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Our File No.: 11870-23

August 17, 2009

Ms. Kristen Walli
Board Secretary
Ontario Energy Board
P O Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON 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 (Board File No.: EB-2008-0411) – Submission of Dawn Gateway Pipeline Limited Partnership Regarding Proposed Addition to Final List of Issues

Further to the Board's Decision and Order dated August 5, 2009, Dawn Gateway Limited Partnership ("Dawn Gateway") provides the following submissions.

(a) General

Dawn Gateway is concerned by recent attempts to convert the Union application into a new international pipeline application with no sponsor and with no shippers.

DTE Pipeline Company ("DTE") and Westcoast Energy Inc. ("Spectra") have invested considerable time and resources in negotiating and establishing a joint venture arrangement ("Dawn Gateway JV") involving the transfer of assets to the Dawn Gateway JV and investing in a new segment of NPS 24 pipe and Union's under-utilized St. Clair line in order to offer seamless transportation service across the international border. The Dawn Gateway JV does not own storage, nor will it require its shippers to hold storage services. It offers international pipeline transportation services.

Other options were open to DTE and Spectra. Vector Pipeline Limited Partnership ("Vector"), for example, (40% owned by DTE) could have been expanded to provide service. Vector is already a Group 2 NEB pipeline. Other federal cross-border gas transmission projects also were available to offer these international transportation services (ANR Link, Bluewater, TCPL) and other international gas transmission projects were proposed (Dawn Eclipse – Great Lakes; Dawn Express – TCPL). All these alternatives are federally regulated,

most as Group 2 pipelines. The practical effect of the recent procedural developments is to delay or frustrate Dawn Gateway's ability to bring increased competition to these existing cross-border links and to enhance supply diversity and security through the construction of a new, direct transportation link between the strategic storage and supply alternatives available in the Chicago/Michigan area and in Ontario. It is difficult to conceive how this project would not be in the Canadian public interest.

DTE and Spectra believe the Dawn Gateway JV option offers real advantages to Ontario by enhancing the use of existing, under-utilized assets while reducing costs borne by its gas distribution customers. Dawn Gateway JV found favour with the market. Unlike other proposed federal projects, after its Open Season, Dawn Gateway JV successfully contracted with five shippers for cross-border gas transportation service from Belle River Mills, Michigan to Dawn, Ontario. DTE assets and involvement is critical to the success of that venture in improving the utilization of this new path between two strategic supply and market areas.

The Dawn Gateway line, if completed, is an international work and undertaking for the cross-border transmission of gas from Belle River Mills, Michigan to Dawn, Ontario. Applications for approval of that project have been filed with the National Energy Board. The application has been accepted as complete and the review process is underway.¹

(b) Proposed Addition to Final Issues List

The express purpose of the proposed addition to the Final Issues List (App. A, Issues Decision and Order dated April 6, 2009) is to create a new and different, provincially regulated project to provide international gas transportation service between the same delivery and receipt points as Dawn Gateway (Issue 1.2). With respect, that is an improper exercise of provincial jurisdiction.

Moreover, Dawn Gateway questions the basis for this Board's concern. There are no gas distribution customers involved with the Dawn Gateway project. There is nothing "monopoly" about it. Alternative Group 2 NEB regulated service is readily available. Union's contract with Dawn Gateway is non-utility; none of the related costs will be passed on to its regulated franchise distribution customers:

MR. THOMPSON: Well, isn't that contract going to be subject to scrutiny in proceedings before this Board?

MR. BAKER: No. The purpose of Union taking a position on Dawn Gateway is intended to be linked to us also taking a contract at storage position with DTE to move

¹see attached NEB letters dated July 31, 2009 (Federal Coordination Notice) and August 12, 2009 (Procedural Guidance)

additional storage capacity to Ontario. So it would be part of our unregulated storage portfolio that we're looking to manage."

...

[MR. BAKER:] I would say that it would not be subject to scrutiny, because it would be part of our unregulated storage operation. (Tr. 1, p. 64, lines 7-14 and 19-21)²

Dawn Gateway proposes to compete with other federally regulated pipelines, fully at its own risk, to provide cross-border gas transmission service.

Why would the Board seek now to actively regulate a fully "at risk" international gas transmission project whose costs will not be borne by any franchise gas distribution customers? Ironically, the delays and uncertainty introduced by these recent developments threaten to frustrate the attempts of these private developers to attract more liquidity to the Ontario market at their sole risk; enhance supply diversity and security for Ontario; and provide fresh competition to the existing cross-border service providers like TCPL, Bluewater, ANR Link, Vector and others, all of whom are federally regulated.

While a generic inquiry into "at risk" rate designs for Ontario's LDC's may be worthwhile for a wide variety of reasons, with respect, it is inappropriate to make a surplus utility asset disposition proceeding the vehicle for such a far-ranging inquiry.

(c) Specific Objections

In light of the foregoing, Dawn Gateway wishes to register its objection to the late addition of any new hearing issues for the following reasons:

First, the Board's proposal to add a new issue to this proceeding after the oral hearing has completed would guarantee delay. A re-Noticing of this new Generic Inquiry may be required to provide other interested parties (including other utilities) not participating in the present proceeding, an opportunity to intervene. Given the significant policy issues raised, the record would need to be re-opened, new evidence filed and the hearing re-convened. All of this would frustrate the project's timelines and its ability to meet its contractual commitments to its shippers starting in November, 2010.

Second, the generic nature of the "at risk", light-handed, complaints-based rate regulation issue proposed by the Board unfairly complicates and confuses a fairly straightforward application for approval of the sale of a significantly underutilized utility asset which, though

²see also Board IR #7 v) "Union expects that it will contract for both transportation on Dawn Gateway and Michigan storage with MichCon to support its unregulated storage operations. It is not anticipated that Union will contract capacity on Dawn Gateway to support regulated services to any of Union's customers."

currently in limited use, has clearly been demonstrated not to be required to provide safe and reliable gas distribution service. Given that the Board's initiative could represent a significant departure from the existing utility rate regime in Ontario, the outcome of such a policy review cannot be known with certainty. It cannot be assumed, therefore, that even if some unspecified future change were to be made to Ontario rate regulation at some indeterminate point in the future, a successful project could be developed. For these reasons, Dawn Gateway respectfully submits that any policy review of Ontario rate regulation should be conducted separate from the present application and independent of it.

Third, it is unclear what public interest this additional issue is intended to protect. Union Gas has indicated that its participation in this project relates to its unregulated, non-franchise storage operations. Indeed, the entire undertaking is proposed to take place on an "at-risk" basis. None of the costs of surplus pipeline capacity on Dawn Gateway are to be borne by Dawn Gateway shippers or by franchise gas distribution customers. None of the construction overrun costs, operating costs, costs arising from non-renewal or regulatory costs will be passed through to shippers. All shippers have willingly contracted for the capacity at prices and on terms acceptable to them through a transparent open season process. This process belies any suggestion of 'market power' or unjust discrimination given the other open season options available as well as the freedom afforded shippers to pick their own price and term of service. If the assets are not required operationally for gas distribution service, what legitimate public interest exists for the OEB to continue to regulate them?³ Moreover, the NEB has successfully regulated a host of Group 2 cross-border pipelines in the same area for many years – without complaints. There does not appear to have been an outcry from shippers for an overhaul of NEB regulation of the many existing US/Canada border links. In a word, there is nothing deficient about the NEB's protection of the public interest.

Fourth, the assumption underlying the inclusion of this additional issue is that, as Issue 1.2 states, once completed, the Dawn Gateway project could remain under provincial jurisdiction. Dawn Gateway emphatically disagrees. Regardless of who owns the Dawn Gateway project, it will be an international work or undertaking, subject to federal jurisdiction. Requiring Union Gas, as opposed to Dawn Gateway, to undertake this international project would not assure provincial jurisdiction since ownership is not determinative of the constitutional character of such a pipeline project. Indeed, substituting Union Gas for Dawn Gateway may expose the former to federal jurisdiction, which is the opposite of what appears to be intended by Issue 1.2. If the fact that TCPL-Alberta exported 80% of its receipt volumes was sufficient to convert that local work or undertaking into a federal work or undertaking, 100% of the receipt volumes on the new Union-owned-and-operated cross-border line for a discrete set of shippers, under discrete contracts and tariffs, at discrete rates would certainly raise questions about the jurisdictional character of the services rendered. In turn, that change could give rise to questions about the extent of federal reach over Union's non-franchise assets and services. The only certain result of the host of hypotheticals which underline the proposed new

³Revenue generation is not a valid regulatory purpose: *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200; SCC leave refused December 4, 2008.

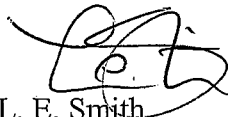
condition is that the Board will cause customers to unnecessarily bear avoidable costs associated with surplus assets and will deny those same customers, and the industry at large, the benefits of timely access to enhanced storage, supply and market options, which could reduce price volatility and which will increase competitive choice.

For the foregoing reasons, Dawn Gateway LP urges the Board to resist the temptation to embark on this jurisdictional experiment, given the unnecessary controversy, delay and uncertainties it will generate. Moreover, this initiative disadvantages Dawn Gateway's attempts to bring a new, competitive alternative to the market for cross-border transportation services.

The delays and uncertainty generated as a result of the late introduction of a major new issue into this proceeding may well frustrate the Dawn Gateway Project, depriving Ontario of the additional liquidity, supply security and market access it represents with no assurance that any provincially-regulated international gas transmission project may take its place.

Yours truly,

BENNETT JONES LLP



L. E. Smith

LES/lk
Enclosures

cc: Mr. P. Cianci (DTE Energy)
Ms. P. Planting (Dawn Gateway)



File OF-Fac-Gas-D159-2009-01 01
31 July 2009

To: Distribution List (attached)

Federal Coordination Notice
Dawn Gateway Pipeline General Partner Inc.
Dawn Gateway Pipeline

On 6 May 2009, Dawn Gateway Pipeline General Partner Inc. (Dawn Gateway) applied to the National Energy Board (the Board or NEB) under section 58 to construct and operate approximately 17 km of 610 mm OD pipe and related facilities from Union's St. Clair Pipeline near Union's Bickford Compressor Station to the Dawn Compressor Station in Lambton County, Ontario. In addition the application includes requests to acquire and operate the existing St Clair River crossing pipeline (approximately 1 km) and the Union Gas Limited's (Union) St Clair line (approximately 12 km). The total project encompasses approximately 30 km of 610 mm OD international natural gas transmission pipeline system.

On 11 June 2009, the Board notified Dawn Gateway that the application was deficient and would not be further considered by the Board until Dawn Gateway addressed consultation with potentially affected parties including landowners, and matters regarding route selection, including supporting environmental studies. On 17 July 2009, Dawn Gateway submitted updated evidence associated with this application and the assessment of the project was reinstated.

The company's application is available on the Board's website (www.neb-one.gc.ca) by clicking on "View" Regulatory Documents then go to "Looking for filing? Enter its Id here" and type in filing identification number A21672 and click on "Go!"). Access to the updated evidence submitted 17 July 2009 can be found using identification number A22272. If you need a hard copy, please contact the company directly.

Details of the project are also provided on the Canadian Environmental Assessment Registry (CEAR) located at http://www.ceaa-acee.gc.ca/050/index_e.cfm. The CEAR reference number for this project is 09-01-49359.

The Board, as responsible authority (RA) under section 5 of the *Canadian Environmental Assessment Act* (CEA Act), is initiating the environmental assessment coordination process for the project in accordance with the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* (Federal Coordination Regulations) to meet its obligations under the CEA Act.

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Pursuant to section 5 of the Federal Coordination Regulations, the Board requests that you review the application and indicate to the Board whether your department/agency:

- (a) is likely to require an environmental assessment of the project under section 5 of the CEA Act (i.e. be a RA);
- (b) is in possession of specialist or expert information or knowledge that is necessary to conduct the environmental assessment of the project (i.e. be a Federal Authority); and
- (c) requires additional information to make a determination referred to in (a) or (b).

With regard to (a) and (b), the Board asks that your response be provided to the Board by 26 August 2009. With regard to (c), the Board asks that your response be provided to the Board within **10 business days** of receipt of this letter. A response form is provided for your convenience. Please note that any correspondence in relation to this application will be placed on the public record.

Responses may be sent either by facsimile or by e-filing. For facsimile please send to 403-292-5503 or 1-877-288-8803. For electronic filing, go to the NEB website at www.neb-one.gc.ca, click on "Submit" under Regulatory Document" and then on "Submit Documents Electronically". Please note that e-mails are not considered electronic filing. **The Board further asks that you provide Dawn Gateway with a copy of any response in respect of the above requests.**

Upon receipt of the information, the NEB will either take on the role as the Federal Environmental Assessment Coordinator (FEAC) to coordinate the examination of the project under the CEA Act to meet the needs of the NEB and RAs/FAs, or consult with other RAs to determine which agency should assume the role as the FEAC. If the NEB prepares the environmental assessment document, it will provide a copy of the report to those RAs/FAs who are involved in the project.

If you are a provincial department receiving this letter, the Board would appreciate a letter from you indicating your level of interest and potential regulatory responsibilities regarding the proposed project.

If no response is received from you by the aforementioned date, the Board will assume that your department or agency has no responsibility to undertake an environmental assessment and is not in possession of specialist or expert information or knowledge.

If you have any questions or concerns, please call Zoe Pfeiffer, Environmental Specialist at 403-299-2778.

Thank you for your cooperation.

Yours truly,



Claudine Dutil-Berry
Secretary of the Board

Attachment

c.c. Ms. Patricia Planting, Dawn Gateway GP
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Louise Knox, Director, Ontario Region, Canadian Environmental Assessment Agency,
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Mr. Craig Newton, Southwest Region – EA Coordinator,
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31 July 2009

Dawn Gateway Pipeline General Partnership Inc. File: OF-Fac-Gas-D159-01 01
Dawn Gateway Pipeline, 6 May 2009

Pursuant to the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements* (Regulations), please indicate to the National Energy Board (the Board) by 26 Aug 2009 whether your Department/Agency (please check off the appropriate box):

- a) is likely to require an environmental assessment of the project(s) under Section 5 of the *Canadian Environmental Assessment Act* (CEA Act);

NO ☐

YES ☐

If **YES**, please indicate the CEA Act trigger(s):

Trigger:

(Specify legislation and Section No.)

- b) is in possession of specialist or expert information or knowledge that is necessary to conduct the environmental assessment of the project(s).

NO ☐

YES ☐

- c) requires additional information to make a determination referred to in a) or b) above.

NO ☐

YES ☐

If **YES to (c)**, please forward the request within 10 business days after receiving this notification as per subsection 6(2) of the Regulations.

Please advise what role your Department or Agency plans to play in this review by **FAXING THIS RESPONSE** to the **Secretary of the Board, Claudine Dutil-Berry**, at **403-292-5503 or 1-877-288-8803**. Please provide the following contact information

Name:

Title/Department:

Address:

Telephone:

()

Facsimile:

()

E-mail:

Date Authorized

Signature for Responding Department or Agency

Distribution List

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File OF-Fac-Gas-D159-2009-01 01
12 August 2009

Ms. Patricia Planting
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Mr. L. E. Smith, Q.C.
Bennett Jones LLP
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Facsimile 403-265-7219

Dear Ms. Planting and Mr. Smith:

**Dawn Gateway Pipeline General Partner Inc.'s (Dawn Gateway GP)
Updated Evidence dated 17 July 2009, submitted pursuant to section 58 of the
*National Energy Board Act***

The National Energy Board has reviewed the above-noted filing dated 17 July 2009 and has classified the application as a Category C for the purposes of Board review and assessment.

Section 58 applications are classified into one of three categories based on the following information available at the time that the application is filed:

- the level of complexity;
- the estimated number and type of information requests which may be generated;
- the probability of third-party interest; and
- the level to which a Federal Authority may become involved in the environmental assessment of the application.

The Board strives to release a decision regarding applications categorized as "C" within 120 days from the date of filing, 80 per cent of the time. The first business day which is one hundred and twenty days from the filing date of this application is 16 November 2009.

The Board notes however that it retains the discretion to convert the consideration of this application from a written process to an oral public hearing, if circumstances warrant. In such a case, the timelines for the release of a decision may be longer.

Dawn Gateway GP is directed to serve a copy of this letter on all interested persons.

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Should you have any further procedural questions regarding this matter, please do not hesitate to contact Diana Audino, Counsel, at 403-299-3552.

Yours truly,

A handwritten signature in cursive script, appearing to read "MKulick".

for Anne-Marie Erickson
Acting Secretary of the Board