

THE ONTARIO ENERGY BOARD

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

**AND IN THE MATTER OF an Application by
Union Gas Limited pursuant to section 43(1) of the
Act, for an Order or Orders granting leave to sell
11.7 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**

ARGUMENT OF DAWN GATEWAY GP

1. Further to the Board's Decision and Order dated August 5, 2009 (page 7, paragraph 2), Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway") respectfully submits its Argument.

General

2. As noted in its letter dated August 17, 2009, Dawn Gateway has developed a project to offer seamless transportation service from Belle River Mills, Michigan across the international border to Dawn, Ontario – a single owner, a single toll and a single nomination ("Dawn Gateway Project"). That fact dictated application to the National Energy Board ("NEB") for approval to acquire or construct and to operate the Canadian pipeline segment.

3. The Dawn Gateway Project offers enhanced access to storage, supply and markets in Michigan/Ontario and beyond which, as the ICF Study demonstrates (Ex. K1.8, Appendix D), offers significant benefits in terms of increased liquidity and reduced price volatility through diversification of supply alternatives and attracting new supply from new producing regions like the Rockies and the shale gas regions under active development in the United States. As ICF identifies, this is particularly

important to Ontario and Dawn in light of the declining supply from Ontario's traditional source of supply in Western Canada.

4. The Dawn Gateway Project was designed to optimize the use of existing pipelines, reducing the environmental footprint and reducing consumer costs. A transparent Open Season held in the same timeframe as other competitors' Open Seasons resulted in the execution of five precedent agreements with shippers between a US receipt point and a Canadian delivery point. Shippers were free to choose the Dawn Gateway Project or one of the other competing cross-border transportation options, including other project sponsors conducting Open Seasons in the same timeframe. Additionally, shippers were free to stipulate their individual price and term. There was no discrimination. Dawn Gateway afforded choice. Indeed, the open, transparent nature of the entire process is the antithesis of a pipeline imposing its will on shippers.

5. There are deadlines prescribed in the contracts. There is serious prejudice to Dawn Gateway if this proceeding becomes protracted or is delayed in order to play out the confusing array of jurisdictional games referred to in the Canadian Manufacturers Exporters ("CME") letter dated August 17, 2009 ("CME letter"). It is highly unlikely that Dawn Gateway and its shippers would survive that kind of delay. Respectfully, the Board should carefully reflect on the fact that the jurisdictional intrigues contrived by CME and OEB Staff are not costless options.

6. Dawn Gateway would have expected CME and Board Staff to welcome a reduction in Union rates through the sale of the St. Clair Line and its removal from rate base and a new pipeline project that will bring new gas supplies, reduced volatility and enhanced liquidity to Dawn. Indeed, both now threaten Union with rate sanctions if that cost burden is not lifted. However, they insist upon more (OEB Staff Submission, p. 18, para. 56; 1T29:19-23).

7. Dawn Gateway is paying for a 20 year old pipeline. The contract price will not change (1T77:11-15). It is not clear to Dawn Gateway by what lawful means interveners can demand from Union a refund of past tolls paid for past distribution service or as an after-the-fact imprudence charge. The record discloses that the net book value ("NBV") is already in excess of the fair market value. There is no evidence on the record to support any other price. It is better left for Union to respond to these proposals in detail since the Dawn Gateway/Union sale price for the St. Clair Line will not change.

8. Moreover, the intervenors after-the-fact re-pricing proposal makes no sense. The Board may wish to consider the alternative which logically arises if the existing under-utilized facilities were re-priced at replacement cost. A much shorter and more direct route from the St. Clair River Crossing directly to Dawn (paralleling the existing TCPL/Vector pipeline corridor) would be far cheaper than building a new pipeline along the route followed by the St. Clair Line and the Bickford-Dawn Line. Respectfully, it is nonsensical to introduce fanciful valuations without supporting evidence so that the related assumptions can be tested. If Dawn Gateway had to pay replacement cost for the 20 year old St. Clair Line, it would make more sense to build a brand new pipeline over a shorter route. Ironically, this would have the effect of expanding the environmental footprint of energy infrastructure in the area and at the same time stranding Union's existing St. Clair Line. Landowners have expressed concerns regarding the impact of additional pipeline routes on their lands and farming operations. Through the easements granted, landowners have previously agreed that the specific route for the Bickford-Dawn Line is an acceptable route for a high pressure natural gas transmission line. Landowners are not looking for additional pipeline routes to cross their land (GAPLO-Union (Dawn Gateway)/CAEPLA Pre-filed Evidence, CAEPLA Written Evidence Statement, May 4, 2009, paragraph 8)

9. Dawn Gateway means no disrespect to the Board when it states as a basic jurisdictional fact that its cross-border project is subject to federal jurisdiction. That is why it filed the relevant application with the NEB; an application which has and will

be supplemented with further relevant evidence such as standard transportation terms and conditions negotiated with its shippers; and blanket approvals for landowner use of the easement and safety zones. Not all that information is before this Board. The Dawn Gateway applications are before the NEB. Neither Union nor Dawn Gateway have asked the OEB to approve those NEB applications.

10. The NEB approval process, now underway, will take its own course. As lead agency along with the Canadian Environmental Assessment Agency ("CEAA") the NEB is coordinating and will conduct the federal environmental review (Dawn Gateway August 17th letter, attachment). With respect, this Board should take care not to attempt to regulate a federal undertaking. Consider, for example, the irony of the OEB never having directly regulated use of the federal pipeline safety zone but now seeking to do so as a requested condition of sale approval. Consider too the legality of the exercise of such purported jurisdiction.

11. Dawn Gateway offers these general remarks as context for its position outlined on the various issues listed below. The serious uncertainty raised by the CME's recent musings about its yet-to-be-filed Argument and the further process it may propose to convert a pipeline offering point-to-point cross-border transportation service from Belle River Mills, Michigan to Dawn, Ontario (CME letter, p. 2, paras. 2 and 5) from federal to provincial jurisdiction is deeply troubling. The survival of the Dawn Gateway Project is very much at stake. Contrary to CME's suggestion, the related delays associated with its proposals are seriously prejudicial.

12. Regarding the specific issues, Dawn Gateway respectfully submits the following.

Issue 1.2 – "If the Proposed Dawn Gateway Line is Ultimately Completed, Should it be Under the Jurisdiction of the OEB or the NEB?"

13. As noted above, the Dawn Gateway Line is proposed to extend from Belle River Mills, Michigan across the border to Dawn, Ontario. The project offers seamless point-to-point international gas transportation service. The single owner and

operator of the Canadian portion of the Dawn Gateway Line, contrary to OEB Staff's misreading of the evidence, is Dawn Gateway (OEB Staff Submission, p. 1, second bullet, Section 1.2 and p. 3, para. 8). Dawn Gateway will subcontract for the performance of various services, some of which, such as marketing and gas control, will be performed under contract by DTE Energy. That does not detract from the fact that it is Dawn Gateway which exercises all management, control and direction of the project – no one else (1T159:14-15 and 19-21).

14. Each segment of the Dawn Gateway Project – including the Michigan segment currently owned by Michigan Consolidated Gas Company; the St. Clair River Crossing currently owned by St. Clair Pipelines LP; the St. Clair Line currently owned by Union; and the Bickford-Dawn line to be constructed by Dawn Gateway – are integral to the functioning of the Dawn Gateway Line and the provision of a seamless international transportation service (1T7:10-26; 1T123:7-23). OEB Staff are wrong to suggest otherwise (OEB Staff Submission, p. 8, paras. 31-32).

15. OEB Staff also draw attention to the TCPL-Alberta situation where the fact that 80% of its receipt volumes cross interprovincial borders was sufficient to convert the local work or undertaking into a federal work or undertaking (paragraph 29). In the present case, when completed, the Dawn Gateway Line would transport 100% of the volumes from its receipt point in the U.S. (360,000 dekatherms/d) to its Canadian delivery point under discrete tariffs, at discrete rates, for a discrete set of shippers, under discrete contracts, under discrete operational controls. If Union were required by the OEB to own and operate such a line, Dawn Gateway respectfully submits that the only constitutional issue would be how far back into the Union system federal jurisdiction extends.

16. On the basis of these facts, there should be no doubt that federal jurisdiction applies and that the NEB is the regulator with jurisdiction once the proposed Dawn Gateway Line is completed. As Dawn Gateway noted in its letter of July 17, 2009, however, the St. Clair Line is subject to OEB jurisdiction both now and after approval

to sell is granted. It only becomes federal if the NEB approves the related applications and if the sale actually takes place.

17. Dawn Gateway also notes the unique nature of the jurisdictional authority in the United States referred to in CME's letter (p. 3, para. 2; 1T49-51) and adverted to in the OEB Staff's submission (page 13, bullet (ii) sub (a)). The Michigan Public Service Commission has jurisdiction over the Michigan segment due to what is known as the Hinshaw Amendment to the *Natural Gas Act* (section 1(c) "NGA") which creates an exception to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). No such amendment or exception exists in the *National Energy Board Act* ("NEB Act") for natural gas pipelines though for international power lines there is carefully circumscribed authority to rely upon provincial certification under certain circumstances (ss. 58.17 et seq). There are no similar provisions in the NEB Act affecting gas pipelines. As such, an international gas pipeline has to be regulated by the NEB. In summary, whatever might be the U.S. constitutional and statutory framework, it does not apply in Canada. The existence of the various NEB Group 2 cross-border pipelines in the same general area is proof of that fact.

Issue 2 – Impact on Union's Transmission and Distribution Systems and Union's Customers

Issue 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?"

18. Dawn Gateway does not have first hand experience with the operating characteristics of the Union system. On the basis of the record developed in this proceeding, however, it is difficult to reconcile OEB Staff's version of the facts with those of the operator, Union.

19. Dawn Gateway defers to Union on the details of this issue save to observe that there are no distribution customers connected to the St. Clair Line, nor are any expected to be connected in the future (Ex. K1.7, Board Staff #5). Nor is the St. Clair

Line integral to providing distribution service to Sarnia. Indeed Union's evidence is that the St. Clair Line could be taken out of service without prejudice to the continued provision of safe and reliable service to Sarnia, and at lesser cost (Ex. K1.7, Board Staff #4).

20. OEB Staff also are wrong about the effect on shippers on the St. Clair Line losing access to the C1 service and rates. Their suggestion is that those shippers would lose access to cost-based rates and be forced to use market-based tolls (OEB Staff Submission, pages 11-16). Virtually all C1 services between St. Clair and Dawn today are short term services priced at market-based rates (1T168:4-7 and 1T9:24 to 1T10:2). Dawn Gateway's tolls also are market-based.

Issue 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?"

21. Once again, Dawn Gateway defers to Union on the details of this issue, but the record suggests future customers can connect to the Sarnia Industrial Line (Ex. K1.7, CME #3 and Board Staff #5). Moreover, Dawn Gateway is an open access transporter which is willing to provide service to any creditworthy shipper. Dawn Gateway has filed its standard form of Precedent Agreement as part of its NEB Application (Ex. K1.8 Appendix Q). Non-discriminatory service is available to shippers subject to standard contractual provisions at prices and contract terms bid to and accepted by the pipeline. Dawn Gateway will be filing standard form transportation contracts and tariffs with the NEB. As such, an additional supply and transportation option to Union supply and transportation would become available to future customers in proximity to the St. Clair Line. There is no tied or bundled service; and no requirement that shippers have any storage services (1T176:19 to 177:16).

22. In regards to intervenors' and Board's concerns that STAR-like reporting is necessary to facilitate a transparent and open process for acquiring access, Dawn Gateway respectfully submits that the proposed mandatory historical contract

reporting of volumes and price should not be the benchmark for making such a determination.

Baker: What I would say, further, on price disclosure and transparency, is that on a go-forward basis the price or value of the service does exist in the market every day. So when parties or shippers, customers, are looking whether they want to hold or contract for transportation, they will look at what the market value is, in this case between Michigan and Dawn.

That's published every day on various bulletin boards, various publications, and that's what they would look at in order to make a determination in terms of what the value of that transportation service or path is and what value they would presumably be willing to pay for it in the market.

So just because you don't have some disclosure of historical contracts doesn't mean that you don't have transparency, in terms of the price or the value of that service going forward.” (1T81:17 to 82:11; emphasis supplied)

Issue 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 Ratemaking Purposes?"

23. Dawn Gateway again would defer to Union as the distribution operator with respect to detailed operational impacts. A number of OEB Staff submissions with no apparent relevance to Issue 2.3, however, beg a response.

24. As noted in its August 17, 2009 letter, Dawn Gateway outlined the transparent, non-discriminatory manner in which it canvassed for and secured contractual support for its project. It is form over substance for OEB Staff to insist on market power assessments and the like where there are no captive customers on Dawn Gateway; when there were existing competitive alternatives available; when there were new, competitive options soliciting support in contemporaneous Open Seasons; and when

shippers themselves picked the price and contract term that best served their commercial interest. Dawn Gateway's future Open Season process will be fully transparent, subject to tried and true complaint-based NEB regulation which has existed across the country for many years. Open access transportation will be subject to standard contractual terms and conditions which, as noted above, will be filed with the NEB.

25. OEB Staff's implication that there is something deficient about NEB Group 2 pipeline regulation is offensive. The Competition Bureau, to the best of our knowledge, has never received a complaint about a failure of NEB Group 2 regulation. Moreover, the OEB Staff proposals would uniquely burden Dawn Gateway and the competition it can bring to existing NEB regulated cross-border links like ANR Link to Niagara Gas Transmission, Bluewater, TCPL, Vector and so forth. Dawn Gateway does not operate storage; does not require its shippers to contract for storage; does not provide storage services; and is prepared to abide by whatever rules or Codes of Conduct that the NEB considers appropriate for it as well as its competitors. Once again, the NEB record is not closed and its own decision has yet to be provided.

26. With respect, the real objectives of CME and OEB Staff appear to be either to artificially inflate asset values in order to create a gain and then confiscate that gain on the sale of surplus assets; or to create a provincially regulated cross-border pipeline project using surplus assets no longer required for distribution service in order to appropriate the revenue generated to subsidize distribution rates.

27. It may be of interest to the Board that the NEB recently dealt with a similar situation. The NEB Reasons for Decision MH-1-2006 permitted the sale of surplus TCPL gas pipeline assets at NBV to an affiliated oil pipeline developer (Keystone-MH-1-2006: Chapter 5 – *The Transfer at Net Book Value*, pp. 53-54, and Chapter 6 – *The Board's Views on the Transfer and the Public Interest*, pp. 55-59). The length of pipe and the value attributed to it were both much greater than the situation in the present case. That decision also discusses the difference between "no harm" and "no

risk of no harm" which, in respect of the latter, the NEB noted it: "... would be impossible and could result in no regulatory approvals ever being granted" (p. 59).

28. Moreover, there is extensive case authority at the Supreme Court of Canada (Stores Block) and the Alberta Court of Appeal (interpreting the SCC Stores Block Decision) which holds that customers pay for service; they thereby acquire no interest to the underlying assets; customers are not entitled to recovery of past rates paid from the proceeds of sale of utility assets; revenue generation by surplus utility assets to subsidize rates is unlawful; and confiscation of sale proceeds by a condition of sale or in the context of a rate proceeding are beyond the jurisdiction of the regulator (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC4 [Stores Block]; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200; SCC leave refused December 4, 2008 [Carbon]; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2009 ABCA [Harvest Hills]; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2009 ABCA 246 [Salt Caverns]).

29. Respectfully, Dawn Gateway cautions this Board about straining its constitutional limitations in order to respond to intervenor and OEB Staff attempts to serve these improper purposes. It is a slippery slope indeed.

30. Moreover, Dawn Gateway's cost is fixed by contract. While interveners may "deem" a higher cost, what is the basis for imposing a penalty on Union? – imprudence? It is a serious misrepresentation of the facts to suggest that Union has imposed the costs of an unprofitable pipeline investment on customers since that line was approved in 1988. In the E.B.L.O. 226, Union's justification for the St. Clair Line was to access new, competitively priced gas supplies post-deregulation. One party estimated the associated gas cost benefits to pay out in two years (Ex.J2.1, Attachment, p. 81, para. 3.5.6). The Board disagreed. It estimated a six-year payout:

Board Findings

3.5.15 In spite of the observed weaknesses in Union's estimates, the Board notes that the savings expected to result from United States spot and firm discretionary gas purchases can reasonably be expected to exceed the costs to be incurred within six years. Thus, the Board finds that Union's proposal is economically feasible since the profitability index will likely be acceptable over six years, and will certainly meet the Board's criterion over the lifetime of the project. (at pp. 84-85; Ex. J2.1, Attachment)

31. That payout date has long since passed. OEB Staff fail to reference or attribute any value in the past related to reduced gas supply costs which supported the construction of the St. Clair line. CME and OEB Staff now threaten Union with rate sanctions if the cost burden of the St. Clair Line is not removed from customers (CME Letter, p. 4, para. 5; OEB Staff Submission, p. 20, para. 64). But when Union tries to relieve that burden and enhance access to new Rocky Mountain supplies, shale gas, new storage and liquidity, to dampen price volatility and enhance security of supply, CME and OEB Staff say "NO" – not unless we get even more! This bizarre result is certain to frequently repeat itself in heavily litigated proceedings the longer the confusion is permitted to exist as to who owns utility assets, their sale proceeds or the revenues they generate after they cease to have a operational utility use.

Issue 4.0 –First Nations Consultations

Issue 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?"

32. There did not appear to be any issue with the proposed sale.

Issue 5.0 - Appropriate Test

Issue 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?"

Issue 5.2 - "What is the Appropriate Test to be Applied by the Board in this Application?"

33. Dawn Gateway submits that the primary test to be employed in connection with the present application is that approval of the sale of the St. Clair Line should only be granted provided that Union is able to furnish safe and reliable distribution service without those assets at the same or lesser cost. The evidence in this proceeding is clear that Union can meet all its existing and foreseeable distribution needs without the St. Clair Line (Ex. K1.7, Board Staff #4). No distribution customers connect to that line, nor would they be expected to in future (Ex. K1.7, Board Staff #5). The Union cost of service would be decreased, lowering rates borne by customers (1T165:22-23). In all respects the primary test is satisfied that Union consumers would not be harmed by approval of the sale of the St. Clair Line.

34. In a broader context, the Board should take comfort in the proposed future use of the St. Clair Line. That does not mean this Board should be the arbiter of whether Dawn Gateway should be approved. As CME noted, Dawn Gateway is not an applicant because it does not own the St. Clair Line (CME letter, page 5). There is no slight to the OEB intended by Dawn Gateway emphasizing the fact that it is an applicant before the NEB and that it and the Canadian Environmental Assessment Agency are leading the environmental assessment. That decision was driven simply by the international character of the project, not an attempt to avoid OEB jurisdiction. There is a significant difference between suggesting the OEB, in effect, must "approve" the Dawn Gateway Project; as opposed to the OEB knowing that, if the NEB approves the project and if the sale is completed, the St. Clair Line will be incorporated into a cross-border project. This Board, therefore, may take comfort in the fact that the jurisdictional character of Union's St. Clair Line will only change if

the NEB approves a new seamless service which would operate on a non-discriminatory basis via transparent Open Seasons, all subject to the NEB's oversight; that new supply sources, storage and markets could be accessed as more fully detailed in the ICF study; and that liquidity and competition for supply and transportation would be enhanced thereby generating value to Ontario and all Ontario consumers through reduced price volatility.

35. In these important respects, an NEB approval of the Dawn Gateway Project would affirm that it is in the Canadian public interest. Such a finding also would be fully consistent with this Board's statutory objectives outlined in section 2 of its enabling legislation (as quoted at p. 32, OEB Staff Submission). By completing the large diameter link from Michigan to Dawn storage, competition in cross-border transportation services would be enhanced; access to competitive gas supplies would be enhanced; connection to new upstream supply would be enhanced and security of supply and reliability would be enhanced. Nothing could be more rational in terms of infrastructure development than maximizing the use of existing facilities; minimizing the environmental footprint; reducing customer rates; and providing additional capacity to funnel new gas supplies to power developers, industrial, commercial and residential customers in Ontario and beyond.

36. As Dawn Gateway noted earlier, OEB Staff is simply wrong about its tariff concerns. The NEB record is not yet complete with respect to the standard terms and conditions of transportation service. A transparent Open Season process and a bid process not confined to pre-ordained prices or contract terms is as non-discriminatory and open access as could be imagined. NEB regulation is simply not deficient.

37. The Dawn Gateway Project opportunity, however, stands a good chance of being choked off by the web of jurisdictional complexity and intrigue which has surfaced at this proceeding, with the result being the inability of Dawn Gateway to meet the November 1, 2010 in-service date. A lengthy digression into alternate rate designs, much less the confused and byzantine process CME appears poised to

propose in its yet-to-be-filed Argument would also certainly end the Dawn Gateway project.

38. Ironically, both CME and OEB Staff want the cost responsibility for the under-utilized St. Clair Line removed from Union's customers. That is what Union now proposes to do. In Dawn Gateway's respectful submission, this Board should now approve Union's proposal to do so.

39. Regarding lands related conditions, with respect, the Board should take care not to attempt to decide matters which may or may not be at issue before a different regulator in a proceeding in which the record is not yet complete. The NEB has very recently received additional evidence, including, for example, blanket approvals for various types of activities which landowners can undertake in the safety zone. These blanket approvals may still evolve through the NEB process. In brief, the NEB record is not yet complete. The federal process is designed to mitigate all impacts upon landowners and to compensate for all damage caused in the construction, operation and abandonment of a pipeline. The existence of that process (which includes NEB supervision and pipeline arbitration committees appointed by the federal Minister, as necessary) provides the OEB with the comfort that any legitimate compensation related issues arising will be addressed in a fair and impartial manner. With respect, the OEB should refrain from conditioning its approval herein in such a way as to adjudicate issues said to arise under federal jurisdiction. As noted above, it would be ironic indeed if this Board purported to regulate use of the federal safety zone as a condition of its approval having had no jurisdiction to regulate off-easement uses previously.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.