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August 21, 2009

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

Dear Ms Walli,

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

Please find attached the Written Argument and Brief of Authorities of Canadian Manufacturers & Exporters ("CME"), electronic copies of which are being sent to intervenors in this proceeding.

Paper copies are being sent to the Board as required.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Peter C.P. Thompson', is written over a horizontal line.

Peter C.P. Thompson, Q.C.

\slc

enclosures

c. Intervenor EB-2008-0411  
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**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 kilometers 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.

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**ARGUMENT OF  
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

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**August 21, 2009**

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## **I. Introduction**

1. In this Application, Union Gas Limited ("Union") asks the Ontario Energy Board ("OEB" or the "Board") to approve the sale of the St. Clair Line to the Dawn Gateway Limited Partnership ("Dawn Gateway LP"), a Joint Venture ("JV") between Union's owner, Spectra Energy Corporation ("Spectra"), and DTE Pipeline Company ("DTE"). Using other assets owned by their subsidiaries and the St. Clair Line, which is an 11.7 km segment of Union's integrated system that the JV proposes to extend some 17 km from Bickford to Dawn, the JV, as a new regulated utility, plans to provide point-to-point Firm Transportation ("FT") services from Belle River Mills, Michigan, to Dawn, Ontario, under the auspices of fixed price long term negotiated contracts (the "JV's Plan"). This proposal will significantly increase the utilization of the existing Belle River to Bickford Pipeline System, which was constructed and subsequently operated for some 20 years as a single pipeline pursuant to cooperative arrangements between entities that are now subsidiaries of Spectra and DTE's parent, DTE Energy, a large Detroit-based diversified energy company involved in the development and management of energy-related businesses and services across the United States.
2. In response to jurisdictional issues found by its regulator to be relevant to the outcome of this proceeding, Union contends that the implementation of the JV's Plan ousts provincial jurisdiction over the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn. We disagree on the grounds that there are no jurisdictional facts to support such a conclusion. Union should

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welcome rather than resist a consideration of the jurisdictional issues raised by its own regulator, particularly since Union's position on jurisdiction, in this Application, is at odds with the position it advanced, and the Board accepted, when Union originally sought the Board's approval to build the St. Clair Line more than 20 years ago.

3. Union asserts that federal jurisdiction over the St. Clair Line and its proposed extension to Dawn is critical. We disagree. Both the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn and the JV's provision of point-to-point FT services from Belle River to Dawn under fixed price long term negotiated contracts can be readily accommodated under provincial jurisdiction.
4. Union asks the Board to approve a sale of the St. Clair Line to the JV at its Net Book Value ("NBV") on the ground that a transfer at that price will not harm ratepayers. We disagree. This proposal deprives Union's ratepayers of future increased utilization benefits attributable to the St. Clair Line to which they are entitled under the well established regulatory principle requiring utility owners to maximize the value of under-utilized utility assets for the benefit of their ratepayers.
5. The Board will be challenged to constructively respond to the important and complex issues this case raises in a manner that is compatible with the applicable legal and regulatory principles and the public interest. We urge the

Board to tailor its response to the application to prevent Union's ratepayers from being deprived of the increased utility asset utilization benefits to which they are entitled. It is our hope that the submissions that follow will help the Board to fashion such a response.

6. In the submissions below, we urge the Board to find that provincial jurisdiction prevails over the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn. The JV's ownership and operation of the St. Clair Line and its extension to Dawn should be provincially regulated in an atmosphere of transparency. The Board should confirm its authority and willingness to regulate the JV in a manner that accommodates the provision of point-to-point FT services from Belle River Mills to Dawn under the auspices of negotiated long term fixed price contracts and commit to exercising that authority in a way that does not interfere with the five contracts the JV has made to provide such services. The sale of the St. Clair Line to the JV should be approved on terms that prevent ratepayer harm by calling for a significant allocation of discounted future utilization benefits attributable to the St. Clair Line to Union's ratepayers.

## **II. Background and Overview of CME's Position**

7. In a decision dated September 1, 1988, the OEB rejected the argument, then being made by TransCanada PipeLines Limited ("TCPL"), that construction of a segmented Belle River Mills to Bickford Pipeline system by Michigan Consolidated Gas Company ("MichCon"), St. Clair Pipelines Limited now St. Clair Pipelines LP ("St. Clair Pipelines") and Union was a federal undertaking

subject to regulation in Canada by the National Energy Board ("NEB"). At Union's urging, the Board determined that the St. Clair Line, which connects with the Belle River to Bickford segmented pipeline at the St. Clair Valve and extends from that Valve to Bickford, was part of Union's integrated system subject to regulation by the OEB.<sup>1</sup> An Application for leave to appeal the OEB's decision to the Divisional Court was dismissed.<sup>2</sup>

8. In a decision dated October 1988, the NEB deferred to the Divisional Court's response to the OEB's determination that the St. Clair Line was subject to provincial regulation. The NEB determined that the only segment of the Belle River to Bickford Pipeline System subject to federal regulation in Canada was the St. Clair Crossing, extending some 0.87 kilometers from the international boundary in the middle of the St. Clair River to the St. Clair Valve on shore in Ontario.<sup>3</sup> Accordingly, it has already been judicially determined that the St. Clair Crossing is the federally regulated link between the integrated systems of MichCon and Union.
9. In a decision dated March 21, 1989, the Michigan Public Services Commission ("MPSC") also rejected TCPL's argument that the Belle River to Bickford system was subject to federal regulation. At MichCon's urging, the MPSC determined

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<sup>1</sup> Exhibit J2.1, E.B.L.O. 266 Decision with Reasons ("E.B.L.O. 266 Reasons"), paras. 3.8.57 to 3.8.89.

<sup>2</sup> Transcript Volume 2, page 31, line 25 to page 32, line 1; and also see NEB Reasons for Decision, *Altamont Gas Transmission Canada Limited*, GHW-1-92, February 1993 at page 30 stating that "The Ontario Divisional Court dismissed TransCanada PipeLines' Application for Leave to Appeal. The Court provided brief reasons by way of a written endorsement on the record." See CME's Brief of Authorities, Tab 1.

<sup>3</sup> Exhibit K1.7, GAPLO Interrogatory #14 at page 48 being NEB GH-3-88 Reasons for Decision, October 1988 at pages 3, 14 and 15; and Transcript Volume 2, page 26, line 24 to page 32, line 3.

that the 4.7 kilometer segment of 24 inch pipeline extending from the Belle River Mills Compressor Station to the international border in the middle of the St. Clair River was part of MichCon's integrated transmission, distribution and storage system and subject to State regulation by the MPSC.<sup>4</sup>

10. Based on the foregoing, it has been judicially determined in Canada and the U.S. that MichCon's integrated system ends at the international border in the middle of the St. Clair River and that Union's integrated system begins at the St. Clair Valve. In Canada, the St. Clair Crossing is the federally regulated link between the integrated systems of MichCon and Union.
11. DTE's parent, DTE Energy, is the ultimate owner of MichCon.<sup>5</sup> Spectra is the ultimate owner of St. Clair Pipelines and Union. Over the years, the contiguous 24 inch pipeline segments from Belle River Mills to Bickford have been operated by their ultimate owners as a single pipeline pursuant to cooperative commercial contracts between their respective subsidiaries.<sup>6</sup>
12. For many years, the Belle River to Bickford system has been substantially under-utilized, primarily because of constraints on Union's Bickford to Dawn Pipeline system.<sup>7</sup> The possibility that the St. Clair Line might need to be extended to Dawn to relieve these capacity constraints was anticipated by Union in

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<sup>4</sup> Exhibit K1.7, GAPLO Interrogatory #14, pages 29 to 46, and Transcript Volume 2, page 22, line 14 to page 26, line 23.

<sup>5</sup> Exhibit K1.8, Volume 1, page 6, para. 4.

<sup>6</sup> Exhibit K1.7, GAPLO Interrogatory #2, pages 1 to 57.

<sup>7</sup> Exhibit K1.6, Union's Pre-Filed Evidence, paras. 19 to 30.



September 1988 when it requested and obtained approval to construct the line as part of its integrated system.<sup>8</sup>

13. Recently, DTE and Spectra recognized that utilization of the Belle River to Bickford Pipeline could be materially enhanced by extending the 24 inch St. Clair Line from Bickford to Dawn in order to provide point-to-point FT services between Belle River Mills and Dawn under the auspices of fixed price, long term negotiated contracts.<sup>9</sup>
14. An Open Season process produced five binding contracts for such services conditional upon various regulatory approvals, including approval for the construction of an extension of the 24 inch St. Clair Line from Bickford to Dawn.<sup>10</sup> These negotiated long term point-to-point FT services contracts are expected to increase the utilization of the St. Clair Line component of the existing Belle River to Bickford system by a factor of about 8.3 from a level between 2003 and 2008, on average, of about 9.35%, to a utilization level of approximately 77.7%.<sup>11</sup> We strongly support the implementation of measures which materially increase the utilization of existing under-utilized utility assets. We readily acknowledge that achieving increased utilization of utility assets is in the public interest.

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<sup>8</sup> Transcript Volume 1, page 115, line 13 to page 117, line 14, and Exhibit K1.9, GAPLO-Union Evidence, Tab 1, Attachment 1.

<sup>9</sup> Transcript Volume 1, page 10, line 12 to page 13, line 1.

<sup>10</sup> Exhibit K1.6, para. 37, and Exhibit K1.8, pages 8 and 9, paras. 12 to 17, and pages 55 and 56, and Attachment Q.

<sup>11</sup> Exhibit K1.7, FRPO Interrogatory #6 – the total Average Quantity as a % of daily capacity for the six years, 2003 to 2008, is 56.1% or 9.35% on average. See also Transcript Volume 1, page 22, line 2 where Union's witness estimates the average utilization factor for the years 2003 to 2008 at 9%. The commitments made by the five Open Season Shippers for 295,459 Gjs/day represent 77.7% of the total capacity of 379,876 Gjs/day.

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15. Under the plan devised by Spectra and DTE, Union's ratepayers will not realize the benefits associated with the materially enhanced utilization of the existing St. Clair Line. These benefits will be realized by the JV that Spectra and DTE have created. The plan devised by Spectra and DTE disregards the well established regulatory principle that obliges a utility owner to maximize the use of under-utilized utility assets for the benefit of utility ratepayers.<sup>12</sup> As well, there is no transparent presentation, in this case, of the margins to be realized from the increased utilization of the St. Clair Line as part of the proposed Belle River Mills to Dawn Pipeline System. The evidence does not include any calculation of the net present value of those margins over the anticipated economic life of the facilities. The disclosure with respect to these elements of the plan falls well short of the type of disclosure an OEB regulated utility is obliged to provide.<sup>13</sup>
16. The proposed Belle River to Dawn Pipeline is merely another cooperative venture between the ultimate owners of MichCon, St. Clair Pipelines and Union to own and operate it as a single pipeline system. In essence, the JV created by Spectra and DTE is an arrangement that revises the existing cooperative arrangements that have governed the operation of the Belle River to Bickford system since it was constructed some 20 years ago.<sup>14</sup>

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<sup>12</sup> See paras. 107 and 108 of this Argument for cases which refer to this regulatory principle.

<sup>13</sup> See paras. 115 and 116 of this Argument for cases describing the type of disclosure OEB utilities are required to provide.

<sup>14</sup> Exhibit K1.7, GAPLO Interrogatory #2, pages 1 to 57.

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17. The JV between Spectra and DTE is an arrangement between two large intrastate and intraprovincial integrated transmission, distribution and storage utilities to provide international transportation services between parts of their integrated systems. The JV is not an enterprise controlled by either one of the ultimate owners of these utilities. It is a venture deliberately structured to prompt these parties to cooperate with one another in order to maximize the transportation of gas between their two integrated systems.<sup>15</sup> The JV is a cooperative enterprise between the ultimate owners of two state and provincially regulated utilities. The JV depends upon the resources of those utilities for its operation. Without these resources, the JV is nothing but a shell. The two state and provincially regulated utilities are a duet. The JV changes the sheet music but the two state and provincially regulated performers at the piano bench are the same duet that has performed together for some 20 years.
18. The creation of a JV is not essential. Other forms of cooperative arrangements between the parties to the existing arrangement could be used to achieve the objective of increasing the utilization of the existing facilities. Other alternatives include a partnership or a combination of cost and revenue sharing arrangements between MichCon, St. Clair Pipelines and Union, along with their agreement to provide point-to-point FT services pricing between Belle River Mills

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<sup>15</sup> Transcript Volume 1, pages 159 to 162; Union Argument-in-Chief, para. 10 where it is acknowledged that neither DTE nor Spectra have control over the JV.

and Dawn. That said, as long as harm to ratepayers is prevented, we support the creation of the JV.

19. Similarly, a transfer of assets to the JV is not essential to achieving the goal of materially increasing the utilization of the existing utility assets. A lease of assets to the JV would suffice, as is evident from the fact that MichCon may lease, rather than sell, its Belle River Mills segment to the JV.<sup>16</sup> Nevertheless, as long as harm to ratepayers is prevented, we support a transfer of the St. Clair Line to the JV. We are not suggesting that Spectra must participate in the JV through Union, nor are we suggesting that Union should be the owner of all of the assets the JV plans to use.<sup>17</sup> We support the transfer of the St. Clair Line to the JV as long as measures are put in place to prevent ratepayer harm.
20. Union contends that the combined effect of the extension of the St. Clair Line from Bickford to Dawn and the arrangements under the JV for owning and operating the Belle River to Dawn Pipeline, as a single pipeline system, is to oust the OEB's regulatory jurisdiction over the St. Clair Line and its extension to Dawn. This assertion is based on Union's argument that the new cooperative arrangement for owning and operating the extended pipeline system from Belle River to Dawn creates a "new" international pipeline system connecting the Michigan and Ontario markets. In these proceedings, Union contends that, in

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<sup>16</sup> Transcript Volume 1, page 43, line 6 to page 44, line 15.

<sup>17</sup> At page 4 of his August 17, 2009 letter pertaining to the potential addition of an issue to the Final Issues List, counsel for Dawn Gateway LP made submissions premised on the notion that someone is advocating that Union be required to be the owner of all segments of the pipeline between Belle River Mills and Dawn. We are not making any submissions to this effect.

Canada, the Belle River to Dawn Pipeline system "must be"<sup>18</sup> subject to regulation by the NEB, even though, in the U.S., the Belle River Mills segment will continue to be regulated by the MPSC.<sup>19</sup>

21. In the context of the JV's modifications to the existing arrangements and the proposal to extend the 24 inch St. Clair Line from Bickford to Dawn, Union seeks permission to sell the St. Clair Line to the JV. Spectra's 50% ownership in the JV, through a subsidiary other than Union, and Union's request that, for rate-making purposes, the sale price of the St. Clair Line to the JV be fixed at the NBV of the line at the time the transaction is completed,<sup>20</sup> operate to deprive Union's ratepayers of benefits associated with its increased utilization.
22. Pending completion of the sale, Union proposes that its ratepayers continue to provide a full utility return on the significantly under-utilized St. Clair Line and related assets.<sup>21</sup> Union ratepayers have been burdened with providing a full return on these materially under-utilized facilities for years. This burden is reflected in Exhibits J1.1 and J1.2. Cumulatively, for all of the years in which these assets have been under-utilized, this burden, together with return on rate base and applicable income taxes, is a significant amount.

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<sup>18</sup> Union Argument-in-Chief, para. 9, line 5. The phrase "must be" is also repeated in the heading at page 6 of Union's August 17, 2009 Submissions with respect to the potential addition of an issue to the Final Issues List.

<sup>19</sup> Transcript Volume 1, page 38, line 4 to line 24.

<sup>20</sup> Union Argument-in-Chief, para. 1.

<sup>21</sup> Union Argument-in-Chief, para. 4.

23. Ratepayer and landowner interests have actively participated in this Application. CME intervened to assure that the interests of Union's ratepayers are protected.
24. In this Application, the Board has determined that it will consider and decide specific issues with respect to Jurisdiction, Customer Service and Ratepayer Impacts, Land Matters, First Nations Consultation, and the Appropriate Test to be applied in deciding whether to approve the sale.
25. The submissions that follow relate primarily to Jurisdiction, Ratepayer Impacts, and the Appropriate Test to be applied.
26. CME's position on the complex issues this precedent-setting case can be summarized as follows:
  - (a) After objectively considering all of the relevant jurisdictional facts, the Board should conclude that OEB jurisdiction over the St. Clair Line and its proposed extension to Dawn is not ousted, as Union contends. The proposed Belle River to Dawn Pipeline is not a "new" international pipeline system. It is merely an enhancement of the existing link between the Michigan and Ontario markets by means of a wholly intraprovincial extension of a component of Union's provincially regulated integrated system;
  - (b) The JV's ownership and operation of the St. Clair Line and its extension from Bickford to Dawn should be subject to OEB regulation under the auspices of an OEB approved rate schedule that accommodates the JV's

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provision of point-to-point FT services from Belle River to Dawn under the auspices of negotiated long term fixed price contracts. The Board's regulation of the JV's ownership and operation of the St. Clair Line and its extension to Dawn should not interfere with the long term contracts the JV has already consummated with shippers seeking FT services from Belle River to Dawn;

- (c) The Board should transparently regulate the JV's ownership and operation of the St. Clair Line and its extension from Bickford to Dawn in accordance with the provisions of its Storage and Transportation Access Rule ("STAR");
- (d) The ratemaking consequences of the sale transaction for Union's ratepayers should be determined in accordance with the regulatory principle that obliges Spectra, as the ultimate owner of Union's utility assets, to maximize the value of those assets for the benefit of Union's ratepayers;
- (e) Unless the Board imposes appropriate measures to prevent ratepayer harm, the sale of the St. Clair Line at its NBV to a JV in which Spectra holds a 50% interest through a subsidiary other than Union deprives Union's ratepayers of the benefits of the increased utilization of Union's utility assets and is incompatible with Spectra's obligation, as Union's

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owner, to maximize the utilization of Union's utility assets for the benefit of Union's ratepayers;

- (f) The ratemaking consequences for Union's ratepayers of the sale should be determined when the transaction has either been completed or abandoned. If the transaction is completed, then the amount to be allocated to Union's ratepayers should be derived from the present value of the stream of net revenues that the increased utilization of the St. Clair Line will produce;
- (g) Having regard to the public interest regulatory principle that obliges Union's owner to maximize the value of Union's utility assets for the benefit of Union's ratepayers, a substantial portion of the present value of the net revenues realized from the increased utilization of the St. Clair Line should be allocated to Union's ratepayers. In this case, the measure of the harm ratepayers suffer is the extent to which the present value of increased utilization benefits attributable to the St. Clair Line exceeds the NBV amount Union proposes to allocate to ratepayers. Amounts that are diverted from ratepayers to a utility owner as a result of the utility's noncompliance with applicable regulatory principles are the appropriate measure of ratepayer harm. The net present value of the increased utilization benefits attributable to the St. Clair Line should materially



exceed the amount of about \$5.2M that Union proposes to allocate to its ratepayers in 2010;<sup>22</sup>

- (h) Depriving ratepayers of the full benefit to which they are entitled constitutes harm despite the fact that an allocation of something less than the full benefit would eliminate the burden ratepayers currently absorb;
- (i) An allocation to Union's ratepayers of an amount greater than the NBV of the St. Clair Line is in accordance with and supported by the principles articulated by the Board in its Cushion Gas Decision, EB-2005-0211, dated June 27, 2007.<sup>23</sup> This decision suggests that an allocation to ratepayers in an amount exceeding NBV is warranted to prevent a utility owner from enriching itself and thereby harming ratepayers by failing to comply with well established public utility principles;
- (j) The JV's suggestion that it will not proceed with the transaction if the JV's Plan does not oust provincial jurisdiction over the St. Clair Line<sup>24</sup> and its extension to Dawn, as well as its suggestion that the transaction may not be completed if the benefit allocated to ratepayers exceeds the NBV of the St. Clair Line are unjustifiable.<sup>25</sup> These positions are incompatible with Spectra's utility owner obligation to maximize the utilization of Union's

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<sup>22</sup> See paras. 119 to 121 of this Argument where we review high level indicators of the extent to which the present value of increased utility benefits exceeds \$5M.

<sup>23</sup> Union Brief of Authorities, Tab 11.

<sup>24</sup> Exhibit K1.1, OEB Interrogatory #1 at page 2.

<sup>25</sup> Transcript Volume 1, page 34, line 3 to page 35, line 15.

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utility assets for the benefit of Union's ratepayers. The ratemaking consequences for Union of a refusal by the JV to complete the acquisition of the St. Clair Line can be addressed if and when that contingency occurs;

- (k) A finding that the St. Clair Line and its proposed extension from Bickford to Dawn remains subject to provincial jurisdiction should adequately resolve landowner concerns;
- (l) Without measures to prevent ratepayers from being harmed by Spectra's failure to comply with its obligation as Union's owner to maximize the value of under-utilized utility assets for the benefit of Union's ratepayers, the proposed sale of the St. Clair Line to the JV has a materially adverse effect on balance relative to the "status quo" in relation to the Board's statutory objectives of protecting the interests of consumers with respect to prices and of facilitating the rational expansion of transmission and distribution systems; and
- (m) Provided that measures are taken to prevent ratepayer harm, the sale of the St. Clair Line to the JV is in the public interest and should be approved.

27. We elaborate on the rationale for CME's position in the sections that follow.

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### **III. Jurisdiction**

28. This Board determined some 20 years ago that the St. Clair Line is subject to provincial and not federal regulatory jurisdiction. For this reason, we submit that it is most appropriate for this Board to consider Union's contention that the JV's Plan ousts OEB jurisdiction over the St. Clair Line and its proposed extension to Dawn.
29. Cost awards are unavailable in NEB proceedings. The JV can thus avoid scrutiny by parties who can only participate in regulatory proceedings with cost award support if it can persuade the OEB to defer to the NEB's determination of the jurisdictional issues raised by this Application. This is precisely what Union and the JV attempted to do prior to the Board's determination of the Final Issues List for this proceeding.
30. We applaud the Board for including the jurisdictional questions in its Final Issues List because this provides representatives of small and medium sized ratepayers such as CME and others who require cost award support to participate in a proceeding of this nature with a full opportunity to be heard on the question of jurisdiction.
31. In his August 17, 2009 submissions regarding the Board's Proposed Addition to the Final Issues List, counsel for Dawn Gateway LP refers to and encloses correspondence pertaining to the current status of the Application Dawn Gateway LP filed with the NEB on May 6, 2009. Curiously, the JV's Application to the NEB

makes no reference to the fact that on April 6, 2009, the OEB released its Issues Decision and Order including jurisdictional questions in its Final Issues List. Neither Dawn Gateway LP nor Union appear to have advised the NEB of the constitutional questions at issue in this proceeding.<sup>26</sup>

32. The NEB should be notified of the constitutional issues in this proceeding because, on the basis of the Ontario Court of Appeal decision in *re: Constitution Act, 1867, s.92(10)(a)*, 64 O.R. (2d) 393, [1988] O.J. No. 176,<sup>27</sup> the NEB has an obligation to defer its consideration of the Dawn Gateway LP Application until the OEB has rendered its decision on these jurisdictional issues. The OEB proceedings raising these issues of jurisdiction were commenced when Union filed its Sale Approval Application dated December 23, 2008.<sup>28</sup> The Board identified the jurisdictional questions that needed to be answered to inform its decision on the specific sale approval relief Union is seeking in its Draft Issues List attached to Procedural Order No. 1 circulated on or about March 16, 2009. The Board's Issues Decision and Order dated April 6, 2009, resolved the debate about the relevance of these jurisdictional issues in this proceeding. All of this occurred prior to the JV's filing of its Application with the NEB on May 6, 2009. The current status of the JV's Application to the NEB cannot and does not limit

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<sup>26</sup> The only reference to this OEB proceeding that we could find in Exhibit K1.8 is at Appendix C where it is indicated that "A separate application for the sale of the St. Clair Line has been submitted by Union Gas Limited to the OEB under docket no. EB-2008-0411".

<sup>27</sup> CME Brief of Authorities, Tab 2.

<sup>28</sup> Exhibit K1.6, Application page 3.

the Board's authority to decide the jurisdictional issues that are relevant to the relief Union requests in this Application.

33. In paragraph 21 of the Notice of Constitutional Question prepared by Union and circulated on August 6, 2009, Union asserts that the OEB is not the "proper forum" for determining the jurisdictional questions because Dawn Gateway LP is not an applicant in this OEB proceeding. The JV is not an applicant in this proceeding because it does not own the St. Clair Line. It is, however, an active party in these proceedings and is bound by the Board's Issues Decision and Order dated April 6, 2009, and its recent Decision and Order dated August 5, 2009, directing Union to prepare and serve a Notice of Constitutional Question on the Attorneys General of Ontario and Canada. It is particularly appropriate that this Board consider these jurisdictional questions because the position Union now takes on jurisdiction is at odds with the position it advocated and the Board supported in its September 1, 1988 Decision.
34. The principles of *res judicata* and issue estoppel should prohibit Union from re-arguing the question of jurisdiction over the St. Clair Line and the other components of the contiguous 24 inch pipeline system between Belle River Mills and Bickford. Questions pertaining to the regulatory jurisdiction over these pipeline segments were answered affirmatively more than 20 years ago by the

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OEB, the NEB and the MPSC.<sup>29</sup> At the urging of Union, St. Clair Pipelines and MichCon, those regulatory tribunals ruled to the effect that:

- (a) Michigan's consolidated integrated system extends to the international boundary in the middle of the St. Clair River;
- (b) the existing 24 inch link between the Michigan and Ontario markets joins Union's integrated system at the St. Clair Valve; and
- (c) the only international link between the integrated systems of MichCon and Union is the NEB regulated St. Clair Crossing extending from the international border in the middle of the St. Clair River to the St. Clair Valve.

35. If the principles of *res judicata* and issue estoppel do not prohibit Union from seeking to effectively reverse the jurisdictional findings made some 20 years ago then, at the very least, there should be a heavy onus on Union to demonstrate that the OEB's jurisdiction over the St. Clair Line and its proposed extension to Dawn is ousted by the JV's Plan. When questions of jurisdiction arise at first instance, federal jurisdiction is the "exception to the rule" where a wholly intraprovincial work is at issue.<sup>30</sup> *A fortiori*, once a jurisdictional determination

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<sup>29</sup> Exhibit K1.7, GAPLO Interrogatory #14, Attachment 2, pages 29 to 76, and Exhibit J2.1.

<sup>30</sup> See Submissions to a similar effect in para. 3 of Board Staff Submission and the *Northern Telecom* case cited by Board Staff in their footnote 4 found at Tab 2 of Board Staff Brief of Authorities. At page 11 of the Report, Justice Dickson (as he then was) states "Because provincial competence is the rule and federal competence is the exception, the onus is on the party who invokes the exception to establish the constitutional facts necessary for the exception to come into play. Failing such a demonstration, exclusive provincial competence must govern."

has been made in favour of provincial jurisdiction, the onus of obtaining a variance of that finding to one in favour of federal jurisdiction should be far greater than the burden that prevailed at the outset.

36. Accordingly, we submit that, except in the clearest of cases, the Board should not reverse prior jurisdictional determinations that have endured for more than 20 years. Moreover, the Board should be particularly wary of any proposal that attempts to oust its jurisdiction as part of a strategy to divert to a utility owner benefits to which ratepayers are entitled.
37. In *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 upon which Union relies,<sup>31</sup> the Supreme Court of Canada ("SCC") emphasized that an analysis of jurisdictional questions "requires a careful examination of the factual circumstances of any given case".<sup>32</sup> The need for a careful evaluation of all of the relevant jurisdictional facts was emphasized by the SCC in *Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, where Chief Justice Dickson stated:

"It is impossible in my view to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving a Section 92 Subsection 10, paragraph A. The common theme in the cases is simply that the court must be guided by the particular facts in each situation ... Useful analogies may be found in the decided cases.

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<sup>31</sup> Union Brief of Authorities, Tab 2 and Union Argument-in-Chief, paras. 8 and 9.

<sup>32</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)*, (1998) 156 D.L.R. (4<sup>th</sup>) 456 (S.C.C.) at para. 52.

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but in each case the determination of this constitutional issue will depend upon the facts which must be carefully reviewed. (Emphasis added)<sup>33</sup>

38. Determining the jurisdictional issues thus requires the Board to evaluate the relevant jurisdictional facts carefully and objectively, having regard to the heavy onus that Union must discharge. Union must establish that, taken together, the proposed changes in the ownership and operation of the Belle River to Bickford Pipeline and its extension from Bickford to Dawn operate to transform the MPSC, NEB and OEB regulated Belle River to Bickford Pipeline System into a new federally regulated international pipeline.
39. Before commenting further on Union's analysis of the jurisdictional issues, we wish to emphasize that we interpret Union's argument on jurisdiction to be limited to the contention that the JV's Plan creates a new "single federal work or undertaking" as described in the *Westcoast* decision. Union's Argument is based on the first ground specified in that decision but not on the second. Union's Argument focuses on the existing and proposed pipeline system extending from Belle River to Dawn. Union's Argument does not focus on the JV's ownership and operation of part of that system, being the St. Clair Line, and its proposed extension to from Bickford to Dawn. Clearly, the JV's ownership and operation of the St. Clair Line and its proposed extension from Bickford to Dawn is not "integral" to an existing federally regulated interprovincial work or undertaking. Rather, the St. Clair Line and any extension of it to another point within Ontario is

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<sup>33</sup> This excerpt is found at para. 52 of the *Westcoast* decision at Tab 2 of Union Brief of Authorities.



"integral" to Union's intraprovincial storage and distribution activities and thus wholly within OEB jurisdiction.<sup>34</sup>

40. Union's analysis of the jurisdictional issues in its Argument-in-Chief is neither careful nor objective. It is also incomplete in that it does not address relevant jurisdictional facts about the existing Belle River to Bickford Pipeline System.

41. Crucial jurisdictional facts not included in Union's analysis of the jurisdictional issues in its Argument-in-Chief include the following:

- (a) the fact that a 24 inch pipeline connecting the vast integrated transmission, distribution and storage systems of MichCon and Union has been in existence for years;
- (b) the fact that the jurisdictional nature of the three contiguous segments of the existing 24 inch line connecting the Michigan and Ontario markets was judicially determined more than 20 years ago;
- (c) the fact that, for years, the contiguous segments of the existing 24 inch pipeline from Belle River to Bickford have been operated by subsidiaries of Spectra and DTE's parent as a single pipeline system;
- (d) the fact that DTE and Spectra, as the ultimate owners of the existing system, will remain the ultimate owners in the proposed Dawn Gateway JV; and

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<sup>34</sup> On this point, we support the Board Staff Submission at para. 32.

- (e) the fact that the resources operating and maintaining the integrity of the assets of the proposed Belle River to Dawn Pipeline will be sourced from the resources of the vast state and provincially regulated integrated systems of MichCon and Union. While they may be relabeled, these are merely the existing resources that currently support the operation and maintenance of the Belle River to Bickford Pipeline System.<sup>35</sup>
42. During the course of the hearing, Union's witnesses were asked to explain what it was about OEB jurisdiction over the St. Clair Line and its extension to Dawn which precludes the JV from doing exactly what it wishes to do. Counsel for Union indicated that the response to this question would be addressed in argument,<sup>36</sup> yet there is nothing in Union's Argument-in-Chief which deals with the matter.
43. Examples of projects that qualified for NEB regulation in Canada as "new" international pipelines are the Alliance, Vector, and Brunswick Pipelines, each of which involved the construction of new cross-border facilities. The Alliance Pipeline was a "new" international pipeline extending some 2,995 kms from a point near Gordondale, Alberta, to its terminus near Chicago, Illinois, where it would connect with the integrated North American pipeline grid. The project also included approximately 770 kms of lateral pipelines and related facilities in British Columbia and Alberta. The Alliance Pipeline involved the construction of

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<sup>35</sup> See paras. 58 to 70 of this Argument where we elaborate upon the resources that will actually support the JV and the division of responsibilities between those supporting resources.

<sup>36</sup> Transcript Volume 1, page 61, lines 5 to 26, and Transcript Volume 2, page 43, line 18 to page 44, line 8.

massive new interprovincial and international cross-border pipeline facilities.<sup>37</sup>

The Vector Pipeline project was a new international pipeline that extends from Joliet, near Chicago, Illinois, some 552 kms to Dawn, Ontario.<sup>38</sup> The Brunswick Pipeline is the Canadian component of a new international pipeline which extends 145 kms from the Canaport Liquefied Natural Gas ("LNG") Terminal in Saint John, New Brunswick, to a point on the U.S. side of the international border near St. Stephen, New Brunswick, where it interconnects with the Maritimes & Northeast Pipeline, LLC ("M&NP US").<sup>39</sup>

44. The Dawn Gateway proposal does not involve the construction of any new cross-border facilities. The proposed JV creates nothing new at the international border. Rather, under the proposed JV, the physical and operational situation at the international border remains precisely as it is today. The St. Clair Crossing international link remains physically unchanged and will continue to be operated as part of a single pipeline system from Belle River Mills, a point within MichCon's integrated system, to Dawn, a point well within the parameters of Union's integrated system. The St. Clair Crossing remains as the international link between the integrated systems of MichCon and Union. The comparison made by this Board in its September 1, 1988 decision between the St. Clair Crossing and other federally regulated international and interprovincial links in Canada remains valid today. These short, federally regulated pipeline links are

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<sup>37</sup> NEB Reasons for Decision, Alliance Pipeline Ltd. on behalf of the Alliance Pipeline Ltd. Partnership, GH-3-97, November 1998.

<sup>38</sup> NEB Reasons for Decision, Vector Pipeline Limited Partnership, GH-5-98, March 1999.

<sup>39</sup> NEB Reasons for Decision, Emera Brunswick Pipeline Company Ltd., GH-1-2006, May 2007.

common. Examples that existed in 1988 are described in the Board's September 1, 1998 E.B.L.O. 226 decision and included pipeline links under NEB jurisdiction which connect Ontario with Québec and Ontario with the U.S. These NEB regulated pipeline links include two owned by Champion Pipeline Corporation Ltd. ("Champion"), two owned by Niagara Gas Transmission ("Niagara"), one owned by Union, one then owned by Novacorp. International Pipeline Ltd. ("Novacorp."), and one owned by TCPL.<sup>40</sup>

45. The dissenting opinion of J.-G. Fredette in the NEB's Reasons for Decision in the February 1993 Altamont Gas Transmission Canada Limited, GHW-1-92, refers to a list of 17 bridge gas pipelines which the NEB approved and currently regulates.<sup>41</sup> In the GH-1-96 Reasons for Decision dated January 1996<sup>42</sup>, the NEB approved the application of Novagas Clearinghouse Pipelines Ltd. to construct a 16.5 km link between provincially regulated facilities in British Columbia and Alberta subject to a reference it had directed to the Federal Court of Appeal raising jurisdictional questions with respect to the connecting upstream and downstream facilities. The Federal Court of Appeal declined to hear the reference on the ground that once the federally regulated link had been constructed and was operating, issues pertaining to the jurisdictional character of

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<sup>40</sup> Exhibit J2.1, E.B.L.O. 226 Reasons, paras. 2.5.1 to 2.5.13.

<sup>41</sup> NEB Reasons for Decision, Altamont Gas Transmission Canada Limited, GHW-1-92, February 1993, at page 27 and figure 6-1 and 6-2 at pages 28 and 29; CME Brief of Authorities, Tab 1

<sup>42</sup> NEB Reasons for Decision, Novagas Clearinghouse Pipelines Ltd., GH-1-96, January 1996, at pages 1 to 6 and page 19; CME Brief of Authorities, Tab 3.

the upstream and downstream facilities it connected were moot.<sup>43</sup> This case supports the principle that, except in the clearest of cases, the Board should not reverse prior jurisdictional determinations upon which facilities have been constructed and operated.

46. Another decision that parallels the physical circumstances in this particular case is the Federal Court of Appeal's decision in *Consumers' Gas Co. v. Canada (National Energy Board)*, (1996) F.C.J. No. 320 1996, A.C.F. No. 320, 195 N.R. 150, 61 A.C.W.S. (3d) 1074<sup>44</sup> in which the Court rejected the NEB's conclusion that declared the Ottawa East Line of the Ottawa distribution system of Consumers Gas ("Consumers") to be subject to federal regulatory jurisdiction. The NEB had concluded that the line was an integral part of the NEB regulated pipeline link between Consumers' gas distribution system in Ontario and the gas distribution of its affiliate in Québec. In setting aside the NEB Order, the Court recognized that the Ottawa East Line was and always had been an integral part of Consumers' Ottawa distribution system, just as the St. Clair Line, in this case, is and always has been an integral part of Union's integrated distribution, transmission and storage system.
47. Like a number of Union-owned laterals in Union's Northern Operations Area between TCPL's Mainline and the plants of end-use consumers, the St. Clair Line carries gas on a single pipeline from a federally regulated link, the St. Clair

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<sup>43</sup> *Alberta (Attorney General) v. Westcoast Energy Inc.* [1997] F.C.J. No. 77 FCA, at paras. 15 and 16; CME Brief of Authorities, Tab 4.

<sup>44</sup> CME Brief of Authorities, Tab 5

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Crossing, to points in Union's integrated system for storage and ultimate distribution. The proposed extension of the St. Clair Line from Bickford to Dawn will enhance the ability of the St. Clair Line to carry gas from the St. Clair Crossing to Union's storage system for ultimate distribution. The expansion of an intraprovincially regulated lateral to enhance the ability to store gas serves a distribution purpose. We agree with Board Staff that functionally, the St. Clair Line and its proposed extension to Dawn is integral to an intraprovincial work or undertaking, namely, storage and distribution.<sup>45</sup> Functionally, the St. Clair Line and its proposed extension from Bickford to Dawn is the same as a single pipeline lateral connecting a federally regulated pipeline with an end use consumer.

48. The Ontario Divisional Court and Court of Appeal Decisions and the Federal Court of Appeal Decision in the "Bypass Cases" cited in paragraph 27 of the Board Staff Submission establish that such pipelines are subject to provincial jurisdiction.<sup>46</sup>
49. The only new facilities being constructed are an extension of the St. Clair Line from Bickford to Dawn. The Dawn Gateway JV proposal merely enhances the existing link between the Michigan and Ontario markets by extending the Ontario segment of the existing link within Union's integrated system to another point

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<sup>45</sup> See para. 34 of Board Staff Submission.

<sup>46</sup> See footnotes 28, 29, 30 and 31 in Board Staff Submission and CME Brief of Authorities, Tab 2 for the Ontario Court of Appeal decision indexed as *Re: Constitution Act, 1867, s.92(10)(a)*, 64 O.R. (2d) 393 [1988], O.J. No. 176 (Ont. C.A.).

within that integrated system. An extension of the St. Clair Line from Bickford to Dawn does not eliminate its intraprovincial status.

50. Union's analysis not only disregards relevant jurisdictional facts, but also relies on irrelevant facts in an attempt to influence the Board's analysis. On more than one occasion, Union witnesses referred to their "understanding" that its ultimate parent Spectra will not proceed with the JV if Union's submissions on the issue of jurisdiction are not upheld.<sup>47</sup> Statements to this effect are irrelevant to the determination of whether the Dawn Gateway JV is a new federal undertaking as Union contends. Union's reliance on these statements underscores the lack of objectivity in its analysis of the jurisdictional issues. This attempt by Union, Spectra and the JV to leverage the question of jurisdiction and other determinations in their favour should be ignored.
51. Similarly, the pace at which the regulatory approval process proceeds when questions of jurisdiction arise is not relevant to a determination of such questions. The contention made by counsel for Union and Dawn Gateway LP in their recent August 17, 2009 submissions pertaining to the potential addition of an issue to the Final Issues List about the impact that a finding that provincial jurisdiction prevails over the JV's ownership of the St. Clair Line and its extension to Dawn might have on project pace should have no bearing on the Board's consideration of the jurisdictional questions. Further, the notion that a finding in favour of

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<sup>47</sup> Exhibit K1.7, OEB Interrogatory #1, page 2; Transcript Volume 1, page 34, line 3 to page 35, line 15; page 137, line 1 to page 139, line 25; and page 165, line 9 to page 167, line 28; Union Argument-in-Chief, para. 115.

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provincial jurisdiction hinders project progress is a proposition that lacks merit as long as the Board confirms its ability and willingness to accommodate the JV's Plan to sell point-to-point services between Belle River Mills and Dawn under negotiated long term fixed price contracts so that OEB regulation will not interfere with the contracts the JV has already made with five of the Open Season shippers.

52. Conditions included in the various agreements between Spectra and DTE regarding the possibility of adverse findings on jurisdiction or other issues are irrelevant to the Board's analysis of the jurisdictional facts.<sup>48</sup> Absent supporting jurisdictional facts, a project proponent's jurisdictional preference is irrelevant.<sup>49</sup>
53. Because the St. Clair Line and its proposed extension from Bickford to Dawn are facilities located entirely within Ontario, the physical extension of the St. Clair Line from Bickford to Dawn cannot possibly oust provincial jurisdiction over these facilities. Accordingly, the evidence upon which Union must rely to support its contention that implementation of the plan ousts provincial jurisdiction is evidence pertaining to the JV's Plan. Do the cooperative arrangements reflected in the JV's Plan constitute a new "single federal work or undertaking"?
54. We submit that one way of objectively evaluating whether the cooperative arrangements reflected in the JV's Plan establish a case for federal jurisdiction

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<sup>48</sup> Para. 113 of Union Argument-in-Chief refers to these types of conditions.

<sup>49</sup> Transcript Volume 1, page 52, line 21 where Union's witness appears to acknowledge that jurisdiction is not a matter of choice.



over the JV's ownership and operation of the St. Clair Line and its extension to Dawn is to ask whether these modifications, if made to the Belle River to Bickford Pipeline System, would oust provincial jurisdiction over the St. Clair Line. If not, then the modifications to the existing cooperative arrangements reflected in the JV cannot oust provincial jurisdiction over the St. Clair Line and its proposed extension from Bickford to Dawn. This approach is essentially the same approach Board Staff describes in paragraph 8 of their Submission to support the conclusion that:

"There is not a substantial change in the "management, control and direction" or the "function integration" in the proposed use of the Dawn Gateway Line compared to its original and current use so as to justify a transfer from provincial to federal jurisdiction."

55. It needs to be recognized that the segment currently owned by MichCon of some 4.7 km extending from the Belle River Mills Compressor Station to the middle of the St. Clair River is but a miniscule part of MichCon's 19,000 miles of transmission and distribution lines and 124 BCF of underground storage, which serves 1.3M customers in 500 communities in Michigan.<sup>50</sup>
56. St. Clair Pipelines, which owns the federally regulated 0.87 km link in the chain at the St. Clair Crossing, has no staff. St. Clair obtains all of its services through contracts with its affiliate, Union.<sup>51</sup>

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<sup>50</sup> Information from MichCon's website.

<sup>51</sup> Exhibit K1.7, GAPLO Interrogatory #2.

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57. Similarly, the 11.7 km of the St. Clair Line forms part of Union's vast system consisting of 37,000 miles of distribution lines and 2,790 miles of transmission pipeline and more than 150 BCF of underground storage serving 1.3M residential, commercial and industrial customers in 400 communities throughout Ontario.<sup>52</sup> It is the resources of the two large state and provincially regulated integrated systems that support the operation of the Belle River to Bickford Pipeline as a single pipeline system.
58. Resources from the large state and provincially regulated integrated systems will continue to be the source of support for the operations and maintenance of the pipeline link between the two integrated systems. The JV will have no employees. Everything is to be contracted out to Spectra-Union or DTE resources.<sup>53</sup> While the labels used to describe the resources may change, the reality is that the supporting resources will emanate from the large state and provincially regulated integrated entities ultimately owned by Spectra and DTE's parent.
59. Under the existing arrangements between MichCon, St. Clair and Union, the Belle River to Bickford system is operated as a single pipeline. The agreements indicate that MichCon manages west to east gas flows while Union manages east to west gas flows.<sup>54</sup> Today, DTE-MichCon maintains the integrity of its

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<sup>52</sup> Information from Spectra's website.

<sup>53</sup> Transcript Volume 1, page 160, lines 6 to 12.

<sup>54</sup> Exhibit K7.1, GAPLO Interrogatory #2 being the Operating Agreement and sections 4 and 5 thereof.

pipeline situated on the US side of the international border. Similarly, Union maintains the integrity of the St. Clair Crossing, as well as its own assets on the Canadian side of the international border. This situation will remain unchanged under the modified cooperative arrangements that are to apply to the Belle River to Dawn pipeline.<sup>55</sup>

60. The objective of the Belle River to Dawn system is the same as the objective of the Belle River to Bickford system, namely, to facilitate the transportation of gas between the large state and provincially regulated integrated transmission, distribution and storage systems of MichCon and Union, for injection into storage and, ultimately, for withdrawal from storage and distribution. Union's St. Clair Line is currently available to provide intraprovincial distribution support, just as MichCon's Belle River Mills segment is available to provide support for its intrastate distribution system.<sup>56</sup> These facilities and the extension of the St. Clair Line from Bickford to Dawn will continue to be available to provide distribution services support, if necessary, under the modified cooperative arrangements that are to apply to the Belle River to Dawn system under the JV.

61. Union relies on the fact that under the modified arrangements that will apply to the Belle River to Dawn proposal, DTE resources will have sole responsibility for flow control and marketing.<sup>57</sup> This contrasts with the situation that prevails under

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<sup>55</sup> Exhibit K7.1, GAPLO Interrogatory #5.

<sup>56</sup> The ability of each of these line to provide such support is discussed in the MPSC and OEB decisions provided in Exhibit K1.7, GAPLO Interrogatory #14.

<sup>57</sup> Transcript Volume 1, page 157, line 12 to 20, and Exhibit J2.2.

the cooperative arrangements that apply to the Belle River to Bickford system where responsibility for these functions is divided. Would the Board's September 1, 1988 determination of the jurisdictional character of the Belle River to Bickford system be different if responsibility for flow control and marketing had been allocated differently? We think not. In its September 1, 1988 decision, the Board rejected TCPL's argument that assigning responsibility to one party for gas flows over the entire length of the Belle River to Bickford system transformed the cooperative arrangements into a single federal undertaking.<sup>58</sup>

62. When compared to the existing Belle River to Bickford Pipeline, it is apparent that the proposal to operate the Belle River to Dawn pipeline as a single pipeline is nothing new. The agreement that only one of the partners to the JV will now control east and west gas flows on the Belle River to Dawn pipeline is not substantially different, we submit, from the existing arrangements where each of the partners to the JV is responsible for controlling flows in one direction for the entire length of the system between Belle River Mills and Bickford. The existing cooperative arrangements between subsidiaries of Spectra and DTE's parent are designed to assure that the easterly and westerly flows of gas are those that would be provided by a single pipeline. Transferring easterly gas flow responsibility from one party to another does not change the jurisdictional character of the pipeline system. The gas will still be transported, as it is

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<sup>58</sup> Exhibit J2.1, E.B.L.O. 226 Reasons, para. 3.8.3 (f) and paras. 3.8.67 to 3.8.89.

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currently, through the existing facilities which will continue to be operated as a single pipeline system.

63. Union will be a services provider to the JV. The functions it performs for the JV will be similar to the functions it performs today as a service provider to St. Clair Pipelines and as manager of its own utility assets. Pipeline assets on the U.S. side of the international border will remain state regulated. Resources from MichCon will continue to be responsible for the integrity of those assets. The fact that the U.S. assets remain state regulated, as well as the fact that the assets may continue to be owned by MichCon as a state regulated utility, are incompatible with a conclusion that the JV's operation of non-owned state regulated assets constitute part of a new international undertaking which must be federally regulated in Canada.
64. Union contends that, in cooperation with DTE, the provision of "new" point-to-point FT services from Belle River to Dawn under the auspices of long term fixed price negotiated contracts will oust provincial jurisdiction over the St. Clair Line and its proposed extension to Dawn. Changing the menu of transportation services does not alter the jurisdictional character of the facilities used to transport the gas. The existing jurisdictional character of the Belle River to Bickford system would not change if Spectra and DTE were to have Union and MichCon revise their existing menu of services and rate schedules to the extent necessary to accommodate point-to-point pricing from Belle River to Bickford, or even from Belle River to Dawn, under the auspices of negotiated long term fixed-

price contracts. The gas would still be transported through the same facilities in the same manner as it is currently being transported. In fact, it is arguable that the C1 Rate Schedule already accommodates a sale of transportation services under the auspices of negotiated long term fixed price contracts. The C1 Rate Schedule contains the following clause:

"Multi-year prices may also be negotiated, which may be higher than the identified rates."

65. Would the availability of a different menu of services on the Belle River to Bickford Pipeline System have prompted the Board in September 1988 to find that it was a federal undertaking? We think not. Any change in the number of contracts to be signed or the amount of the toll specified in each contract are not factors which operate to alter the jurisdictional character of the facilities used to transport the gas.
66. Similarly, changing the manner in which transportation services from Belle River to Dawn are to be marketed, compared to the way transportation services from Belle River to Bickford are currently marketed, does not alter the jurisdictional character of the facilities. The Board's September 1, 1988 determination of the jurisdictional character of the St. Clair Line segment of the Belle River to Bickford line would not have changed if the parties to the cooperative arrangements supporting the construction and operation of the system as a single pipeline had outsourced the marketing of transportation services to a third party. The gas

would still be transported through the same facilities in the same manner as it is currently being transported.

67. Any nomination efficiencies for shippers that result from the provision of point-to-point FT services cannot oust provincial jurisdiction over the St. Clair Line and its extension from Bickford to Dawn.<sup>59</sup> The differences between nominating to a JV rather than to two parties cooperating in the provision of single pipeline services are not substantive. They are merely cosmetic. The jurisdictional character of the segments of the Belle River to Bickford Pipeline System, as determined by the Board on September 1, 1988, would not have changed had the proponents of the Belle River to Bickford pipeline system proposed to offer point-to-point transportation services between Belle River Mills and Dawn.
68. Nor does the introduction of joint ownership through Spectra and DTE's agreement to pay 50% of the costs of extending the St. Clair Line from Bickford to Dawn have a transformative effect on the jurisdictional character of the pipeline system. Ownership changes are never determinative, as Union points out in its Argument-in-Chief, and, as already noted, the objective of achieving materially increased utilization of existing utility assets by providing point-to-point FT services from Belle River Mills to Dawn could be achieved without any changes in asset ownership.

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<sup>59</sup> Exhibit J2.2 describes nomination procedures.

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69. The fact that the JV's Plan contemplates that assets on the U.S. side of the border can be leased rather than purchased weighs against rather than in favour of the case for federal jurisdiction over the system extending from Belle River Mills to Dawn. As long as state or provincially regulated assets are leased, their use should not alter their jurisdictional character. Otherwise, it would be possible to create a situation where the regulation of leased assets, including matters pertaining to rates, operational safety and other topics, could oscillate between federal and provincial jurisdiction as the terms of leases expire. We suggest that, as long as any portion of provincially and state regulated assets used to support an alleged undertaking are leased, then the existing state and provincial regulatory regimes continue to apply.
70. DTE's agreement to pay 50% of the costs of extending the St. Clair Line to Dawn does not transform the facilities into a new federal undertaking. DTE's agreement to pay half of these costs is substantively the same as Tri-State's agreement to pay 50% of the proposed extension of the St. Clair Pipeline from Bickford to Dawn that was the subject of a Leave to Construct Application filed by Union in April 1999.<sup>60</sup> One of the purposes of that Application was to add pipeline capacity between Bickford and Dawn to do precisely what the JV proposes in this case, namely, to move more volume into Dawn over the St. Clair to Dawn components of Union's integrated system.<sup>61</sup> Throughout that

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<sup>60</sup> Exhibit J2.5.

<sup>61</sup> Exhibit J2.5, section 1, paras. 2(a) to (d) inclusive, and section 2, paras. 1 to 11.



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Application, Union acknowledges that the St. Clair Line and its proposed extension to Dawn are part of Union's integrated interprovincial transmission, distribution and storage system.<sup>62</sup>

71. We submit that the jurisdictional findings in the Board's September 1988 decision would have been the same had the cooperative arrangements now proposed by the JV with respect to ownership, operation and the menu of transportation services available been in place when the Board first considered the jurisdictional character of the Belle River to Bickford system. As Board Staff states in their Submission, the JV's proposal does not make the substantial changes to the management, control, direction or functional integration of the pipeline that would be required to support a wholesale transfer of jurisdiction over the St. Clair Line and its proposed extension to Dawn to federal tribunal.<sup>63</sup>
72. It has already been judicially determined that the cooperative arrangements that allow the Belle River to Bickford Pipeline System to operate as a single pipeline are insufficient to establish NEB jurisdiction over anything other than the St. Clair Crossing. Although there is to be some realignment of responsibilities, the de facto management, direction and control of the Belle River Mills to Dawn system will remain divided between DTE and Spectra/Union resources. Altering the division of responsibilities between the supporting resources cannot operate to oust provincial jurisdiction over the facilities.

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<sup>62</sup> Exhibit J2.5.

<sup>63</sup> Board Staff Submission at para. 8, and see para. 17 of this Argument where we submit that without the resources of the cooperating state and provincially regulated utilities, the JV is nothing but a shell.

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73. As already noted, the JV is not an enterprise which is controlled by either one of the ultimate owners of the two large intrastate and intraprovincial utilities who will be providing all of the resources the JV needs. It is, and always has been, a duet. It is a cooperative venture that, for jurisdictional purposes, is indistinguishable from the cooperative arrangements that currently apply to the Belle River to Bickford Pipeline system.
74. The JV's proposed acquisition of the St. Clair Line is not analogous to TCPL's merger with NOVA Gas Transmission Ltd. ("NGTL") in an arm's length transaction that combined all of NGTL's intraprovincial assets with all of TCPL's interprovincial assets. This case does not involve a massive arm's length aggregation of intraprovincial and interprovincial utility assets that transforms the former intraprovincial utility system into an integrated part of the federal regulated system.<sup>64</sup> What this case does involve is a non-arm's length removal of a very small part of a large intraprovincial integrated system in an attempt to engage federal regulation so that a utility owner can enrich itself at the expense of its ratepayers. The precedent setting implications of allowing utility owners to remove parts of their provincially regulated systems for such purposes could be far reaching.
75. The extent to which the JV modifies the existing cooperative arrangements pertaining to the operation of the Belle River to Bickford Pipeline as a single

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<sup>64</sup> See para. 29 of Board Staff Submission, and Tab 10 of Board Staff Brief of Authorities.

pipeline system does not oust OEB jurisdiction over the St. Clair Line and its proposed extension to Dawn. Union's evidence in this regard falls well short of discharging the heavy onus that rests upon it in the circumstances of this case.

76. For all these reasons, we submit that the JV does not create a “new” international link between the Michigan and Ontario markets, as Union contends. It merely enhances the existing link between those markets that has been in place for many years by means of an extension, wholly within Ontario, of the existing Ontario component of the link.
77. From a physical, operational and ownership perspective, the only thing substantively “new” about the proposed Belle River to Dawn pipeline is an extension of the provincially regulated St. Clair Line from Bickford to Dawn. The extent to which the JV modifies existing cooperative arrangements cannot alter the jurisdictional character of the existing state federally and provincially regulated segments of the contiguous 24 inch pipeline currently extending from Belle River to Bickford. The St. Clair Line and its proposed extension from Bickford to Dawn are clearly intra-Ontario facilities that should remain subject to OEB regulation.
78. While the consequences of the jurisdictional findings that the Board may make in this case are not relevant to a determination of the jurisdictional issues, such findings will have an effect on the Board’s consideration of other matters contained in the Final Issues List.

79. The consequences for this case of a finding that provincial jurisdiction over the JV's ownership of the St. Clair Line and its extension to Dawn is not ousted are as follows:
- (a) Landowner concerns will be resolved;
  - (b) The JV will be required to comply with the OEB's proposed STAR; and
  - (c) Ratepayer harm will need to be addressed.
80. Based on the foregoing, we submit that an objective analysis of the relevant jurisdictional facts leads to the conclusion that the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn remain subject to OEB jurisdiction. The jurisdictional facts do not support any other conclusion. There is no evidence to support a finding that the JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn should be subject to federal jurisdiction. However, if such a finding is made, then its consequences include the following:
- (a) Landowner harm issues will need to be addressed;
  - (b) Matters pertaining to compliance with STAR will need to be determined;  
and
  - (c) Ratepayer harm issues will need to be considered and resolved.

81. In the “Rate Impacts” portion of the next section of this Argument, we urge the Board to adopt measures to prevent ratepayer harm. As already noted, this topic will need to be addressed regardless of the findings made with respect to the jurisdictional issues.

#### **IV. System Integrity, Customer Services and Ratepayer Impacts**

##### **(a) System Integrity**

82. In their submission, Board Staff express concerns about the impact of the JV's ownership of the St. Clair Line on the system integrity, reliability and operational flexibility of Union's transmission system.<sup>65</sup> Apart from the concerns with respect to the openness of access to and the unknown costs of obtaining transportation services from the JV, which we discuss later, we are of the view that ownership of the St. Clair Line by the regulated JV is unlikely to have any adverse effect on Union's system integrity.
83. The Sarnia Industrial Line (“SIL”) remains linked to the existing St. Clair Line. Accordingly, distribution services support for the SIL will continue to be available through deliveries of gas from the existing St. Clair Line and its proposed extension to Dawn. The contingent distribution services support that the St. Clair Line can provide was one of the reasons for this Board's conclusion, in September of 1988, that the St. Clair Line is part of Union's integrated system

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<sup>65</sup> Board Staff Submission at para. 35.

and subject to provincial rather than federal regulation.<sup>66</sup> The continuing contingent distribution services support, as a source of gas, that the St. Clair Line can provide, as well as the additional support for Union's entire integrated system, as a source of gas, that will be provided with an extension of the St. Clair Line from Bickford to Dawn, are valid reasons for finding that the St. Clair Line and its proposed extension to Dawn remain subject to provincial jurisdiction.

84. We also accept that, as long as Union holds capacity rights on the Belle River to Dawn system that are reasonably commensurate with its needs,<sup>67</sup> the modified arrangements under the JV between Spectra and DTE that are to apply to the Belle River to Dawn pipeline will not have a negative impact on Union's security of supply or design day capability.<sup>68</sup>
85. We agree with Union that there will be no stranded assets if Union's St. Clair Line and related assets are transferred to a JV in which Spectra and DTE each hold 50% interest.<sup>69</sup> As already noted, it is apparent that, despite the realignment of responsibility for some tasks and some relabeling of the task performers, DTE and Union resources currently involved in supporting the Belle River to Bickford system as a single pipeline will continue to share responsibility for supporting the Belle River to Dawn system as a single pipeline. These modified arrangements

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<sup>66</sup> Exhibit J2.1, E.B.L.O. 266 Decision, pages 118 to 130 and in particular, paras. 3.8.66 to 3.8.75.

<sup>67</sup> Exhibit K8.1, page 55, and Transcript Volume 1, page 62, line 22 to page 70, line 19, which includes a discussion of the commitments Union has made to acquire FT services from the JV.

<sup>68</sup> Union Argument-in-Chief, para. 24.

<sup>69</sup> Union Argument-in-Chief, para. 24.

and the realignment of these resources do not operate to oust OEB jurisdiction over the St. Clair Line and its proposed extension to Dawn.

**(b) Customer Connection and Services**

86. We agree with Union that the JV's ownership of the St. Clair Line will not adversely effect Union's ability to connect future customers in proximity to that pipeline.<sup>70</sup> Regardless of whether the JV's ownership and operation of the St. Clair Line and its extension to Dawn remain provincially or become federally regulated, Union could, if necessary, obtain the requisite regulatory approvals to connect distribution lines to the JV's regulated utility system.
87. Board Staff is concerned that the JV's ownership of the St. Clair Line might preclude a large volume customer from obtaining high pressure gas delivery service.<sup>71</sup> We do not share this concern. As a regulated entity, the JV will have an obligation to serve. In this context and regardless of whether the JV's ownership and operation of the St. Clair Line and its extension to Dawn remain provincially or become federally regulated, either Union or the large volume customer could, if necessary, obtain the requisite regulatory approvals to connect distribution lines to the JV's regulated utility system.
88. With respect to customer services, care should be taken to distinguish between the availability of transportation services from the JV and the impact of the JV's

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<sup>70</sup> Union Argument-in-Chief, paras. 33 and 34.

<sup>71</sup> Board Staff Submission, paras. 36 and 37.

ownership and operation of the St. Clair Line and its extension to Dawn on the availability of services from Union.

89. With respect to the availability of transportation services from the JV, we accept that extending the St. Clair Line from Bickford to Dawn eliminates existing constraints on the ability to provide FT services from Belle River to Dawn. From the results of the Open Season, it is apparent that the JV's provision of point-to-point FT services from Belle River to Dawn under the auspices of negotiated fixed price long term contracts will materially increase the utilization of existing facilities.<sup>72</sup> While these contract and pricing structure changes are positive developments, they are not contingent upon the existence of either a JV or an entity subject to federal regulation in Canada.
90. A transfer or lease of assets to another legal entity, such as a JV or a partnership, is not absolutely essential to accommodate the availability of point-to-point FT services between Belle River and Dawn under negotiated long term fixed price contracts.
91. We disagree with Union that 50/50 ownership of the entire pipeline from Belle River to Dawn is essential to achieve the objective of maximizing utilization of the Belle River to Dawn system.<sup>73</sup> This contention is discredited by the fact that MichCon may not sell but only lease its assets to the JV. Cost and revenue

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<sup>72</sup> Union Argument-in-Chief, para. 41, and see para. 14 and footnote 12 of this Argument.

<sup>73</sup> Union Argument-in-Chief, para. 39.



sharing arrangements between the existing owners could be structured to provide the same incentives that 50/50 ownership through the JV provides. Nevertheless, we reiterate that we can support the transfer of the St. Clair Line to the JV as long as measures are adopted to prevent ratepayer harm.

92. The fact that Union may use the capacity it holds under contract with the JV to move gas into storage for subsequent use to meet the needs of "ex-franchise" customers does not relieve the regulators of the JV, as a transportation services provider to multiple shippers, from requiring sufficient transparency with respect to price and access to ensure that the public interest is protected. The regulated transportation services the JV provides to Union should not be viewed as if the services were part and parcel of Union's unregulated storage assets, as counsel for Dawn Gateway LP seems to be suggesting in his August 17, 2009 submissions on the potential addition of an issue to the Final Issues List.<sup>74</sup> The services the JV provides as a regulated transmission services utility should be viewed in the same manner as the transportation services Union provides under its M16 Rate Schedule.

93. Similarly, obtaining regulatory approval for fuel ratio changes on the Belle River segment of MichCon's System and lower combined fuel ratios for the JV for FT services from Belle River to Dawn is not contingent upon the existence of a federally regulated JV in Canada. Any request made to the MPSC for fuel ratio

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<sup>74</sup> See first full paragraph on page 4 of Bennett Jones August 17, 2009 letter to the OEB pertaining to the potential addition of an issue to the Final Issues List.

changes will be considered and determined on its merits regardless of whether the applicant is MichCon, the JV, or some other legal entity, and regardless of whether the applicant is subject to provincial or federal regulation in Canada.<sup>75</sup>

94. As well, any marketing efficiencies and nomination efficiencies for shippers that result from the availability of point-to-point FT services from Belle River Mills to Dawn are not contingent upon the existence of a federally regulated JV in Canada. These efficiencies will be the same if the JV's ownership and operation of the St. Clair Line and its extension to Dawn remain subject to provincial jurisdiction.
95. Accordingly, while the JV's ownership of the St. Clair Line and its extension from Bickford to Dawn will materially supplement the availability of FT services from Belle River to Dawn, this customer service enhancement is not contingent upon the existence of a federally regulated JV in Canada. The availability of enhanced customer services from the JV provides no support for the case that provincial jurisdiction over the St. Clair Line and its proposed extension to Dawn is ousted.
96. With respect to the availability of services from Union, the JV's ownership of the St. Clair Line will preclude Union from continuing to offer C1 transportation services between St. Clair and Dawn. Board Staff is concerned that some of Union's customers seeking such services may not be able to obtain them from the JV at prices comparable to the prices at which such services are currently

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<sup>75</sup> Exhibit J1.7, GAPLO Interrogatory #11.

available under Union's C1 Rate Schedule.<sup>76</sup> While we agree that these access and pricing concerns should be considered, we suggest that it ought to be remembered that the JV's ownership of the St. Clair Line and its extension to Dawn will be regulated and, as far as we are concerned, regulated by the OEB. Any existing or new customer of Union that encounters access or pricing problems with the JV can raise those matters with the regulator. Since the regulator can investigate and, if necessary, remedy any access or pricing concerns that a consumer raises with respect to the JV's ownership and operation of the St. Clair Line and its extension to Dawn, the elimination of Union's C1 service between St. Clair and Dawn should not prevent a transfer of the St. Clair Line to the JV.

**(c) Rate Impacts**

97. In the section of their submission entitled "Impact on Customer Rates – Proposed Regulatory Framework" Board Staff criticize the lack of transparency in the regulatory framework requested by Dawn Gateway LP in their Application to the NEB.<sup>77</sup> While we support and adopt Board Staff's criticisms, we consider them to be primarily matters of academic interest because of our view that there are no jurisdictional facts to support a conclusion that provincial jurisdiction over the JV's ownership of the St. Clair Line and its extension to Dawn should be ousted. We are confident that the OEB's regulation of the JV's ownership of the St. Clair Line and its extension to Dawn will provide for the degree of transparency and

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<sup>76</sup> Board Staff Submission at paras. 38 to 41.

<sup>77</sup> Board Staff Submission at pages 13 to 17, paras. 42 to 50.

regulatory scrutiny that is required to protect the public interest, including the interests of consumers. OEB regulation of the JV's ownership and operation of the St. Clair Line and its extension to Dawn will ensure that the JV complies with the provisions of the Board's STAR.

98. For these reasons, our submissions on Rate Impacts focus on the appropriateness of Union's request to approve the transfer of the St. Clair Line to the JV at its NBV at the time the transaction is completed.<sup>78</sup> The purpose of this feature of Union's approval request is to obtain an advance determination, in these proceedings, of the concept or valuation method that will be applied to determine the amount to be allocated to Union's ratepayers when the transaction eventually takes place.<sup>79</sup>
99. The Arguments of Union and Board Staff are premised on the notion that the Board determines the "price" at which assets are sold in a non-arm's length transaction. While this may simply be a matter of semantics, when dealing with a non-arm's length transaction, we prefer to characterize the issue as one of determining the method to be applied after the transaction has been completed to derive the value that should be allocated to ratepayers to prevent ratepayer harm. Regardless of the price that the JV and Union have agreed upon in their

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<sup>78</sup> Union Argument-in-Chief, para. 43.

<sup>79</sup> Transcript Volume 1, page 29, lines 10 to 18 where Union's witness acknowledges that the approval being requested relates to the method to be applied to determine the price of the St. Clair Line at the time of its transfer to the JV.

non-arm's length transaction, the question is what is the amount to be allocated to ratepayers to prevent harm.

100. We agree that the Board should determine, in these proceedings, the appropriate valuation method to be applied after the transaction has been completed to derive the rate-making consequences of the proposed sale to the JV. The project proponents are entitled to advance notice of the conceptual basis upon which rate-making consequences will be later determined.
101. Relying upon the SCC Decision in *ATCO Gas & Pipelines Ltd. V. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, Union argues that the value to be allocated to ratepayers is limited to the NBV of the St. Clair Line.<sup>80</sup> We disagree. We submit that the *ATCO* decision does not apply to the circumstances of this case. We submit that, in this case, the concept that should be applied to determine the value to be allocated to ratepayers is one that reflects the significantly increased utilization of the St. Clair Line.
102. While we acknowledge that reducing rate base by approximately \$5M provides a benefit to ratepayers by reducing the burden they have been carrying for years, the issue is not whether ratepayers derive some benefit from Union's proposal. The issue is whether the allocation of an amount limited to the NBV of the St. Clair Line is sufficient to prevent harm to Union's ratepayers. In the circumstances of this case, we submit that limiting the amount allocated to

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<sup>80</sup> Union Argument-in-Chief, paras. 57 and 60.

ratepayers to the NBV of the St. Clair Line is materially insufficient to prevent ratepayer harm.

103. We submit that, in this case, the valuation concept to be applied to prevent ratepayer harm is one that reflects the Present Value ("PV") of the stream of net revenues that will be realized from the significantly increased utilization of the St. Clair Line (the "PV of Future Utilization Benefits"). This approach is appropriate, in this particular case, because it will prevent Union's ratepayers from being harmed by Spectra's breach of its obligations, as Union's utility owner, to maximize the value of utility assets for the benefit of Union's ratepayers.
104. Unlike *ATCO*, which involved the disposition by a utility of "non-utility" assets, this case involves a proposed transfer of utility assets from one utility to another. The purpose of the transfer is to materially increase the utilization of the assets as utility assets.
105. In its *Cushion Gas* decision, the Board held that adherence to regulatory principles could lead to an allocation to ratepayers of an amount greater than the NBV of the transferred assets. Evidence demonstrating that customers will be harmed "in any fashion" can lead to an allocation greater than the NBV of the transferred assets.<sup>81</sup> As well, an allocation greater than the NBV of the transferred assets is justified where it is required to ensure that utilities comply with their regulatory obligations and operate in the public interest.

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<sup>81</sup> EB-2005-0211 Decision with Reasons, June 27, 2007, at Tab 11 of Union Brief of Authorities, and in particular, at pages 8 and 9. The phrase "in any fashion" appears at page 8.

106. In analyzing ratepayer harm in this case, it should be recognized that Union requests permission to transfer existing under-utilized utility assets to another utility in which Union's owner Spectra holds a 50% interest through a subsidiary other than Union. The sale transaction is part of a plan by Spectra and DTE to dramatically increase the utilization of the Belle River-Bickford Pipeline System and its proposed extension from Bickford to Dawn. Despite the assertion in the submissions of Union dated August 17, 2009, pertaining to the potential addition of an issue to the Final Issues List that a primary objective for Union's proposed sale of the St. Clair Line is "to optimize and increase the value of the St. Clair Line for the benefit of ratepayers...",<sup>82</sup> no effort is being made to allocate the optimized value of Union's under-utilized utility assets to Union's ratepayers. On the contrary, the transparent purpose of the plan is for Spectra and DTE to realize the benefits of the increased utilization of the St. Clair Line. Spectra's participation in the JV, through a subsidiary other than Union, is incompatible with its utility owner obligation to maximize utilization of the St. Clair Line for the benefit of Union's ratepayers. To prevent ratepayers from being harmed by Spectra's breach of its utility owner obligations to Union's ratepayers, the value of the assets being transferred should reflect the PV of Future Utilization Benefits attributable to the St. Clair Line.

107. Spectra should be prevented from harming Union's ratepayers and enriching itself by failing to comply with the well established public utility principle that utility

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<sup>82</sup> Union's August 17, 2009 Submissions pertaining to a potential addition to the Final Issues List at para 4(i).

owners are obliged to maximize the value of under-utilized utility assets for the benefit of its ratepayers. This principle is expressed in a number of prior cases including the Board's EB-2005-0211, EB-2006-0081 ("Cushion Gas No. 2")<sup>83</sup> Decision and Order dated June 28, 2006, and most recently in the EB-2005-0551 Natural Gas Electricity Interface Review ("NGEIR") Decision with Reasons dated November 7, 2006. In Cushion Gas No. 2, the Board described the application of the principle to both utility storage and transportation assets as follows:

"The Board also has the authority to incent (or disincent) utility behaviour at its discretion. The Board is not limited to a traditional cost of service approach to rate regulation; as noted above, it considers a variety of rate setting methodologies. Inherent in that flexibility is the power to incent or disincent particular utility behaviour. The Board acts well within its powers when it encourages or discourages certain utility activities through its ratemaking powers.

The Board approved sharing of proceeds from transactional services is illustrative. The Board permits the gas utilities to collect revenues for transactional services, i.e. the state of storage or transportation assets that are temporarily surplus to utility needs. The underlying assets (i.e. the actual pipelines and storage facilities) remain in ratebase; however, the utility is not only permitted, but in fact encouraged to "rent out" these assets to third parties when they are not needed to serve the utilities' in-franchise customers. As such the Board allows for a sharing of proceeds to incent the utilities to maximize the use of these assets. This benefits the ratepayer and the shareholder, who both share in the benefit of the transactional services revenues. The Board's authority to require a sharing of such proceeds is not explicit but is derived from its s.36(3) jurisdiction to adopt any method or technique it deems appropriate in setting rates."

108. In the NGEIR Decision,<sup>84</sup> the application of the principle to utility storage assets is captured in the following passages:

"The Board finds that the entire margin on storage transactions that are underpinned by "utility asset" storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers.

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<sup>83</sup> Board Staff Brief of Authorities, Tab 11.

<sup>84</sup> EB-2005-0051, Natural Gas Electricity Interface Review ("NGEIR") Decision with Reasons, November 7, 2006, at pages 100 to 103, and in particular, at pages 101 and 102; CME Brief of Authorities.



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Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space. The Board finds that shareholders will retain all of the margin on short-term transactions arising from the "non-utility" storage space.

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The Board finds that the current 25% incentive is excessive given that ratepayers bear all of the costs of the existing storage assets. The Board believes that a 10% incentive is sufficient."

109. This legal and policy rationale justifies an allocation amount to ratepayers that differs from the NBV of the under-utilized assets that Union proposes to allocate. The Board not ought not to countenance Spectra's failure to comply with its obligations to Union's ratepayers.
110. That this is the correct concept to apply to prevent ratepayer harm and to stimulate adherence to well established regulatory principles is corroborated by considering what a stand-alone utility would do upon recognizing that, in cooperation with its existing upstream partner, the utilization of currently under-utilized utility assets could be materially increased by creating a new legal entity such as a JV or a partnership to hold the utility assets and to use them in combination to provide point-to-point FT services under negotiated long term fixed price contracts.
111. A stand alone utility, not subject to the direction of a holding company parent, would participate in the JV or partnership either in its own name or through a subsidiary. If Union held the 50% interest in the JV created to maximize the use of the St. Clair Line, or if Union leased rather than sold it assets to the JV, the net revenues realized from the JV would be subject to review in Union's rate cases

just as Transactional Services (“TS”) revenues are currently reviewed in Union’s rate cases. For example, if MichCon leases rather than sells its assets to the JV, its regulator will be able to evaluate the prudence and reasonableness of the lease revenues and, if necessary, impute revenues to assure that MichCon’s ratepayers are not deprived of the full benefit to which they are entitled. The rent the JV pays should reflect the fact that commitments are in place to use the capacity to almost 78% of its capability, as well as the possibility that the remaining 12% of capacity could be sold. If the MPSC applies the same regulatory principles that this Board applies, then a significant portion of these rents would be allocated to MichCon’s ratepayers. The value of TS net revenues that this Board allocates to Union’s ratepayers recognizes the obligation of a utility owner to maximize utilization of utility assets primarily for the benefit of its ratepayers. Currently, the Board allocates 90% of Union’s TS net revenues to ratepayers.<sup>85</sup>

112. The amount to be allocated to ratepayers is not limited to 50% of the extent to which the PV of Future Utilization Benefits attributable to the St. Clair Line exceeds NBV as Union suggests in its Argument-in-Chief. In the context of the Board’s determination that Union’s ratepayers are entitled to 90% of TS net revenues, as much as 90% of the amount by which the PV of Future Utilization Benefits attributable to the St. Clair Line exceeds NBV could be credited to

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<sup>85</sup> NGEIR Decision *supra* at page 103; CME Brief of Authorities, Tab 6.

Union's ratepayers. The allocation to ratepayers could possibly be 100% based on the *Toronto Hydro* decision Board Staff cites in their Submission.<sup>86</sup>

113. If the JV was treated in the same manner as Union affiliates then, in the rate case in which the final amount to be allocated to ratepayers is determined, the "price" at which the sale transaction takes place would have to be a market price.<sup>87</sup> We submit that a market price would reflect the PV of Future Utilization Benefits attributable to the St. Clair Line. The share allocated to ratepayers would be at least 50%, and, in our submission, as much as 90% to 100% under the provisions of the Affiliate Relationships Code ("ARC") which states:

"Panels on rate cases will determine if there are exceptional circumstances justifying a different treatment."

114. A final determination of the amount to be allocated to ratepayers that is compatible with applicable regulatory principles cannot be made in this proceeding because Union has failed to present any evidence of the capitalized value of the net revenues associated with the materially increased utilization of the St. Clair Line will result from providing FT services to the Open Season bidders. However, no one will be prejudiced if the final determination of the amount to be allocated to Union's ratepayers is made later as long as the concept or valuation method that will be applied to determine the amount to be allocated is determined in this proceeding.

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<sup>86</sup> Board Staff Submissions at page 76 and Board Staff Brief of Authorities, Tabs 12 and 13.

<sup>87</sup> OEB's "Interpretive Guideline to the Affiliate Relationships Code for Gas Utilities", December 2004; Union Brief of Authorities at Tab 4, page 2.

115. That said, the total absence of a transparent presentation of these benefits in these proceedings is of concern because it is incompatible with Union's disclosure obligations as an Ontario public utility. These obligations were described recently in a Decision and Order of the Board in EB-2008-0304, dated November 19, 2008,<sup>88</sup> as follows:

"A public utility Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of Toronto Hydro-Electric System Limited v. Ontario Energy Board [2008] O.J. No. 3904 (QL), para. 78:

"At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large."

Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.

A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion."

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<sup>88</sup> CME Brief of Authorities at Tab 7.

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116. The Board Panel in the RP-2001-0032 proceeding<sup>89</sup> describes the obligations on a utility to make a transparent and complete presentation of all relevant information as follows:

“The Board has always relied on the good faith of utilities of making timely, complete and accurate disclosure of all information relevant to the operations of the utility whether or not the specific information has a direct impact on the Board’s rate-making function.”

117. The foregoing excerpt is from an Enbridge Gas Distribution ("EGD") Rate Case. The excerpt pertains to the lack of adequate disclosure pertaining to the implementation of a plan by EGD's parent company, Enbridge Inc. ("EI"), to create a 50/50 limited partnership with the parent company of BC Gas in an entity named CustomerWorks Limited Partnership ("CWLP") and to then transfer utility assets to that entity. The purpose of these transactions was to attempt to deprive ratepayers of the benefit of efficiencies that could be realized by rationalizing utility resources engaged in the provision of Customer Care services. The plan called for the transfer of utility resources from EGD and BC Gas to CWLP; and the provision of Customer Care services by CWLP to EGD and BC Gas at costs reflecting the entire complement of resources that had been transferred to the limited partnership. Neither EGD nor BC Gas had any ownership interest in the limited partnership. Their parent companies were the ultimate beneficiaries of any enhanced profits that CWLP realized by materially rationalizing the utility resources which had been transferred to it by EGD and BC

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<sup>89</sup> RP-2001-0032 Enbridge Gas Distribution Inc., Decision with Reasons, Volume 1, December 13, 2002, pages 181 to 197, and in particular, para. 6.2.21 at page 197; CME Brief of Authorities, Tab 8.

Gas. Ultimately, sufficient disclosure of the necessary information to quantify the value of the benefits that should have been allocated to ratepayers was obtained but not before the Board issued and served a summons on the Executive Vice-President of EI to attend the hearing and provide the requisite information.<sup>90</sup>

118. In this case, where the obvious purpose of the proposed transaction is to enable Spectra and DTE to realize the benefits of the materially increased utilization of the assets Union seeks leave to sell, there should be a transparent presentation of the benefits Spectra will receive if the St. Clair Line is transferred to the JV at NBV rather than at a value that reflects the PV of Future Utilization Benefits attributable to those facilities. The value of these benefits should not be shrouded in secrecy, particularly when the JV will be a utility providing regulated transportation services to multiple shippers.<sup>91</sup>

119. Although Union has provided insufficient information to enable to Board to make a final determination in these proceedings of the PV of Future Utilization Benefits attributable to the St. Clair Line, there are a number of evidentiary indicators that support the conclusion that this value materially exceeds the NBV of the St. Clair Line of about \$5.2M in 2010. One of these value indicators is the estimated replacement cost of the St. Clair Line that is filed in confidence at Exhibit X1.1 and is materially greater than \$5.2M. Another is a high level estimate that can be derived from the November 1, 2008 Valuation Report that reflects historic

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<sup>90</sup> RP-2002-0133, Enbridge Gas Distribution Inc., Decision with Reasons, Volume 1, November 7, 2003, paras. 870 to 900; CME Brief of Authorities, Tab 9, and in particular, at para. 898.

<sup>91</sup> Transcript Volume 1, page 27, line 27 to page 28, line 24.

utilization of the St. Clair Line at an average of approximately 9.3% of its capabilities. On the basis of the commitments made by Open Season bidders, utilization of the St. Clair Line will increase by a factor of about 8.3 to 77.7% of its capability.<sup>92</sup> If the St. Clair Line has a net revenue-based value of \$2M when operating, on average, at 9% of its capability, then when operating at 77.7% of its capability, its value would increase to about \$16.6M assuming no change in margins. At 100% utilization, this very high level indicator would produce a value for the St. Clair Line of about \$21.5M. Under confidential negotiated contract pricing, the margins could be higher for the reasons described in paragraph 59 of the submission of Board Staff. If they are higher, then the PV of Future Utilization Benefits attributable to the St. Clair Line will be higher.

120. A further way of deriving a "high level" indicator of the PV of Future Utilization Benefits attributable to the St. Clair Line is to take the mid-point of the \$/Gj range within which the point-to-point price for FT services from Belle River to Dawn is likely to fall, which Union witnesses place between \$0.10 and \$0.15/Gj.<sup>93</sup> Applying the amount of \$0.125 to the 295,459 Gjs per day for which five shippers have already committed produces revenues of about \$36,932/day or \$13,480,316/annum. The 11.7 km St. Clair Line represents about 34% of the distance between Belle River Mills and Dawn. Accordingly, an estimate of revenues attributable to the St. Clair Line is 34% of \$13,480,316, or an amount of

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<sup>92</sup> See footnote 12.

<sup>93</sup> Transcript Volume 1, page 171, line 18 to page 172, line 22.

about \$4,583,308/annum. These revenues relate to about 78% of the capacity of the pipeline and compare to the average annual revenue amount realized between 2003 and 2008 from the St. Clair Line of about \$467,500.<sup>94</sup> The annual revenues at 78% utilization will be about 9.8 times the average revenues reflected in the \$2M value for the St. Clair Line which is based on its historic usage. Using this high level approach, the value of the St. Clair Line, at 78% utilization, would be about \$19.6M and, at 100% utilization, would increase to something in the order of \$25M.

121. These amounts greatly exceed the \$5M limit which Union asks the Board to place on the amount to be allocated to Union's ratepayers. These high level indicators of value, along with the replacement costs for the St. Clair Line, strongly suggest that the amount to be allocated to ratepayers should be materially greater than \$5M. If 100% of the pipeline's capability is sold, then with 100% of the PV of Future Utilization Benefits allocated to ratepayers, the amount over and above the NBV of about \$5M could perhaps be as much as \$20M.
122. The point is that while the evidence pertaining to the precise amount to be allocated to ratepayers is incomplete, the indicators are that the appropriate amount to be allocated to prevent ratepayer harm materially exceeds the NBV of the St. Clair Line. We agree with the expectation expressed by Board Staff in paragraph 52 of their submission to the effect "that the net present value of the

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<sup>94</sup> Exhibit J1.1 where Net Revenues for the six years 2003 to 2008 is \$2,805,000 or, on average, \$467,500/per year.



long term forecasted revenues in the proposed Dawn Gateway Line will be a substantial amount ..." and "markedly higher than the proposed sale price set at Net Book Value."

123. This case does not involve a "franchise termination situation", nor does it involve a disposition of redundant utility assets.<sup>95</sup> What we have in this case is a proposed disposition of utility assets for the purpose of significantly increasing their usage as utility assets. A proposal to increase the use of under-utilized utility assets is not an extraordinary event out of the ordinary course as Union implies.<sup>96</sup> We adopt and support the analysis on this point contained in paragraphs 65 to 72 of the submission of Board Staff. As well, as a matter of principle, increasing the use of under-utilized utility assets is an obligation that rests with every utility owner in Ontario. As a matter of principle, ratepayers are to be the primary beneficiaries of the fulfillment of that obligation.
124. This case is a "compensation" type of case of the sort referred to by Union at paragraph 58 of its Argument-in-Chief. The "special interest purchaser" argument does not apply in this case to enable Spectra to harm Union's ratepayers by failing to comply with its obligations as Union's utility owner. The St. Clair Line is not being sold to the JV as scrap metal. It is being sold to be used by the purchaser to generate revenues under commitments that have already been made for almost 78% of the St. Clair Line's capacity. Each and every arm's

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<sup>95</sup> Union Argument-in-Chief, para. 50.

<sup>96</sup> Union Argument-in-Chief, para. 53.

length purchaser of a revenue producing pipeline asset, 78% of which had been pre-sold to shippers, would need to reflect the PV of these revenues in their proposed purchase price. Union is clearly conferring a preference on the JV by agreeing to a price limited to the NBV of the St. Clair Line.

125. Nor does Union's attempt to classify any value greater than the NBV as "income"<sup>97</sup> enable Spectra to deprive Union's ratepayers of their appropriate share of the PV of Future Utilization Benefits. This classification is incorrect for the reasons described by Board Staff in their Submission.<sup>98</sup> Moreover, the Board's discretion to allocate an amount to ratepayers to prevent harm is not confined to allocations of "capital" as opposed to "income." The Board determines the amount to be allocated to ratepayers, regardless of its classification as "income" or "capital."

126. In the circumstances of this case, it would be incompatible with well established regulatory principles as well as unfair and unreasonable to limit the value allocated to Union's ratepayers to the NBV of the St. Clair Line at the time the transfer is completed. Relevant to the issue of unfairness it is the fact that Union's ratepayers have, for many years, been burdened with paying a full return on the significantly under-utilized St. Clair Line.<sup>99</sup>

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<sup>97</sup> Union Argument-in-Chief para. 57.

<sup>98</sup> Board Staff Submission, paras. 65 to 72.

<sup>99</sup> See para. 22 of this Argument.

127. Based on the foregoing, we urge the Board to find that the consequences for Union's ratepayers of the transfer of the St. Clair Line to a regulated JV in which Spectra holds a 50% interest other than through Union should be determined when the transaction has been completed. We urge the Board to remain silent as to the "price" that the JV should pay Union to acquire the asset. Instead, and regardless of the price that the JV and Union have agreed upon in their non-arm's length transaction, the transfer should be approved on the basis of a determination that the value to be allocated to ratepayers will not be limited to the NBV of the St. Clair Line but will reflect the appropriate ratepayers' share of the PV of Future Utilization Benefits attributable to that asset as well as the returns Union's owner reasonably needs to take on the added risks associated with selling point-to-point FT services from Belle River to Dawn under the auspices of negotiated long term fixed price contracts.
128. To assure that there is sufficient information available to make these determinations when the transaction is completed, the Board should direct Union to provide an independent estimate of the PV of Future Utilization Benefits attributable to the St. Clair Line. Interested parties can then scrutinize and test this information, as well as other indicators of that value such as the replacement cost of the St. Clair Line, at which point the Board can determine the amount to be allocated to ratepayers in a manner that ascribes appropriate weight to the regulatory principle obliging Union to maximize the value of under-utilized assets for the benefits of its ratepayers.

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129. When determining the appropriate proportion of the PV of Future Utilization Benefits to be allocated to ratepayers, as a result of the sale of the St. Clair Line to the JV, the Board has the discretion to consider and to bring into account the added return that a utility owner should be permitted to earn for assuming risks associated with the provision of point-to-point FT services from Belle River to Dawn under the auspices of long term negotiated fixed price contracts. If Union's owner wishes this factor to be considered when the Board determines the proportion of the PV of Future Utilization Benefits attributable to the St. Clair Line, then, through Union, the JV will need to make a full and transparent presentation of the estimated year-by-year return it is expected to realize under the JV's Plan, and to show how that return is affected when more than the NBV of the St. Clair Line is allocated to ratepayers. We wish to emphasize that information pertaining to the JV's anticipated returns only becomes relevant in the asset valuation process in the event that Union's owner wishes that information to be taken into account in order to reduce the proportion of the PV of Future Utilization Benefits attributable to the St. Clair Line that are allocable to ratepayers.
130. We also wish to emphasize that the issue pertaining to the added return that the JV needs to assume risks associated with long term negotiated pricing is a factor that will only be considered in the context of determining the proportion of the PV of Future Utilization Benefits attributable to the St. Clair Line to be allocated to ratepayers. The question of the added return that is needed to assume these risks is not intended to become an issue in determining the appropriateness of

the contract prices shippers have agreed to pay the JV. The Board can establish the percentage of the PV of Future Utilization Benefits to be allocated to ratepayers after taking into account the extent to which returns to the JV will be affected by allocating an amount greater than the NBV of the St. Clair Line to Union's ratepayers. If Union's owner does not wish to lead evidence of this nature, then the proportion of the PV of Future Utilization Benefits attributable to the St. Clair Line to be allocated to ratepayers should be at least 90% and perhaps as much as 100% for the reasons we have already outlined.

131. As already noted, Union says that the JV may not complete the proposed transaction if provincial jurisdiction is found to prevail over the St. Clair Line and its extension from Bickford to Dawn, or if the Board does not specifically approve the price that Union and the JV have agreed upon in their non-arm's length transaction. This evidence creates another rate-making scenario that we urge the Board to consider and decide, at a conceptual level, when rendering its Decision with Reasons in this case. The scenario to be considered is whether a "do nothing" response to the Board's Decision in this case gives rise to possible rate-making consequences for Union.

132. We submit that a refusal by the JV to complete the transaction because of a finding that provincial jurisdiction over the St. Clair Line and its extension from Bickford to Dawn has not been ousted would be unjustifiable. Similarly, a refusal by the JV to proceed with the transaction because the Board does not agree to limit the amount allocated to Union's ratepayers to the NBV of the St. Clair Line is

unjustifiable because it is incompatible with the obligation of utility owners to maximize the value of under-utilized assets for the benefit of ratepayers.

133. There is no reason for the JV to conclude that OEB regulation of its ownership and operation of the St. Clair Line and its extension to Dawn will either prevent it from selling point-to-point FT services from Belle River to Dawn under the auspices of long-term fixed price negotiated contracts, or prevent it from achieving returns that are reasonable having regard to the increased risks it is assuming. On the contrary, having regard to the extent to which Union's owner has been generously treated as a result of the OEB's NGEIR Decision and its approval of Union's 5 year Incentive Regulation Plan ("IRP"), there is every reason for the JV to believe that its ownership and operation of the St. Clair Line and its extension to Dawn will be treated fairly under OEB regulation. OEB regulation can accommodate the JV's provision of point-to-point FT services from Belle River to Dawn. Range rates and other types of rate schedules that the Board has previously approved can be used to achieve this objective.<sup>100</sup>

134. Section 36(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

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If the value of service spread ranges between \$0.10 and \$0.15/Gj as Union witnesses say, then a range rate ceiling above \$0.15/Gj is all that is needed to accommodate the JV's Plan in the event it is found that its ownership and operation of the St. Clair Line and its extension to Dawn is subject to provincial regulation. As well, the wording that currently exists in both Union's C1 and M16 Rate Schedules to the effect that "Multi-year prices may also be negotiated, which may be higher than the identified rates" is a rate schedule option which would accommodate the JV's Plan.

reasonable rates. In this context, we submit that the OEB is empowered to do whatever the MPSC can do to accommodate the JV's Plan. We also reiterate that in its decision in this case, the Board should express a commitment to accommodate the JV's Plan without interfering with the long term contracts it has already signed. We urge the Board to accompany its commitment to this effect with process directions to assist the JV and Union to complete the sale transaction in the context of a finding in favour of provincial jurisdiction over the JV's ownership and operation of the St. Clair and its extension to Dawn.

135. We urge the Board to consider issuing process directions which 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 issuance of such directions, as the result of a finding that provincial jurisdiction prevails over the JV's ownership and operation of the St. Clair Line and its extension to Dawn, is not a "jurisdictional experiment" as suggested by counsel for Dawn Gateway LP in his August 17, 2009 letter to the Board. Rather, the issuance of such directions is constructive response to the relevant jurisdictional facts which do not operate to oust provincial regulatory authority over the St. Clair Line and its extension to Dawn.

136. The disclosure made by the JV in its Application, confidential or otherwise, would need to be sufficient to comply with the disclosure obligations required of an OEB regulated transportation services utility to which we have already referred. 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 also expect the evidence would include a description and copies of the MPSC rate schedules which apparently are sufficient to accommodate the JV's Plan. The application should include suggested OEB rate schedules to accommodate the point-to-point pricing from Belle River to Dawn under the auspices of negotiated long term fixed price contracts.

137. As noted above, as far as we are concerned, there is no need to include information with respect to the returns that it expects to realize from selling FT services between Belle River Mills and Dawn under the auspices of negotiated long term fixed price contracts when the JV applies for approval of OEB rates to accommodate the sale of transportation services under such a regime. The question of returns the JV realizes only becomes an issue in the context of Union's application to the Board to determine the final amount allocable to ratepayers upon the transfer of the St. Clair Line to the JV. In that Union proceeding, the returns the JV realizes only becomes an issue if the JV wishes the proportion of the benefits to be allocated to ratepayers to be reduced on the grounds that, without such relief, it will not realize the returns that it says it needs to assume the risks of operating under the auspices of a negotiated long term fixed price contracting regime for the provision of transportation services between Belle River Mills and Dawn. If Spectra, through Union, decides it needs that type of relief, then there will need to be a transparent demonstration of the year-by-year returns the JV forecasts and the impact on those returns on the allocation of



the PV of Future Utilization Benefits attributable to the St. Clair Line to ratepayers before the Board can determine the appropriate proportion of benefits to allocate to ratepayers.

138. An unjustifiable refusal to complete the Board-approved sale should prompt a rate-making response that excludes owning and operating expenses associated with the under-utilized component of the St. Clair Line from Union's revenue requirement. When rendering its decision in this case, we urge the Board to alert Union that this rate-making contingency will be addressed if and when it arises and to establish a reasonable deadline for Union to advise the Board whether the JV will complete a Board-approved sale of the St. Clair Line to the JV that does not limit the amount to be allocated to Union's ratepayers to NBV. We suggest that the Board direct Union to advise whether the JV will complete the Board-approved sale within 90 days from the issuance of the decision in this case.
139. For these reasons, we urge the Board to make the following determinations regarding the proposed sale and its rate impacts:
- (a) The sale of the St. Clair Line to the JV should be approved without reference to the price agreed upon by Union and the JV;
  - (b) Regardless of the price agreed upon, the amount to be allocated to ratepayers to ensure adherence to regulatory principles and to prevent ratepayer harm will be determined when the transaction is completed having regard to the PV of Future Utilization Benefits attributable to the

St. Clair Line and, if the JV wishes, a return for the JV that is reasonable, having regard to the increased risks it has assumed;

- (c) The determinations requested above will be based on a transparent presentation by Union of all of the requisite relevant information; and
- (d) There may be rate-making consequences for Union if the JV unjustifiably refuses to proceed with the project.

## **V. Landowner Matters**

140. As already noted, landowner concerns will be adequately addressed by a finding that the St. Clair Line and its extension from Bickford to Dawn remains subject to provincial jurisdiction. We defer to the submissions of counsel for the landowners with respect to the measures to be implemented in the event of a finding that the JV should be subject to federal regulation in Canada rather than provincial regulation.

## **VI. First Nation Consultation**

141. We have no submissions to make on this issue.

## **VII. Appropriate Test**

- (a) Will the Transaction have an Adverse Effect on Balance Relative to the "Status Quo" in Relation to the Board's Statutory Objectives?

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142. Our analysis of this question differs from that contained in Board Staff's Submission.<sup>101</sup> The starting point for our analysis is the fact that the plan to increase utilization of existing utility facilities through the sale of point-to-point FT services from Belle River to Dawn under the auspices of negotiated long term fixed price contracts can be implemented without a JV or a sale of the St. Clair Line to the JV. As outlined previously, the other alternatives include new cost and revenue sharing arrangements between MichCon, St. Clair Pipeline and Union and changes to the menu of transportation services they currently provide to include point-to-point FT services from Belle River to Dawn under the auspices of long term fixed price contracts.
143. The features of the plan that can be implemented without either a JV or such a sale include the extension of the St. Clair Line from Bickford to Dawn and the collaborative provision by MichCon and Union of point-to-point FT services from Belle River to Dawn under the auspices of long term fixed price contracts. These are the elements of the plan that will have the beneficial effects on competition in the sale of gas to users and provide additional options to manage price volatility, as well as the other benefits that Union describes in its Argument-in-Chief.
144. Since these elements of the plan can be achieved without creating a JV or transferring the St. Clair Line to the JV, they are not attributable to the proposed sale of the St. Clair Line to the JV.

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<sup>101</sup> Board Staff Submission at paras. 99 to 113.

145. The features of the plan that relate directly to the proposed sale of the St. Clair Line to the JV are:
- (a) The creation of the JV in which Spectra holds a 50% interest through a subsidiary other than Union; and
  - (b) The proposal to limit the allocation of value to Union's ratepayers to the NBV of the St. Clair Line.
146. These two features of the plan have a distinctively negative and adverse effect relative the "status quo" in relation to the Board's statutory objectives because the "status quo" calls for utility owners to comply with their regulatory obligation to maximize the value of under-utilized utility assets primarily for the benefit of their ratepayers. Spectra's participation in the JV through a subsidiary other than Union and the proposed sale which purports to limit the allocation of value to Union's ratepayers to the NBV of the St. Clair Line operate to preclude Union's ratepayers from sharing in the increased utilization benefits attributable to the St. Clair Line. Without measures to prevent this harm, the interests of consumers with respect to prices will not be protected. As well, the expansion of the St. Clair Line from Bickford to Dawn, being rooted in a proposed sale of the St. Clair Line to the JV on terms that contravene a well established regulatory principle, is a step in a self-serving exercise by the utility owner to enrich itself at the expense of Union's ratepayers. An expansion that is part of such an exercise

is not rational. It contravenes the Board's statutory objective to facilitate rational expansion of transmission and distribution systems.

147. When the analysis of the adverse effects of the proposed sale are confined to the features of the plan that are directly related to that sale, it is evident that, without measures to prevent ratepayer harm, the impact of the proposed sale in relation to the Board's statutory objectives is distinctly negative and not otherwise as Union argues.

**(b) What is the Appropriate Test to be Applied by the Board in this Application?**

148. A threshold point we wish to emphasize is that the Board has an obligation to decide the issues in its Final Issues List. The determination of these issues is necessary to inform the Board's response to the specific sale application relief sought by Union.
149. The Board's options in this Application are not limited to either unconditionally approving Union's request, or denying the Application in its entirety, as Union appears to contend.<sup>102</sup> The Board is fully empowered to render a decision that prevents harm and is fair.
150. In urging the Board to recognize that materially increased utilization of existing facilities could be achieved without the proposed sale, we are not requesting that the deal be re-written on the basis of theoretical possibilities as Union

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<sup>102</sup> Union Argument-in-Chief, para. 107.

suggests.<sup>103</sup> Rather, we rely on these facts to demonstrate the harm that Union's specific sale proposal causes. We have acknowledged 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 would cause. Respect for "sound business judgment" does not extend to unconditionally approving transactions that cause ratepayer harm.

151. The Board is not bound by the price Union and the JV have ascribed to the St. Clair Line when determining the amount to be allocated to ratepayers in accordance with well established regulatory principles. In exercising its regulatory functions, the Board is not bound by the provisions of contracts. The PV of Future Utilization Benefits concept that we say should be applied to determine the rate-making consequences of the sale of the St. Clair Line to the JV prevents the harm to ratepayers that Union's sale proposal would cause. In the context of the regulatory principle that requires utility owners to maximize the value of under-utilized utility assets for the benefits of their ratepayers, as well as the burden that Union's ratepayers have carried for years with respect to the materially under-utilized St. Clair Line, it would be unfair and unreasonable to limit the allocation to Union's ratepayers to the NBV of the St. Clair Line.
152. For all of these reasons, we submit that the criteria that should be accorded the greatest weight in this Application are the prevention of harm and fairness.

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<sup>103</sup> Union Argument-in-Chief, para. 108.

## **VIII. CME's Response to the Issues List**

153. The foregoing submissions are reflected in our response to each of the questions in the Board's Final Issues List set out below.

### **1.0 Jurisdiction**

#### **1.1 If the proposed sale is approved, should the St. Clair Line be under the jurisdiction of the OEB or the NEB?**

- The JV's ownership and operation of the St. Clair Line and its proposed extension from Bickford to Dawn should remain subject to OEB jurisdiction. There are no jurisdictional facts to support the ousting of OEB jurisdiction over these facilities.

#### **1.2 If the proposed Dawn Gateway Line is ultimately completed, should it be under the jurisdiction of the OEB or the NEB?**

- The JV's ownership and operation of the St. Clair Crossing should remain subject to NEB jurisdiction. Its ownership and operation of the St. Clair Line and its extension from Bickford to Dawn should remain subject to OEB jurisdiction.

### **2.0 Impact on Union's Transmission and Distribution Systems and Union's Customers**

#### **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?**

- The JV's ownership and operation of the St. Clair Line and its proposed extension to Dawn should have no adverse impact on the integrity, reliability and operational flexibility of Union's transmission and distribution systems.

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**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?**

- The JV's ownership of the St. Clair Line and its proposed extension from Bickford to Dawn should have no adverse impact on Union's ability to connect future customers that are in proximity to the St. Clair Line.

**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?**

- The JV's ownership and operation of the St. Clair Line and its proposed extension from Bickford to Dawn would eliminate Union's ability to provide C1 transportation services between its St. Clair and Dawn delivery/receipt points. However, as long as Union holds capacity on the JV's system, the transportation services the JV provides to Union should adequately enable Union to meet the needs of its existing customers for transportation services between these two points.
- The OEB, as the regulator of the JV's ownership and operation of the St. Clair Line and its extension to Dawn, can resolve any access or pricing issues raised by existing or new Union customers wishing to contract directly with the JV for transportation services between the St. Clair and Dawn.
- Eliminating the availability of C1 transportation service from Union between St. Clair and Dawn should have no adverse effect on Union's other rates.
- Regardless of the amount the JV pays to Union for the St. Clair Line, the value to be allocated to Union's ratepayers upon completion of the transaction should be determined in a manner compatible with Spectra's obligation as Union's owner to maximize the value of under-



utilized utility assets for Union's ratepayers. It is unfair, unreasonable, and incompatible with well established regulatory principles to limit the rate-making consequences of the transaction to the NBV of the assets at the time the transaction is completed.

### **3.0 Land Matters**

#### **3.1 How would a change in ownership and regulatory oversight impact the landowners' interests including any land use restrictions, rights under existing agreements, abandonment obligations, and availability of costs awards related to regulatory proceedings?**

- Landowner concerns will be resolved if the JV's ownership of the St. Clair Line and its proposed extension from Bickford to Dawn remain subject to OEB regulation.

### **4.0 First Nation Consultations**

#### **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?**

- We support Union's submissions on this issue.

### **5.0 Appropriate Test**

#### **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?**

- Yes, for the reasons outlined in paragraphs 142 to 147 of this Argument.

#### **5.2 What is the appropriate test to be applied by the Board in this application?**

- Prevention of harm and fairness as to described in paragraphs 148 to 152 of this Argument.

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**IX. Relief the Board Should Grant**

154. At the outset of this Argument, we expressed the view that the Board will be challenged to constructively respond to the important and complex issues this case raises in an manner that is compatible with applicable legal and regulatory principles and the public interest. We submit that to meet this challenge, the relief the Board grants should include the following:

- (a) A determination that the JV's ownership of the St. Clair Line and its proposed extension from Bickford to Dawn should be subject to OEB regulation;
- (b) A determination that the Board has the regulatory authority and ability to accommodate the JV's Plan without interfering with the negotiated long term fixed price contracts between the JV and five of the Open Season bidders;
- (c) A commitment to accommodate the JV's Plan, without interfering with those contracts;
- (d) An approval of the sale of the St. Clair Line to the regulated JV in which Spectra and DTE will each hold a 50% interest with Spectra's interest being held through a subsidiary other than Union;
- (e) Regardless of the price the JV agrees to pay to Union for the St. Clair Line, a determination that the consequences for ratepayers, including the value to be allocated to them as a result of the sale, should be determined

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later, when the transaction has been completed. The price paid should not be limited to the NBV of the St. Clair Line but should be determined, having regard to the PV of the Future Increased Utilization Benefits attributable to the St. Clair Line and, if the JV wishes, a reasonable rate of return for the JV's owners;

- (f) Directions requiring Union to transparently present all information necessary to enable the Board to make the determinations described in subparagraph (b);
- (g) Directions requiring Union to inform the Board within a reasonable period of time after the issuance of the decision in this case whether the JV plans to complete the purchase and sale in accordance with the terms of the Board's decision;
- (h) Directions to assist the JV in proceeding in accordance with its plan under the auspices of provincial regulation over its ownership and operation of the St. Clair Line and its extension to Dawn; and
- (i) Directions requiring Union to apply for an Order determining the rate-making consequences for Union's ratepayers, if any, in the event that the JV refuses to complete the purchase and sale.

**X. Costs**

155. CME respectfully requests that it be awarded 100% of its reasonably incurred costs of participating in these proceedings.

156. We submit that CME's participation in these proceedings has been responsible and justifies an award of 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of August, 2009.

A handwritten signature in black ink, appearing to read "P. Thompson", with a long horizontal flourish extending to the right.

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Peter C.P. Thompson, Q.C.  
Vincent J. DeRose  
Vanessa MacDonnell  
Counsel for CME