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August 24, 2009

Filed via RESS

Ontario Energy Board
2300 Yonge Street, F27
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Madam Secretary:

Re: EB-2008-0411: GAPLO/CAEPLA's Reply Submissions re: Possible New Issue

Pursuant to the Board's decision and order dated August 5, 2009, GAPLO/CAEPLA provides the following reply submissions with respect to the possible new issue proposed by the Board.

In Union's submissions of August 17, 2009, Union states:

"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."¹

In Dawn Gateway's submissions of the same date, Dawn Gateway similarly states:

"The Dawn Gateway Line, if completed, is an international work and undertaking for the cross-

¹ Union Submissions (August 17, 2009) at p.2, para.5.

border transmission of gas from Bell [sic] River Mills, Michigan, to Dawn, Ontario.”²

Based upon this characterization of Dawn Gateway as an international pipeline subject to NEB regulation, both Union and Dawn Gateway oppose this Board considering in this proceeding an alternative form of regulatory treatment for Dawn Gateway in the provincial jurisdiction.

With respect, the jurisdictional issue as defined by the Board in this proceeding is precisely whether the St. Clair Line as part of Dawn Gateway should continue to operate in the jurisdiction of the Ontario Energy Board or whether it should, in fact, fall under the jurisdiction of the National Energy Board. That jurisdictional issue awaits determination by this Board.

Should this Board accept the submissions of Board staff, CME, FRPO and GAPLO/CAEPLA on this application that there is no material change in the use and operation of the St. Clair Line under Union’s Dawn Gateway’s proposal which would eliminate it as integral to Union’s provincial system (as previously determined by the Board) and justify its approval for sale and transfer to the federal jurisdiction, the St. Clair Line will continue in the provincial jurisdiction. In this event, with respect to the appropriateness of this Board considering alternate regulatory treatment to achieve the financial objectives of Dawn Gateway, Union has expressly acknowledged that if a different provincial regulatory approach permitting negotiated rates were available, it might be possible “to structure the project in a way that meets customer’s needs, satisfies the investor’s risks/return requirements, and maintains OEB jurisdiction over some assets”³.

There is no basis for Union’s assertion that “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 U.S. pipeline, as a single enterprise...”⁴ Again, with respect, while functional integration of other facilities under common management, control and direction may determine their constitutional character as federal⁵, the separate regulation of

² Dawn Gateway Submissions (August 17, 2009) at p.2.

³ Union Submissions (August 17, 2009) at p.8, para. 21.

⁴ Union Submissions (August 17, 2009) at p.6, para. 17.

⁵ GAPLO/CAEPLA Written Argument at p.6, para.11.

MichCon/St.Clair/Union facilities does not preclude their functional integration under the respective management, control and direction of these parties.

As referenced in GAPLO/CAEPLA's written argument, it is the reality of the commercial relationship between the parties and not their "commercial costume" which determines the constitutional character of these pipeline facilities as provincial.⁶ Whether operated as they are currently or in some other combination by the same parties (as under Dawn Gateway), the constitutional character of these facilities remains the same. However, with the availability of negotiated rates in the provincial jurisdiction, functional integration of the American and Canadian components could be achieved as readily with the St. Clair Line and new Bickford to Dawn line under provincial jurisdiction as under Union's Dawn Gateway proposal. From the perspective of their customers, there should be no difference in the capacity of Spectra/GTE to "meet the business needs of customers and investors"⁷.

In its submissions, with respect to the proposed transfer of the St. Clair Line as part of Dawn Gateway to the federal jurisdiction, Dawn Gateway "questions the basis for this Board's concern"⁸. From the extensive written argument submitted by Board staff and intervenors in this proceeding, it is apparent that this Board must be concerned because of the proposed transfer of facilities properly within the provincial jurisdiction and the negative impacts which will result for both rate payers and landowners.

GAPLO/CAEPLA supports the submissions of CME that the proposed new issue "falls within the scope of matters already listed for determination in this proceeding" but that, in any event, "no one is prejudiced by the addition of such questions"⁹. Union suggests that "adding the potential issue at this time would likely result in a delay of many months, and possibly even years"¹⁰ which "would jeopardize the presently targeted November, 2010 in service date for the Dawn Gateway Pipeline"¹¹. Dawn Gateway similarly comments that "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 ..."¹². Dawn Gateway

⁶ GAPLO/CAEPLA Written Argument (August 21, 2009) at p.19, para. 41.

⁷ Union Submissions (August 17, 2009) at p.8, para. 21.

⁸ Dawn Gateway Submissions (August 17, 2009) at p.2.

⁹ CME Submissions (August 17, 2009) at pp. 3 and 4.

¹⁰ Union Submissions (August 17, 2009) at p.7, para. 20.

¹¹ *Ibid.* at p.8, para.22.

¹² Dawn Gateway Submissions (August 17, 2009) at p. 5.

notes that “applications for approval of that project [Dawn Gateway] have been filed with the National Energy Board. The application has been accepted as complete and the review process is underway.”¹³

With respect to the implications for Dawn Gateway of whatever additional time may be required by this Board to determine appropriate alternate regulatory treatment for the Dawn Gateway pipeline, GAPLO/CAEPLA notes that Union’s application in this proceeding itself requests until December, 2013 for the project to proceed on the basis that “Dawn Gateway JV may require several years to complete all the steps needed to put the Dawn Gateway Line into service”¹⁴. For the information of the Board, in response to the NEB’s direction of August 12, 2009 (attached to Dawn Gateway’s submissions) with respect to commencement of the NEB review process, GAPLO/CAEPLA will be requesting a stay of the NEB’s review of the Dawn Gateway application pending disposition of outstanding issues by this Board.

Yours very truly,

COHEN HIGHLEY LLP

A handwritten signature in black ink, appearing to read 'P. Vogel', with a stylized, cursive flourish at the end.

Paul Vogel

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c.c. Parties to EB-2008-0411 *via email*

¹³ *Ibid.* at p.2.

¹⁴ Union’s Application (December 23, 2008) at p.3, para.12.