



By E-mail

August 17, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Union Gas Limited ("Union")
Dawn Gateway Limited Partnership ("Dawn Gateway LP")
Additional Issue
Board File No.: EB-2008-0411
Our File No.: 339583-000036

Introduction

As solicitors for Canadian Manufacturers & Exporters ("CME"), we are writing to provide submissions on whether the Board should add to the issues list in this proceeding an issue of the type described in paragraph [29] of the Board's Decision and Order dated August 5, 2009, directing Union to serve a Notice of Constitutional Question on the Attorneys General of Ontario and Canada (the "Notice Decision").

We understand the Board to be inviting submissions on whether a Decision in this particular case in favour of provincial jurisdiction over the St. Clair Line and its proposed extension to Dawn should include process directions to help Dawn Gateway LP and other parties to these proceedings, including Union, formulate a response to the Decision.

For reasons which follow, our answer to this question is yes; and in our view, it is unnecessary to supplement the Final Issues List to achieve this objective.

The submissions which follow are divided into two (2) parts. In Part 1, we provide our interpretation of the topics described in the issue upon which the Board has invited submissions. On the assumption that we have correctly interpreted the scope of this issue, we submit that the matters described are relevant to and implicit in the matters in issue in this particular proceeding. We then suggest that it is unnecessary to add an issue to describe topics implicit in matters already in dispute. However, we readily acknowledge that no one will be prejudiced by the addition of such an issue.

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In Part 2, we provide submissions in response to points that we anticipate Union and Dawn Gateway LP may rely upon to urge you to inappropriately narrow the scope of matters to be decided in this particular proceeding. The points which we anticipate Union and/or Dawn Gateway LP may urge upon you are based on submissions contained in Union's Argument-in-Chief and the Notice of Constitutional Question dated August 6, 2009.

Part 1 – Process Directions in the event Provincial Jurisdiction Prevails

The issue described in the Notice Decision relates to a contingency that arises if the Board finds that the plan for the Joint Venture ("JV") between Spectra Energy Corporation ("Spectra") and DTE Pipeline Company ("DTE") to lease and acquire assets to sell point-to-point Firm Transportation ("FT") services between Belle River Mills Michigan and Dawn Ontario under the auspices of negotiated long term fixed price contracts (the "JV's Plan") does not oust provincial jurisdiction over the St. Clair Line and its proposed extension from Dawn to Bickford. The issue is relevant to a determination of an appropriate outcome for the sale approval application in the event that the Board finds that provincial jurisdiction prevails over the JV's ownership and operation of the St. Clair Line and its extension to Dawn.

We are unclear as to whether the issue described in paragraph [29] of the Notice Decision is intended to be limited in scope to the question of whether the Board has the authority and ability to adopt a light-handed method of regulation of the JV's ownership and operation of the St. Clair Line and its extension to Dawn and, if so, the procedural steps that the Board should take to exercise that authority, or whether the issue, as framed, is asking the question how the Board should exercise such authority, in the event it finds that provincial jurisdiction prevails over the St. Clair Line and its extension to Dawn. (emphasis added)

For the purposes of these submissions, we assume that the narrower interpretation of the issue is appropriate and that the Board is not, in this particular proceeding, suggesting that it should determine how to precisely establish a lighter regulatory treatment which accommodates the JV's Plan.

In the context of paragraph [29] of the Notice Decision, our re-phrasing of the issue upon which the Board has invited submissions is as follows:

"In the event provincial jurisdiction prevails, should the Board adopt a lighter form of regulatory treatment for the JV's ownership and operation of the St. Clair Line and its extension to Dawn to accommodate the sale of point-to-point FT services from Belle River to Dawn under negotiated long term fixed price contracts so that the owners of the JV have an opportunity to earn returns sufficient to justify taking on the additional risks associated with operating under such a regime? If so, then what process should be followed to establish the regulatory regime that should be applied?"

The question of whether the Ontario Energy Board ("OEB" or the "Board") has the authority and ability to accommodate the JV's Plan is raised by the evidence and argument submitted by Union in this proceeding. Union contends that National Energy Board ("NEB") regulation in Canada of the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn is essential for the JV's Plan to be accommodated and for the JV to realize sufficient returns to justify taking on the additional risks associated with operating under negotiated long term fixed price contracting regime. CME disagrees with Union's assertions to this effect. Accordingly, there is an issue in this proceeding pertaining to whether OEB regulation of the St. Clair Line and its extension to Dawn can accommodate the JV's Plan.

We submit that this issue falls within the scope of matters already listed for determination in this proceeding. In our Argument to be filed on Friday of this week, we will be submitting that Section 33(3) of the *Ontario Energy Board Act* empowers the Board to accommodate the JV's Plan because it authorizes the Board to adopt any method or technique that it considers appropriate when approving just and reasonable rates. We will be submitting that the OEB is empowered to do whatever the Michigan Public Services Commission ("MPSC") can do to accommodate the JV's Plan.

When considering whether a supplement to the Final Issues List is required, care should be taken to distinguish between the question of whether the Board has the authority and is willing to accommodate the JV's Plan and the question of how that authority should be exercised. In our view, the question "Should the Board accommodate the JV's Plan" falls well within the ambit of matters to be determined in these proceedings.

We will be arguing that, in its Decision in this case, the Board should express a willingness to consider ways of accommodating the JV's Plan. We will also be suggesting process directions which the Board can issue, in its Decision in this case, to help the JV and other parties respond to a Decision in favour of provincial jurisdiction.

The process directions we contemplate would call for an Application and supporting evidence from the JV within a fixed period of time following the issuance of the Decision in this case. The disclosure made by the JV in its Application, confidential or otherwise, would need to be sufficient to meet the disclosure obligations on OEB regulated utilities. There would need to be a transparent demonstration of the returns the JV says it needs to assume the risks of operating under the auspices of a negotiated long term price contracting regime. We would expect the evidence to be filed by the JV to include much of what has already been filed with the NEB. We would expect the evidence would include a description and copies of the MPSC Rate Schedules, which apparently are sufficient to accommodate the JV's Plan. We submit that Range Rate Schedules for the provincially regulated components of the pipeline, or rate schedules authorizing negotiated contracts could accommodate point-to-point pricing from Belle River to Dawn.

If we are correct in our view that the specific issue upon which the Board has invited submissions is limited to the question of whether the Board can and should accommodate the JV's Plan, then we reiterate that, in our view, this issue is implicit in matters in issue

in this proceeding. We do not think it is necessary to add an issue to describe questions that are implicit in matters in issue in this proceeding. However, no one is prejudiced by the addition of such questions.

The JV, as a party to this proceeding, should be encouraged to make submissions in its Final Argument due August 21, 2009, on this process issue, without prejudice to its position on jurisdiction. The Board should have the benefit of the JV's views on this process point.

On the other hand, if the question the Board has framed in paragraph [29] of the Notice Decision contemplates a presentation, in this proceeding, of a particular form of light-handed regulation for the JV's ownership and operation of the St. Clair Line and its extension to Dawn, then that question, in our view, is beyond the scope of this proceeding and should be dealt with after the JV has had an opportunity to consider and respond to the Decision the Board renders in this case.

The process directions that should issue to help the parties respond to a decision in this case finding that provincial jurisdiction prevails should also cover the contingency of a "do nothing" response from the JV. Based on the evidence and argument in this case, a finding in favour of provincial jurisdiction and/or a finding that the amount to be allocated to Union's ratepayers is not limited to the Net Book Value ("NBV") of the St. Clair Line may prompt a "do nothing" response from the JV.

In the submissions we will be filing on Friday. We will be arguing that provincial jurisdiction prevails and that the Board should approve a sale of the St. Clair Line to a JV in which Spectra holds a 50% interest other than through Union, as long as measures are adopted to prevent the ratepayer harm that the transaction causes. We will be arguing that a refusal by the JV to proceed with the transaction, because of findings in favour of provincial jurisdiction or because of a finding that the amount allocable to Union's ratepayers is not limited to the NBV of the St. Clair Line, would be unjustifiable.

We will be submitting that a refusal by the JV to complete an approved sale on these terms should prompt a rate-making response which excludes from Union's revenue requirement the owning and operating expenses with respect to the under-utilized component of the St. Clair Line.

When rendering its Decision in this case, we will be urging the Board to alert Union that the rate-making consequences of a "do nothing" response will be addressed if and when that contingency occurs. This, we submit, is another topic that falls within the ambit of matters raised by Union's evidence and argument, as well as by the Final Issues List in this proceeding.

Part 2 – Response to Arguments that Union and Dawn Gateway LP May Make

Proper Forum

Because the issue described in paragraph [29] of the Notice Decision is contingent upon a finding that provincial jurisdiction prevails, we anticipate that Union and Dawn Gateway LP may reiterate the arguments they have made previously about the OEB not being the "proper forum" for a determination of the jurisdictional issues.

We suspect that this argument will be made, yet again, because Union refers to it in paragraph 21 of the Notice of Constitutional Question dated August 6, 2009. There, Union states as follows:

"Union Gas submits, however, that the OEB should not be making a decision in this case on the question of whether Dawn Gateway Pipeline will actually be subject to the jurisdiction of the NEB. Dawn Gateway LP is not an applicant in this proceeding, and Union Gas submits that the proper forum for determining whether the Dawn Gateway Pipeline will be subject to regulation by the National Energy Board is Dawn Gateway LP's application to the National Energy Board."

The Board rejected submissions to this effect in its Issues Decision and Order dated April 6, 2009 (the "Issues Decision") and again in the Notice Decision dated August 6, 2009.

The Board identified the jurisdictional questions which needed to be answered to inform its Decision on the specific sale approval relief Union requests in this Application in the Draft Issues List attached to Procedural Order #1 that was circulated on or about March 16, 2009. The Issues Decision, dated some 3 weeks later, is binding on Union and Dawn Gateway LP. The filing of an Application with the NEB on May 6, 2009, one month after the jurisdictional issues were found to be relevant to this proceeding, cannot constrain the scope of matters determined by the Board to be relevant to the sale application relief Union requests.

The fact that Dawn Gateway LP is not an applicant in this proceeding has no bearing on the "proper forum" issue. Dawn Gateway LP is not an applicant because it does not own the St. Clair Line. It is, however, a party to these proceedings and, as a party, it has been active on matters of process. The presence of Dawn Gateway LP as a party to this proceeding precludes it from now challenging the Board's authority to decide the jurisdictional issues. Both Union and Dawn Gateway LP are bound by the Board's Issues and Notice Decisions.

For all of these reasons, the contention that this proceeding is not the "proper forum" for a determination of the jurisdictional questions lacks merit and particularly so when the jurisdictional characterization Union now asserts is at odds with the position it advocated and the Board supported in its September 1, 1988 Decision. If this issue is again raised and argued by Union and Dawn Gateway LP, then it should be rejected.

Constraints on Matters to be Decided

We anticipate that Union and/or Dawn Gateway LP may rely on other points Union made in Union's Argument-in-Chief delivered on July 6, 2009, pertaining to alleged constraints on the Board's decision-making options in this particular case. In paragraphs 107 to 110 of its Argument-in-Chief, Union appears to contend that the Board's decision-making options are limited to either approving Union's specific request or denying the Application. If this point is raised, then it should be rejected.

We submit that the Board has an obligation to decide the issues in its Final Issues List, including matters in dispute implicit within the parameters of those issues. The determination of these issues is necessary to inform the Board's response to the specific sale application relief Union asks the Board to grant. We submit that the Board's options are not limited to either unconditionally approving Union's request or denying the Application, as Union appears to contend. The Board is fully empowered to render a Decision reflecting its determination of the jurisdictional questions and a Decision which prevents harm and is fair.

Union and/or Dawn Gateway LP may also argue that findings in favour of provincial jurisdiction and/or findings that an allocation of benefits to ratepayers greater than the NBV of the St. Clair Line are outside the range of possible outcomes because they relate to "theoretical possibilities" and do not respect "sound business judgment". These arguments lack merit. Respect for "sound business judgment" does not prevent the Board from finding in favour of provincial jurisdiction and approving a sale of the St. Clair Line to the JV on terms which prevent harm and are fair.

In exercising its regulatory functions, the Board is not bound by the provisions of contracts, including, for example, the provision of the non-arm's length sales agreement between Union and the JV which assumes that the JV's Plan will oust provincial jurisdiction over the St. Clair Line and its extension to Dawn.¹ The inclusion of such clauses in an agreement dated May 1, 2009, to which Union is a party, being a date after the release of the Board's April 6, 2009 Issues Decision, is of questionable appropriateness. If Union was acting objectively, the clause would have recognized that the issue of jurisdiction over the St. Clair Line and its extension to Dawn was one before Union's regulator for determination. The agreement would not have presumed the answers to the jurisdictional questions in this case. It would have been conditional on appropriate approvals being obtained from the regulatory authorities having jurisdiction.

In the submissions to be filed on Friday, we will be urging the Board to find that Union's proposal to limit the allocation of benefits to ratepayers to the NBV of the St. Clair Line causes harm to ratepayers and is unfair. In this connection, we are not requesting that the deal be re-written on the basis of theoretical possibilities as Union suggests. In fact, in our submission to be filed on Friday, we will acknowledge our support for a sale of the St. Clair Line to a JV in which Spectra holds a 50% interest other than through Union as long as measures are adopted to prevent the ratepayer harm that the transaction causes.

¹ See Article 3 of Confidential Exhibit X1.2, Section 3.1 (d)(iii), (iv) and (v).

Summary

For all of these reasons, we submit that it is unnecessary to amplify the Final Issues List to receive submissions with respect to the issuance of directions to help the JV and others respond to a Decision in this case finding in favour of a provincial jurisdiction over the St. Clair Line and its proposed extension to Dawn. Nevertheless, no one will be prejudiced if the Board invites parties to make such submissions.

Please contact me if there are any questions pertaining to the contents of this letter.

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Thompson', followed by a long horizontal flourish.

Peter C.P. Thompson, Q.C.

PCT\slc

c. Intervenor EB-2008-0411
Paul Clipsham (CME)
Vince DeRose & Vanessa MacDonnell (BLG)

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