91] has led to the execution of five confidential transportation contracts with different parties for periods between 5 to 10 years.

Board staff submits that the confidentiality of these contracts which includes the name of the shipper, the terms of service, the volume and the fixed negotiated tolls[92] is an example of the lack of transparency[93] on the proposed Dawn Gateway Line. Also, negotiated terms of service may allow Dawn Gateway LP to discriminate between customers (e.g., preferential terms of service for its competitive storage customers). Therefore, the lack of transparency and the lack of any requirement to have standard terms of service may impact non-discriminatory access to the new transportation services on the proposed Dawn Gateway Line.

103. Board staff notes that Union and Dawn Gateway LP have agreed to a condition of approval[94]. However, in Board staff's view this condition will not provide the necessary safeguards since the proposed Dawn Gateway Line will be controlled

[90] Union's Argument in Chief, July 6, 2009, paragraphs 88-90
[91] Transcript, Vol. 1, pages 62-64 & pages 70-71
[92] Transcript, Vol. 1, page 22-23
[93] Transcript, Vol. 1, pages 63-64 & pages 70-71
[94] Union's Argument in Chief, July 6, 2009, p 43, para 120

by DTE and Dawn Gateway LP which may become subject to the NEB's complaint-based regulation.

104. As a result, Board staff submits that there may be a risk of Dawn Gateway LP tying its transportation services to its competitive storage services. The affiliate companies of Dawn Gateway LP, such as DTE and Union, offer competitive storage services. As the proposed Dawn Gateway Line would be a competitive transportation service which provides access to that storage, the potential exists for Dawn Gateway LP to tie transportation services on the proposed Dawn Gateway Line to its affiliate competitive storage services in Michigan and Ontario. This may impact non-discriminatory access to the new transportation services on the proposed Dawn Gateway Line.

105. Board staff concludes that having competitive storage and competitive transportation in the absence of any transportation contract disclosure (in terms of price, volume and terms of service) should not be supported.

Board staff submits that for the above reasons, the sale of the St. Clair Line should not be approved.

Will the proposed sale protect the interests of consumers with respect to prices and the reliability and quality of gas service?

In this section, Board staff has the following concerns:

- New transportation services on the proposed Dawn Gateway Line are similar to Union's C1 transportation service except these new services would be at market-based rates (i.e., the price for these services would be uncertain);
- Transportation services under market-based rates usually involve negotiated terms of services. This would not ensure a level playing field since customers may not receive the same price, reliability and quality of service for the equivalent transportation service;
- Union and Dawn Gateway LP did not conduct a market power assessment even though they are requesting market-based rates for long-term firm transportation services; and
- Board staff submits that the above concerns may impact customers in terms of prices, and the reliability and quality of gas service.

106. Board staff has reviewed Union's Argument in Chief[95] and disagrees with its views expressed in paragraphs 91 to 94. Paragraph 91 of Union's submission states:

> "*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".*

Board staff notes that the new transportation services on the proposed Dawn Gateway Line are similar to the existing C1 transportation services on Union's St. Clair Line except these new services would be at market-based rates (i.e., negotiated prices). As a result, customers would no longer have the opportunity to purchase C1 transportation service under cost-based rates. This may impact existing customers and potential customers with respect to prices as the price for these services would be uncertain (i.e., not known in advance of negotiations).

107. Board staff notes that transportation services under market-based rates usually means that the terms of services are also negotiated. As a result, customers may be treated differently. Board staff submits that this would not ensure a level playing field since customers may not receive the same price, reliability and quality of service for the equivalent transportation service.

108. Union and Dawn Gateway LP did not conduct a market power assessment even though they are requesting market-based rates for long-term firm transportation services[96]. As a result, Dawn Gateway LP has the potential to:

a. Withhold or restrict services and therefore, increase the price by a significant amount for a significant period of time; and

b. Discriminate in terms of price and/or terms of service.

109. Board staff submits that this may impact customers in terms of prices, and the reliability and quality of gas service. Therefore it would be prudent to require such an assessment prior to any consideration of granting Union the leave to sell the St. Clair pipeline.

110. Board staff submits that there may be a risk of non-public transportation information being used to enhance Dawn Gateway LP's position and its affiliates' positions in the competitive storage market. Therefore as outlined in the

[95] Union's Argument in Chief, July 6, 2009, paragraphs 91-94
[96] Transcript Vol. 1, June 22, 2009, p 144

proposed STAR[97] it would be prudent to require Dawn Gateway LP to develop and maintain protocols prior to any consideration of granting Union the leave to sell the St. Clair pipeline.

Will the proposed sale facilitate the rational development and safe operation of gas storage?

In this section, Board staff has the following concern:

- The lack of transparency and issues regarding non-discriminatory access are counter to the rational development of gas storage.

111. Board staff has reviewed Union's Argument in Chief and disagrees with its views expressed in paragraphs 100 to 101[98]. Paragraph 100 of Union's submission states in part that:

> "….*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"*.

Board staff is of the view that non-discriminatory access to transportation services is essential to a competitive storage market. This ensures that all potential customers have non-discriminatory access to transportation services regardless of where or from whom they purchase storage services. This is of particular importance especially in this case where a transmitter owns and operates competitive storage in Michigan and Ontario.

112. Board staff notes that:

(i) Union and Dawn Gateway LP did not conduct a market power assessment for long-term firm transportation services[99];

(ii) there is a lack of transparency on the proposed Dawn Gateway Line[100];

(iii) the new transportation services on the proposed Dawn Gateway Line may not have standard terms of service which may allow the Dawn Gateway LP to discriminate between customers (e.g., preferential terms of service for its competitive storage customers); and

(iv) there may be a risk of Dawn Gateway LP tying its transportation services to its affiliate competitive storage services. These concerns, all or in part, may impact non-discriminatory access and as a result, the level of competition in the storage market.

[97] Notice of Proposal to Make a Rule regarding STAR dated April 9, 2009
[98] Union's Argument in Chief, July 6, 2009, para 100-101
[99] Transcript Vol. 1, June 22, 2009, p 144
[100] Transcript, Vol. 1, pages 63-64 & pages 70-71

113. Board staff concludes that the lack of transparency and issues regarding non-discriminatory access will not facilitate the rational development of gas storage.

5.2 WHAT IS THE APPROPRIATE TEST TO BE APPLIED BY THE BOARD IN THIS APPLICATION?

114. Board staff has reviewed Union's submission[101] and disagrees with Union's views expressed in paragraphs 103 to 119.

115. Board staff is of the view that the proposed sale combined with the intention of the removing the subject line from OEB regulation in the future will negatively impact Union's existing and new customers. This is due to Board staff's concerns regarding the lack of transparency; the lack of service availability as Union's C1 transportation service and Hub services will no longer be available at cost-based rates; and issues pertaining to non-discriminatory access. Board staff concludes that harm to these customers is anticipated and therefore the sale of the St. Clair Line is not in the public interest.

Role of Management and Risk to Shareholders versus Ratepayers

In this section, Board staff has the following concerns:

- If the Board approves the sale of the St. Clair Line, the Board should recognize that Union played a key role in justifying the St. Clair Line in 1988 based on a forecast profitability index of 1.64, and the subsequent lacklustre performance of the St. Clair Line since its in service date.

116. Paragraph 110 of Union's submission states in part that (underlining added for emphasis):

> *"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. 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."*

117. Board staff submits that it was Union that exercised its discretion in 1988 by submitting an application for leave to construct the St. Clair Line[102]. That

[101] Union's Argument in Chief, July 6, 2009, paragraph 105
[102] Exh K1.9 GAPLO's Evidence, Tab C 1 [Union Gas Limited pre-filed evidence in E.B.L.O. 226]- Application for Leave to Construct the St. Clair Line, dated April 21, 1988, Project Economics [pages 17-21, paragraphs 48 – 53],

application included economic justification for the project. The conclusion is presented in paragraph 53 of the section titled "Project Economics" of that application which states that:

> *53. The results of the DCF analysis are also sumarized in Schedule 10. The profitability index is 1.64 by the end of the second year. Because the profitability index exceeds 1.0, the project meets the E.B.O. 134 test for system expansion without consideration of potential transportation revenues and gas cost savings by other Ontario LDC'S.*

Board staff submits that evidence in the current case points to the St. Clair Line as a project that was and still is underutilized and unprofitable for a long time. Board staff concludes that the evidence clearly indicates that it was Union's Management who should be responsible for these results.

Profitability of the St. Clair Line and Role of Ratepayers

In this section, Board staff has the following concerns:

- The ratepayers bore the consequences of the St. Clair Line's underperformance; not the shareholders. That is, the ratepayers paid higher rates than they would have, had the St. Clair line been profitable.
- In contrast to the ratepayers, the shareholders whose management justified the St. Clair Line as a profitable project, were held whole through guaranteed returns on the rate base.

118. Board staff notes that Union has earned its approved rate of return on the asset base which included the St. Clair Line since its 1990 in-service date. Evidence during examination in chief[103] indicated that the current transportation contracts for shipping gas on the St. Clair Line are short in nature and are seasonal. The St. Clair Line has been and remains underutilized. Union's witness indicated on cross examination that the Bickford to Dawn Line has been constrained since the in service date of the St. Clair Line[104], which also constrained use of the St. Clair Line. This was also confirmed by Union when cross examined by CME where it indicated that the Bickford to Dawn Line has been constrained for 10-15 years[105].

119. Board staff concludes that the St. Clair Line's carrying cost was below its revenues for at least 10 to 15 years. This is further corroborated in Undertaking

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[103] Transcript, Vol. 1, June 22, 2009, page 9, line 15 to page 10, line 2
[104] Transcript , Vol. 1, June 22, 2009, pages 117, 119, 121
[105] Transcript, Vol 1, June 22, 2009, page 107, lines 3 to 19

No. J1.2[106] which shows that the St. Clair Line's rate of return was negative during the period 2003-2008.

Board staff submits that it was the ratepayers who bore the consequences of the St. Clair Line's underperformance, and not the shareholders. In other words, the ratepayers paid higher rates than they would have, had the St. Clair Line been profitable. In contrast to the ratepayers, the shareholders whose management justified the St. Clair Line as a profitable project were held whole through guaranteed returns on the rate base.

Appropriate Test should include Fairness to Ratepayers

In this section, Board staff has the following concerns:

- Should the Board approve Union's Application, to sell the St. Clair Line, the "Appropriate Test" under the Board approved Issues List should include fairness to ratepayers;
- Union had a key role in justifying the historically underperforming St. Clair Line in 1988; and
- Should the Board approve Union's Application, to sell the St. Clair Line, basing the transaction on market value would address the objective of "Fairness to Ratepayers".
- Replacement cost can be a proxy for Market Value, in case of sale.

120. Board staff submits that if the Board approves Union's Applicationto sell the St. Clair Line, the "Appropriate Test" under the Board approved Issues List[107] should include fairness to ratepayers.

121. Boards staff demonstrated in this submission that it is the shareholders who have been kept whole and not Union's ratepayers since Union's rates reflected the full approved rates of return on the asset base (and this included the St. Clair Line as of its 1990 in-service date).

122. Union argued that the ratepayers would be better off by removing an underperforming asset from rate base. This is part of Union's justification for selling the St. Clair Line at Net Book Value. Board staff submits that Union is not reflecting the ratepayers' contribution to support an underperforming asset since its in-service. The pipeline has been substantially paid for and Union has now decided to sell it at its residual value to an entity that will put it to a better use

[106] Undertaking No. J1.2, submitted June 30, 2009- Union's Rate of Return of the St. Clair Line (2003 – 2008)

[107] Issues Decision and Order, Appendix A, April 6, 2009 for proceeding EB-2008-0411

that, presumably, will now be a profitable venture. The ratepayers in contrast have been required to pay for the cost of the St. Clair Line and also pay for a reasonable return to Union's shareholders.

123. Board staff concludes that setting the price above Net Book Value is fair given the historical underperformance of the St. Clair Line while it was part of rate base and the expected higher performance of the proposed Dawn Gateway Line of which the St. Clair Line is a vital component. In that regard, Board staff's view is consistent with the views of the Canadian Manufacturers & Exporters[108] ("CME") as well as the views of the Federation of Rental-Housing Providers of Ontario[109] ("FRPO").

Legal Considerations

124. Board Staff does not dispute Union's submission that part of the appropriate test to be applied by the Board to this transaction is similar to the 'no harm' test that the Board applies to applications for leave to sell electricity transmission or distribution systems under section 86 of the Act and the principles enunciated in the combined MAADs proceeding.[110]

125. However, the combined MAADS proceeding in which the Board applied the 'no harm' test was in respect of an application under s.86 of the Act which deals with a change in ownership or control of systems. In that case, the Board stated,

> "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…. In section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is no harm to consumers".[111]
> (emphasis added)

[108] Transcripts Vol. 1, June 22, 2009, page 25, lines 18-22 and page 104, lines 2-8
[109] Transcript Vol. 1, June 22, 2009, pages 99 – 103, exchanges: Mr. D.Quinn , Ms. S.Wong, Vice Chair and Presiding Member G.Kaiser
[110] Union Submissions at page 38 para 103 and RP-2005-0018 / EB-2005-0234 / EB-2005-0254 / EB-2005-0257 ("Combined MAADs Proceeding") .
[111] Combined MAADs Proceeding at pages 6-7

126. The present application involves a sale of a specific asset which, although significant, is not substantial considered in the context of Union's entire distribution system in Ontario and is not a "share acquisition or amalgamation" the Board referred to in the Combined MAADs proceeding.

127. Accordingly, in Board Staff's view, the Board deciding this application is not constrained by the 'test' enunciated in the combined MAADS proceeding or to equate its jurisdiction to "protect the interests of consumers" with ensuring only that there is "no harm". Board Staff submits that the 'public interest' aspect of this case should be considered more broadly than merely ensuring that consumers are not harmed and should extend to considerations of fairness and equity for ratepayers.

128. The Board has authority to incent (or disincent) utility behaviour at its discretion and the Board's approval of sharing of proceeds from transactional services is illustrative. In the Union Cushion Gas Case #2, the Board stated:

> "…The underlying assets (ie. the actual pipelines and storage facilities) remain in ratebase; however, the utility is not only permitted, but in fact encouraged to 'rent out' these assets to third parties when they are not needed to serve the utilities' in-franchise customers." [112]

The Board goes on to state,

> "The Board's authority to encourage or discourage utility behaviour in the public interest is not limited to transactional services. In appropriate circumstances, it can be and has been exercised where the utility has sold an asset outright." [113]

129. Board Staff submits that the Board should exercise its jurisdiction in this case to incent utilities to maximize the use of underperforming assets but not where it results in harm relative to the Board's objectives or unfairness to ratepayers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

[112] Union Cushion Gas Case #2 at page 13
[113] Union Cushion Gas Case #2 at page 14