unionGas
A Spectra Energy Company

August 17, 2009

By RESS & Courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
27th Floor, 2300 Yonge Street,
Toronto, Ontario.
M4P 1E4

Dear Ms. Walli:

**Re: Union Gas Limited ("Union")
Application for Leave to sell 11.7 km natural gas pipeline to a limited partnership being created between Spectra Energy Corp. and DTE Pipeline Company
EB-2008-0411**

Please find attached Submissions of Union Gas Limited with respect to the potential new issue in this matter.

In the event you have any questions on the above or would like to discuss in more detail, please do not hesitate to contact me at (519) 436-4601.

Sincerely,

Mark Murray
Manager, Regulatory Projects and Lands Acquisitions
Encl.
:mjp

cc. Nabih Mikhail, Project Advisor, Facilities
Lillian Ing, Case Administrator
All Intervenors EB-2008-0411

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 kilometres 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.

SUBMISSIONS OF UNION GAS LIMITED
RE: Potential New Issue

BLAKE, CASSELS & GRAYDON LLP
Box 25, Commerce Court West
Toronto, Ontario M5L 1A9

Sharon S. Wong
Lawyer for the Applicant
Union Gas Limited

SUBMISSIONS OF UNION GAS LIMITED

1. In its August 5, 2009 Decision and Order (the "Order"), the Board asked for submissions on whether the Board should add the following issue to the issues list in this proceeding:

> "[29] Should the Board consider establishing a form of regulatory treatment for the Dawn Gateway Line similar to the regulatory treatment that would be available to the pipeline under Federal jurisdiction and if so, what steps should the Board take to obtain the necessary evidence?"

2. Paragraph 4 of the Order defines the "Dawn Gateway Line" as a 34 km pipe running from Belle River Mills, Michigan to Dawn. Despite this definition, Union assumes that the OEB's question in paragraph 29 of the Order is limited to whether the OEB should establish a different form of regulation for the existing OEB-regulated St Clair Line and the proposed new Bickford-Dawn Line, and that the OEB did not intend to suggest that the regulatory jurisdiction over Belle River Mills Line or the existing NEB-regulated St Clair River crossing could be changed to the OEB.

<u>Overview of Union's Position</u>

3. Union submits that the potential issue should not be added to the issues list for this proceeding. Union requests that its application for leave to sell the St. Clair Line be determined based on the proposed transaction described in Union's evidence which contemplates the St. Clair Line being incorporated into and becoming part of a single pipeline providing seamless international transportation service from Belle River Mills, Michigan to Dawn, Ontario.

4. Union's primary objectives for the sale of the St. Clair Line are separate and distinct from those of the Dawn Gateway JV. Union's reasons for the proposed sale are:

(i) to optimize and increase the value of the St Clair Line for the benefit of ratepayers given that the pipeline has been and continues to be significantly under-utilized;

(ii) to see the St Clair Line incorporated into the broader Dawn Gateway Line in order to attract new supplies to Ontario and to enhance the security of supply and supply diversity at Dawn; and

(iii) to increase the interconnectivity between storage in Michigan and Ontario consistent with the Board's NGEIR storage decision.

In Union's submission, these are the relevant considerations to be considered by the Board in this application.

5. The negotiations between Westcoast Energy Inc. ("Spectra") and DTE Pipeline Company ("DTE"), and the five binding Precedent Agreements that the Dawn Gateway JV has entered into with shippers have all been based on Dawn Gateway Pipeline providing a seamless international transportation service from Belle River Mills, Michigan to Dawn, Ontario. Therefore, the Dawn Gateway Pipeline project as currently structured can only proceed if the US and Canadian portions of the pipeline are operated together as one single enterprise. For the reasons set out in Union's Argument in Chief, Union believes that such an international pipeline must necessarily be regulated by the NEB as a matter of constitutional law. Therefore, even if lighter regulation was available from the Ontario Energy Board, the Dawn Gateway JV could not make use of it.

6. However, Union supports the Board holding a generic hearing in the future to consider whether lighter regulation, similar to the complaint based regulation that is available at the NEB, should be available from the OEB.

Need for a Seamless, Integrated Service from Belle River Mills to Dawn

The Business Reasons for an Integrated Service

7. In paragraph 26 its August 5, 2009 Decision and Order the Board stated:

> [26] ... It is apparent from the submissions that the constitutional issue is driven by Union's desire to obtain a "lighter" regulatory treatment for the service to be offered on the proposed line. Union wants to be able to negotiate long term rates with shippers as opposed to having rates set on a cost of service basis.

8. Union disagrees with this characterization of its submissions for two reasons.

9. Firstly, Dawn Gateway Pipeline Limited Partnership and Dawn Gateway Pipeline, LLC are the parties that are offering the service on the proposed Dawn Gateway Pipeline, and jointly making the decisions in respect of the proposed line. Union does not have any ownership interest in the Dawn Gateway JV and will not be offering any services on the proposed line.

10. Secondly, although the ability to offer a negotiated long term rate to shippers is an important feature of the proposed pipeline, the ability of Dawn Gateway JV to offer a seamless integrated service from Belle River Mill to Dawn is a crucial feature of the proposed project. Mr. Baker testified about the importance of the integrated nature of the service:

> Dawn Gateway is looking to combine the existing assets and some new construction to develop an integrated transportation path from Belle River in Mills, Michigan to Dawn, and to really provide an integrated point-to-point service from those two points. (TR. Vol. 1, page 7, line 10-14)
>
> ***
>
> Another important aspect I think to recognize on this path today is that it is not utilized to a significant extent and that is really due to a number of factors, but principally the lack of coordination and inability to coordinate the marketing of the various components and pipelines and services on that path.
>
> So specifically today, customers need to contract separately for transportation service from MichCon, then separately for service from Union.

What happens a lot of the times is that because both parties are trying to maximize the value for that service, often times the economics don't work from a customer's perspective and it results in a combined toll that is uneconomic from a customer perspective. (TR. Vol. 1, page 8, line 19 to page 9, line 4)

***

So as a result, the volumes that are contracted to flow on this path, the corresponding pipeline utilization rates are very low. Generally the only time we see volumes contracted to move is when the market price differential between Michigan and in Ontario and Dawn is sufficient enough to support those volumes moving. Also when the respective prices that are offered from MichCon on the US side and Union on the Canadian side work together from a customer's perspective, it is economic to flow the gas. (TR. Vol. 1, page 9, lines 15-23)

***

So given the current issues on this path and the lack of marketing coordination, we began discussions with DTE in terms of how could we make this path more economic and more competitive, and there were also discussions happening with customers and potential shippers in terms of: What service would they desire and what would they need to be better attracted to move gas supply on this path?

Customers indicated that in order for them to be attracted and see value, what they would need is a point-to-point service from Michigan to Ontario, so an integrated and coordinated service and one that was competitive from both a fixed toll and a variable fuel perspective. (TR. Vol. 1, page 11, lines 7-18)

***

The second thing I would say in terms of -- when we looked at this project and trying to get additional utilization of the assets, it became clear to us that this was not something that Union could do on its own.

We needed to get integration on the other side of the border. That's why we started to have discussions with DTE. So there is nothing else tied to this.

We are trying to work together as an initial step to develop this path and the integrated point-to-point service for all of the reasons that we have talked about.

But it is very much a sharing of risks and trying to get alignment between the Canadian and the US assets to be able to attract additional supply through Michigan and into Dawn. That is the goal. (TR. Vol. 1, page 110, line 25 to page 111, line 10)

11. In paragraph 13 of its Argument in Chief, Union also highlighted the integration of the US and Canadian portions of the line as a key feature of the proposed project and submitted that point-to-point service from Michigan to Dawn could only be offered by an NEB regulated pipeline:

> 13. Two important features of the proposed Dawn Gateway Pipeline for attracting shippers to use the proposed line are 1) the integrated point-to-point nature of the proposed line so that the service is co-ordinated between Belle River Mills and Dawn, and 2) Dawn Gateway Pipeline's ability to offer one fixed, long-term toll over the entire pipeline from Belle River Mills to Dawn.
>
> 14. Neither of these two important features can be offered unless the Dawn Gateway Pipeline is regulated as an NEB Group 2 pipeline. If Dawn Gateway offers an integrated point-to-point service crossing the international border it must be NEB regulated pursuant to the Supreme Court of Canada's Westcoast decision.

The Contractual Reasons why an Integrated Service is Necessary

12. The Dawn Gateway Pipeline has been structured as a single business enterprise running between Belle River Mills and Dawn, with the affiliates of both Spectra and DTE that form the Dawn Gateway JV sharing the costs and risks for the entire pipeline on both sides of the border on a 50/50 basis and having equal control over business decisions.[1] This is an important feature of the structure for shippers because it means that both Spectra and DTE are motivated to maximize the usage of the line on both sides of the border so that the toll over the entire length of the pipeline is economical for the shippers.[2]

13. The overriding business principle of the Dawn Gateway JV is equal ownership of assets and equal sharing of all project risks and benefits. If the intra-Ontario assets are required to remain under Union's ownership and be OEB regulated under a light handed regulation model, the Dawn Gateway Pipeline would be prevented from operating as a single business enterprise on both sides of the border, with the result that the overall business model of the Dawn

---

[1] Testimony of Steve Baker and Mark Isherwood, Transcript Vol. 1, June 22, 2009, at pp. 159-162, and Ex. No. K1.4, Organizational Charts for Dawn Gateway Partnership Structure in Canada and US.

[2] TR. Vol. 1, page 8, line 19 to page 9, line 4

Gateway JV would be significantly changed. The fundamental underpinning for the Dawn Gateway JV would be eliminated, and it is very likely that the joint venture would not proceed.

14. Moreover, the 5 shippers who have entered into Precedent Agreements to ship natural gas on the Dawn Gateway Line have done so on the basis that the line would be a point to point service between Belle River Mills and Dawn. If the Dawn Gateway Pipeline is not able to provide the proposed point to point service, then those Precedent Agreements would no longer be binding on the 5 shippers and they could contract with a competing project which does offer a point to point service from Michigan to Dawn under NEB regulation, and this would further add to the risk that the Dawn Gateway Project would not proceed.[3]

An Integrated Pipeline from Belle River Mills to Dawn Must be Regulated by the NEB

15. As a result of the legal principles set out in paragraphs 8 and 9 of Union's Argument in Chief, Union believes that an international pipeline operating as a single business enterprise providing point to point service from Michigan to Ontario must necessarily be regulated by the NEB as a matter of constitutional law.

16. Accordingly, even if complaint based regulation, such as what is available to Group 2 pipelines at the NEB, was available from the OEB, neither Union nor any other entity would be able to make use of that form of lighter regulation to offer a point to point service from Michigan to Dawn that would be subject to OEB regulation.

17. Complaint based regulation at the OEB might allow Union to offer long term, fixed rates from the St. Clair Valve Site to Dawn. However, in order for a pipeline running from the St. Clair Valve Site to Dawn to be subject to OEB regulation that pipeline could not operate in a functionally integrated manner with a US pipeline, as a single enterprise, with the US and Ontario pipeline under common management and control and offering an international point to point service from Michigan to Dawn, as is being proposed by Dawn Gateway. In order to

[3] Para. 2 of the Precedent Agreement, Tab Q to Dawn Gateway LP's NEB Application, Ex. Ex. No. K1.8

maintain OEB jurisdiction over the Ontario portion of the path from Belle River Mills to Dawn, the Belle River Mills pipeline would still have to be managed and controlled as a separate business enterprise, and the current lack of coordination between Union and Michcon which results in uneconomic tolls along the path would continue to exist.

18. The proposed structure of the Dawn Gateway Pipeline is consistent with all other federal pipelines providing transportation services from the US border to Dawn. Although the regulatory history of the St Clair Line is different, and there were different drivers supporting its initial construction, the Dawn Gateway proposal is consistent with the structure of the Vector, TCPL, ANR Link Line pipelines, all of which are under federal jurisdiction. Further, all competing projects to Dawn Gateway that would require new assets in Ontario would similarly fall under federal jurisdiction.

Adding the Potential Issue Would Hinder the Project

19. In paragraph 29 of the Order, the OEB asked the parties to comment on how evidence could be obtained in this proceeding on the potential new issue if it is added to the Issues List. The potential issue could set a very significant precedent for the OEB, and if the issue was added it would undoubtedly be of great interest to many interest groups who customarily intervene in Board proceedings and who are not intervening in this proceeding. It is likely that many interest groups would seek to intervene at this late stage of the proceeding, and the hearing could become akin to a generic hearing.

20. Union would need time to consider what evidence it should bring before the Board, and then additional time to obtain that evidence. Similarly, intervenors would need time to prepare their evidence and Union may have to prepare Reply evidence. It is possible that parties might seek to file expert evidence which would further delay matters. Adding the potential issue at this time would likely result in a delay of many months, and possibly even years.

21. If a different regulatory model had been available when DTE and Spectra started their negotiations, it may have been possible to structure the project in a way that meets customers' needs, satisfies the investors risk/return requirements, and maintains OEB jurisdiction over some of the assets. However, the negotiations that have taken place over the last 2 years to get the project to this point assumed the current regulatory model without the uncertainty of a possible regulatory change, and the market and investors have agreed with the project as it is proposed. Neither Union nor Dawn Gateway JV had any knowledge and still do not have knowledge as to whether a different regulatory model could be put in place that would meet the business needs of customers and investors (especially DTE) and also allow some form of OEB jurisdiction to be maintained over the intra-Ontario assets. New investment decisions have to be made based on the regulatory framework that exists at the time the decisions are made. The proposed Dawn Gateway Line will provide a service that is in demand from customers and on a timeline and at a toll that meets their needs.

22. The regulatory process needed to assess a new form of regulation at the OEB would be long and generic in nature. The delay and uncertainty inherent to such an assessment would jeopardize the presently targeted November 2010 in-service date for the Dawn Gateway Pipeline.

23. Finally, with western Canadian natural gas supplies in decline, the replacement supplies are all south of the Great Lakes. Ontario is competing to attract new supply sources currently flowing south of the Great Lakes. Unless new supply can be attracted to Dawn, Dawn may begin to lose its appeal to market participants, especially those in Quebec and the US North East. It is critical that new diverse sources of supply be connected to Ontario, especially given the focus on new gas fired power generation in the Province. The Dawn Gateway Line is a project that will achieve these objectives and maintain and grow the value of Dawn for Ontario, and the timeliness of its service availability is critical to its commercial viability and success. From Union's perspective, it is critical that the Dawn Gateway project advance, and the timetable be maintained to the extent possible in order to ensure that these new supplies connect to Ontario to offset supply declines from the Western Canadian Supply Basin and to provide

greater supply choice and diversity for the benefit of Ontario and other customers downstream of Dawn.

<u>Conclusion</u>

24. Union therefore requests that the potential new issue not be included on the Issues List for this proceeding. Union requests that its application for leave to sell the St. Clair Line be determined based on the project as described in Union's evidence which includes the Dawn Gateway JV operating one functionally integrated, point to point international pipeline from Belle River Mills to Dawn. The project as described in the evidence is the only project that has been accepted by the various proponents.

25. Union supports the Board holding a generic hearing in the future to consider whether lighter regulation, similar to the complaint based regulation that is available at the NEB, should be available from the OEB and under what circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 17, 2009

Sharon Wong

Sharon S. Wong
Lawyer for Union Gas Limited