Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2008-0411

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

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 running between the St. Clair Valve Site and Bickford Compressor Site in the Township of St. Clair, all in the Province of Ontario.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Cynthia Chaplin
Member

Cathy Spoel
Member

DECISION AND ORDER

Background

[1] On December 23, 2008, Union Gas Limited ("Union") filed an application with the Ontario Energy Board (the "OEB") under section 43(1) of the *Ontario Energy Board Act, 1998* seeking an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and the Bickford Compressor Site in the Township of St. Clair.

[2] A Notice of Application dated February 3, 2009, was served and published by Union Gas as directed by the Board. This included serving the Notice of Application on all Aboriginal Groups that could be affected by the application. The following parties

were given intervenor status in this proceeding: Bluewater Gas Storage; Canadian Manufacturers & Exporters ("CME"); Dawn Gateway Pipeline L.P. ("DGPL"); Enbridge Gas Distribution Inc.; Federation of Rental-Housing Providers of Ontario ("FRPO"); GAPLO-Union (a group of landowners) and the Canadian Association of Energy and Pipeline Landowners' Association and certain landowners who are affected directly by the current application (collectively "GAPLO/CAEPLA"); Market Hub Partners Canada L.P.; Shell Energy North America Inc.; St. Clair Pipelines L.P.; and TransCanada Pipelines Limited ("TransCanada"). Nexen Marketing and Ontario Power Generation were given observer status in this proceeding.

[3] A Procedural Order was issued on March 16, 2009 containing a draft issues list. Submissions were received from a number of parties and the Board established a final issues list which is attached as Appendix A to this Decision. Included on the final issues list was First Nations Consultation. No concerns were raised in this area so the Board does not need to address that issue in this decision.

[4] An oral hearing was held on June 22, 2009 and June 23, 2009.

[5] On July 9, 2009, after the filing of Argument in Chief but before the filing of intervenor arguments, the Board received a letter from CME requesting that a Notice of Constitutional Question be served on the Attorney General of Canada and the Attorney General of Ontario pursuant to section 109 of the Courts of Justice Act. The Constitutional Question to be served was related to whether the Dawn Gateway project should fall under the jurisdiction of National Energy Board or the Ontario Energy Board.

[6] On July 10, the Board issued a Procedural Order inviting comments from all intervenors on this question. Submissions were received from CME, GAPLO/CAEPLA, Union, Board staff and DGPL. CME and GAPLO/CAEPLA argued that notice was required. Union, Board staff, and DGPL argued that notice was not required. The Board issued its Decision and Order on August 5, 2009 ordering Union to provide a Notice of Constitutional Question to the Attorney General of Canada and the Attorney General of Ontario regarding this proceeding pursuant to section 109 of the Courts of Justice Act. On September 8, 2009 the Board received notice that the Attorney General of Canada would not be intervening at this stage of the proceeding.

[7] The Board in its August 5, 2009 Decision and Order also asked the parties to make submissions as to whether the Board should add the following issue to the issues list in this proceeding:

> "Should the Board consider establishing a form of regulatory treatment for the Dawn Gateway Line similar to the regulatory treatment that would be available to the pipeline under Federal jurisdiction and if so, what steps should the Board take to obtain the necessary evidence?"

Regarding the potential addition to the issues list, submissions were received from Union, Dawn Gateway LP, CME, GAPLO/CAEPLA and FRPO.

[8] A Procedural Order was issued on October 7, 2009, directing that Union and / or DGPL file, in confidence, copies of Precedent Agreements with five shippers, including information on the terms, volumes and prices. On October 9, 2009 Union requested that an exemption from the Procedural Order on the grounds that the contracts requested are not the property of Union Gas. On October 14, 2009 Dawn Gateway advised the Board that it considers the requested information to be commercially sensitive and, while it is prepared to provide the information, it requested that its circulation be restricted to the Board and its staff.

[9] The Board subsequently determined that access to the information contained in the shippers' contracts would be limited to the Board panel, Board staff and counsel for CME, GAPLO/CAEPLA, and FRPO, as these were the active intervenors.

The Proposed Transaction

[10] The application seeks an order from the Board granting leave to sell 11.7 kilometers of 24 inch diameter steel natural gas pipeline running between the St. Clair Valve Site and the Bickford Compressor Site in the Township of St. Clair (the "St. Clair Line"). Union proposes to sell this line to Dawn Gateway LP, a limited partnership owned jointly by Spectra Energy Corp. ("Spectra") and DTE Pipeline Company ("DTE") through various affiliates. Union is a subsidiary of Spectra.

[11] Spectra and DTE have formed a joint venture to develop a 34 km pipeline (the "Dawn Gateway pipeline") that will commence at the Belle River Mills storage facility in

Michigan, owned by a DTE subsidiary, Michigan Consolidated Gas Company ("Michcon"), and terminate at the Dawn Compressor Site in Ontario owned by Union.

[12] The Dawn Gateway pipeline will, when the transactions are completed, have four components. The first three components are existing pipelines. The last component is a new pipeline to be constructed by the joint venture. The components are identified in the map attached as Appendix B.

[13] The first component is a 4.74 km pipeline owned by Michcon which runs from the Belle River Mills compressor station in St. Clair County, Michigan, to the international border between the United States and Canada in the middle of the St. Clair River. Known as the Belle River Mills Pipeline, this pipeline is currently regulated by the Michigan Public Service Commission. As part of this transaction this pipeline will be leased to Dawn Gateway Pipeline LLC.

[14] The second component of the Dawn Gateway Line is .873 km of pipe presently owned by St. Clair Pipelines LP which commences at the international border between the United States and Canada in the St. Clair River and terminates at Union's St. Clair valve site in Lambton County, Ontario. Known as the St. Clair River Crossing, this line is currently regulated by the NEB. St. Clair Pipelines LP is owned by Westcoast Energy Inc. (which is a subsidiary of Spectra).

[15] The third component is the St. Clair Line, which is the subject of this proceeding. The St. Clair Line is currently regulated by the Ontario Energy Board.

[16] The last component of the Dawn Gateway Line is a proposed new 17 km pipeline running from the St. Clair Line near Union's Bickford station to the Dawn Compressor Station in Lambton County, Ontario.

[17] Union has requested that leave to complete the transaction be extended until December 31, 2013 because it may take several years to complete all the steps necessary to put the Dawn Gateway pipeline into service.

Jurisdiction

[18] Of significance to this proceeding is Union's position that the Canadian segment of the Dawn Gateway pipeline will be subject to federal jurisdiction and regulated by the

National Energy Board including the existing 11.7 km St. Clair Line currently regulated by the Ontario Energy Board. On May 6, 2009 DTE and Spectra through DGPL filed an application with the National Energy Board ("NEB") which would give effect to this change in jurisdiction.[1]

[19] In this application Union is seeking leave to sell the St. Clair Line and related assets to the DGPL at a price equal to net book value. The issues list sets out the issues with respect to jurisdiction:

1. If the proposed sale is approved should the St. Clair Line be under the jurisdiction of the OEB or the NEB?

2. If the proposed Dawn Gateway Line is ultimately completed should it be under the jurisdiction of the OEB or the NEB?

[20] The Board in its decision on April 6, 2009, ruled that these issues should be incorporated in the issues list despite the objections of Union. A month later DGPL applied to the NEB asking that Board to approve the pipeline and assume jurisdiction. Recently, the NEB issued a Letter of Direction indicating that it would, as a preliminary matter, hear submissions regarding jurisdiction. As a result, the jurisdictional issue is now before both Boards.

[21] Union argues in its reply argument that the OEB does not have jurisdiction to determine whether the Dawn Gateway Pipeline should be under federal or provincial jurisdiction. They say that the OEB does not have authority to assume jurisdiction over pipelines yet to be built particularly where the proposed owner of that pipeline, DGLP, has not made any application to the OEB. Union further states that it is not appropriate for the OEB to determine this question because "there is simply no doubt that the international transportation service that the Dawn Gateway joint-venture proposes to offer is constitutionally required to be federally regulated."[2]

[22] The Board understands Union's view that the St. Clair Line should become subject to federal jurisdiction. That does not mean that this Board does not have jurisdiction to decide this issue. Moreover, Union has put this issue in play. Both Union

[1] The Belle River Mills pipeline will remain under the jurisdiction of the Michigan Public Service Commission; see paragraph 12 above.

[2] Union Reply Argument, Pg. 5.

and DGPL have indicated that the project is not likely to proceed unless the Board agrees that the St. Clair Line should become federally regulated. The Board believes that it has both the jurisdiction and the obligation to hear submissions and to make a decision.

[23] In this case, the Board has a greater interest in the jurisdictional issue than might otherwise be the case. That is because this Board has already issued a decision on this issue regarding this pipeline. When this pipeline was first constructed almost 20 years ago, Union came before this Board requesting that the line be declared a provincial undertaking. Union was opposed by TransCanada, an intervenor, which argued for federal jurisdiction. The Board agreed with Union and ruled that the line should be under provincial jurisdiction.[3] The Board was supported in that decision by both the NEB[4] and the courts[5], so understandably the Board asks the question, "What has changed?"

[24] The intervenors say nothing has changed and note that the same parties will be controlling the undertaking albeit through different subsidiaries. They also note that the same service will be offered albeit through longer term contracts and a different regulatory regime. Under the existing arrangements gas is moved from Belle River Mills in St. Clair County, Michigan to Dawn in Lambton County, Ontario. Under the joint venture, the gas will follow the same path although the new pipeline will increase the capacity over the last 17 kilometers.

[25] The only federal undertaking is St. Clair Pipeline LP which is less than a kilometer in length commencing at the international border in the middle of the St. Clair River and terminating at Union's St. Clair Valve site in Lambton County. The existing St. Clair Line which is 11.7 km and the proposed new section of line which is 17 km are not integral or essential to the St. Clair River crossing. Nor have they ever been. It is also worth noting that this is not the first time that Union has proposed a new pipe running from Bickford to Dawn. Union applied to the Board for leave to construct a

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[3] Ontario Energy Board, *Application by Union Gas Limited for a Leave to Construct Decision with Reasons,* E.B.L.O. 266, [September 1988], paras. 3.8.57 to 3.8.89.

[4] National Energy Board*, Reasons for Decision,* GH-3-88 [October 1988], pp. 3, 14 and 15.

[5] National Energy Board*, Altamont Gas Transmission Canada Limited,* GHW-1-92, [February 1993] p. 30. In that decision the NEB stated, "the Ontario Divisional Court dismissed TransCanada PipeLines' application for leave to appeal. The Court provided brief reasons by way of written endorsement on the record. The Court stated that the reasoning of the Supreme Court of Canada in *Kootenay* and *Elk Railway Company v. Burlington Northern Inc.* was dispositive of the issue.

similar pipeline in 1993 which was turned down when the Board determined that there was no economic justification for the proposed facility.[6] There was no indication then that the new line should fall within federal jurisdiction.

[26] At the end of the day, the Union and DGPL arguments rely on the new ownership structure and the fact that the new service is a point-to-point service over the entire pipeline. The Board is not convinced that the change in ownership structure is material. The same two parties remain involved. For the last 20 years two corporate organizations have controlled and operated under a cooperative agreement the different sections of pipe. Under the new proposal that ownership is merged in a joint venture owned 50/50 by the same two corporate organizations.

[27] It is true there are operational changes and one party has been designated the main sales representative. And, the new service will become a point-to-point service running the entire length of the pipe. The intervenors argued that this is not material and the change in business operations could have easily been achieved under the old structure. The intervenors also argue that the form of regulation that the joint-venture hopes to attain from the NEB could have been obtained from the OEB. The Board agrees with that proposition as well but that really is a side issue to be addressed later. The form of regulation is not determinative of whether an undertaking is under federal or provincial jurisdiction.

[28] Section 92(10) of the *Constitution Act, 1867* provides generally that local works and undertakings within a province come within provincial jurisdiction. However, the combined effects of sections 91 and 29 create an exception whereby Parliament has exclusive jurisdiction for works and undertakings that come within the phrase “Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.”

[29] Pipelines, although not specifically mentioned in section 92(10), have been held to be included in the phrase “other works and undertakings.”[7] In the *Central Western*

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[6] Ontario Energy Board, *Application by Union Gas Limited for Leave to Construct Natural Gas Pipelines in the Townships of Sarnia and Dawn Decision with Reasons*, E.B.L.O. 244, [April 3, 1993].

[7] *Campbell-Bennett Ltd. v. Comstock MidEastern Ltd.,* [1954] S.C.R. 207, [1954] 3 D.L.R. 481 (S.C.C.), [1953] 3 D.L.R. 594 (B.C.C.A.)

Railway case,[8] Chief Justice Dickson set out the two basic tests used in constitutional analysis of pipeline jurisdiction: the "physical connection" test and the "vital, integral or essential" test. On pages 1124-1125 of *Central Western Railway*, the Chief Justice stated;

> "There are two ways in which Central Western may be found to fall within federal jurisdiction… First, it may be seen as an interprovincial railway and therefore come under section 92(10)(a) as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under section 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is <u>itself</u> an interprovincial work or undertaking. Under the latter, however, Jurisdiction is dependant upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking."

[30] The fact that a provincial undertaking touches a federal or international undertaking does not always convert a provincial work into a work under federal jurisdiction as the Chief Justice stated at page 1129:

> "Railways, by their nature, form a network across provincial and national boundaries. As a consequence, purely local railways may very well "touch", either directly or indirectly, upon a federally regulated work or undertaking. That fact alone, however, cannot reasonably be sufficient to turn the local railway into an interprovincial work or undertaking within the meaning of section 92(10)(a) of the *Constitution Act 1867.* Furthermore, if the physical connection between the rail lines were a sufficient basis for federal jurisdiction, it would be difficult to envision a rail line that could be provincial in nature: most rail lines located within a province do connect eventually with interprovincial lines."

[31] In the *Cyanamid* case[9], the Federal Court of Appeal considered the issue of control and found that, despite the physical connection of a proposed provincial pipeline

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[8] *United Transportation v. Central Western Railway Corp.* [1990], 119 N.R. 1 (S.C.C.).

[9] *Re National Energy,* [1987] F.C.J. No. 1060, [F.C.A.] *("Cyanamid")*

owned by Cyanamid Canada Limited to the existing federal pipeline of TransCanada PipeLines, TransCanada would have limited control over the proposed pipeline and therefore the provincial line would not be subject to federal jurisdiction. Another key distinction was that the proposed pipeline was not necessary for the operation of TransCanada PipeLines.

[32] This type of analysis was the basis of this Board's decision in 1988 that the St. Clair Line was subject to provincial jurisdiction. The Board stated at Page 126:

> "The NEB will control gas exports out of Canada and gas imports into Canada, including tolls and service, totally, whether the link is 100 feet or 100 miles in length. The jurisdiction of the NEB is served and reserved by limiting its jurisdiction between two points: the international border near the centre of the St. Clair River and the St. Clair Valve Site as proposed by Union.
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> If the NEB were to have jurisdiction easterly beyond the short, river crossing link, where would its jurisdiction end, and for what reason? If not at the proposed valve site, then where? How far east into the bowels of the Union system should the NEB's jurisdiction extend?
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> In the Board's view, any attempt to extend the jurisdiction of the NEB east of the proposed valve site will cause serious and unnecessary economic, legal, political, and jurisdictional problems…"[10]

[33] In determining the degree of operational integration necessary to convert a local work or undertaking to a work or undertaking that is part of the "Classes" identified in section 92(10) of the *Constitution Act*, generally requires that the integration be "vital or essential" to the operation of the interprovincial undertaking.[11]

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[10] Ontario Energy Board, *Application by Union Gas Limited for a Leave to Construct,* E.B.L.O. 266*,* [September 1988], pp. 126-127.

[11] *Reference Re: Industrial Relations and Disputes Investigation Act (Stevedore Reference),* [1955] S.C.R. 529.

[34] This principle was also relied upon by this Board in the *Bypass* case[12]. Industrial companies seeking to reduce their transportation costs wanted to build their own pipelines bypassing the facilities of the gas distribution utilities, and connect directly to TransCanada. The question was the bypass facilities were under Ontario or federal jurisdiction.

[35] The Board ruled that the bypass pipelines were subject to Ontario jurisdiction because they had no direct effect on the operation of TransCanada's pipeline or any material impact on the quantity of the product that would be transported by TransCanada.[13] The Board then stated a case to the Divisional Court, which confirmed that jurisdiction remains with the Province.[14] At the same time, the Federal Court reviewed a decision of the NEB, which authorized the construction of a bypass pipeline, and also found that the NEB had no jurisdiction over the bypass pipeline for essentially the same reasons.

[36] In the same time frame, the OEB stated a case to the Divisional Court to determine whether the OEB had jurisdiction over the proposed construction of LNG facilities by Consumers' Gas, a predecessor to Enbridge. This facility, like the bypass pipeline, required an interconnection with the TransCanada line. It was argued that the NEB had jurisdiction because of the physical connection and the operational integration between the two enterprises creating an interprovincial work or an undertaking within clause 92(10) of the *Constitution Act*. The Divisional Court ruled that although connected to the TransCanada system the Consumers' Gas proposal was a local work because it would not become an integral part of the TransCanada system.[15]

[37] The factual situation in this proceeding is also dramatically different than the *Westcoast* case[16] on which Union relies. *Westcoast* was clearly an international

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[12] Ontario Energy Board, *Determining Certain Matters relating to Certain Contract Carriage Arrangements of the Consumers' Gas Company ("Bypass Case*"), E.B.R.O. 410-I / E.B.R.O. 411-I / E.B.R.O. 412-I, [December 12, 1986]

[13] Ontario Energy Board, *Determining Certain Matters relating to Certain Contract Carriage Arrangements of the Consumers' Gas Company ("Bypass Case*"), E.B.R.O. 410-I / E.B.R.O. 411-I / E.B.R.O. 412-I, [December 12, 1986] para. 8.18

[14] *Re Ontario Energy Board and Consumers' Gas Co. et al.* [1987] O.J. No.281 (Div. Court)

[15] *Re Ontario Energy Board and The Queen in Right of Ontario et al.,* [1986] O.J. No. 1140, pp. 9-11

[16] *Westcoast Energy Inc. V. Canada (National Energy Board)*, [1998] 156 D.L.R. (4th) 456 (S.C.C.)

pipeline subject to federal jurisdiction. The question was whether additional facilities that were being connected to that pipeline became federal as a result of the connection. The Court found that the incremental facilities were integral to the federal undertaking and had common ownership and management. The decision was not simply based on common ownership and management; it was based in large part on the fact that the incremental facilities were an *integral* part of an existing federal undertaking.

[38] Westcoast had applied for orders from the NEB regarding expansions of its gathering pipeline and processing plant in Fort St. John. The NEB held that the proposed facilities were not federal works or undertakings and dismissed Westcoast's application for lack of jurisdiction. On appeal, the Federal Court of Appeal held that the Fort St. John facilities were part of a single federal transportation undertaking within the jurisdiction of Parliament. That decision was upheld by the Supreme Court of Canada. The Supreme Court repeated the established rule that undertakings may come under federal jurisdiction in one of two ways: (1) if they constitute a single federal work or undertaking or (2) if not, they are integral to the core federal transportation communication facility. The Court noted that they must be functionally integrated and subject to common management control and direction.

[39] Another decision with facts similar to the case before us is the Federal Court of Appeal's decision in *Consumers Gas Co. v. Canada (National Energy Board).*[17] There the Court rejected the NEB's conclusion that the Ottawa East Line of the Ottawa distribution system of Consumers Gas would be subject to federal regulatory jurisdiction. 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.

[40] The proposed extension 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 at Dawn for ultimate distribution throughout the province. The expansion of a provincially 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.

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[17] *Consumers Gas Co. v. Canada (National Energy Board),* [1996] F.C.J No.320, A.C.F. No. 320, 195 N.R 150 (F.C.A.)

[41] In the Board's view it is important to distinguish between cases where there is an existing federal undertaking that connects to a new facility. In that case the question is whether the new facility is a totally distinct business or integral to the operation of the existing federal undertaking. It is a different matter where there is an existing provincial undertaking and the only change is in the ownership structure. This is particularly the case where the existing owners continue but through a different vehicle such as a joint venture. On that basis, any provincial undertaking can be converted to a federal undertaking.

[42] In our view, the proposed joint venture remains subject to provincial jurisdiction, save and except that aspect that has been previously declared to be federal. Put simply, the ownership change does not change jurisdiction. Nor does the jurisdiction change because a new class of service is now proposed.

[43] Of particular significance to this case is the Supreme Court of Canada decision in 1972 in *Kootenay.*[18] In that case Burlington, a US Company, constructed a short line to the US-Canada border and Kootenay, a B.C. Company, proposed to construct a line to connect with the Burlington line just north of the Border. Under the arrangement, Burlington would own and operate facilities south of the border and Kootenay would own and operate the facilities north of the border. The Court in holding that the Kootenay line was not part of an extraprovincial undertaking stated;

> "[Kootenay] is not a subsidiary of Burlington or subject to Burlington's control. Its railway would not be operated by Burlington. Its proposed function is to deliver carloads of coal over its line to Burlington, north of the border [for extra-provincial transport by Burlington as its only purpose]…
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> …Kootenay Railway would not connect the province of British Columbia and any other province, nor would it extend beyond the limits of the province…"[19]

[44] Within the context of the *Kootenay* case it is important to consider the following facts:

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[18] *Kootenay & Elk Railway v. Canadian Pacific Railway,* [1974] S.C.R. 955.*("Kootenay").*

[19] *Kootenay* at p. 13.

1. The first component of this project is a 4.74 km pipeline owned by Michcon, a subsidiary of DTE, which runs from the Belle River Mills compressor station in St. Clair County Michigan and terminates at the international border between the United States and Canada in the middle of the St. Clair River. This pipeline is currently regulated by Michigan Public Service Commission and will continue to be so regulated. Note Union is not a subsidiary of DTE or subject to DTE's control.

2. The function of the St. Clair Line has been and will continue to be to transport Michigan gas to Ontario. The Board has already determined this function is part of the Union system and not an integral part of the short international pipeline.

3. The St. Clair Line does not connect Ontario with any other province or extend beyond the limits of the province.

[45] It is clear the St. Clair Line is not itself an interprovincial or extra-provincial work. Nor does it form part of a single undertaking. The pipeline in this case will be owned and operated by separate corporate entities, Dawn Gateway LP in Canada and Dawn Gateway LLC in the US. As noted in Union's argument, "even though there will only be one toll, shippers will enter two contracts, one for the portion of the Dawn Gateway pipeline in US and another for the Canadian portion of the Dawn Gateway pipeline."[20]

[46] This ownership is different from the *Westcoast* case where Westcoast owned and operated the gathering lines as well as the processing and transmission facilities. And in the decision on TransCanada's Alberta System, TransCanada owned and operated *both* the provincial and interprovincial facilities. Common ownership is an important aspect of the concept of common ownership and control. It is also important to recognize that the Belle River Mills line remains under the ownership of Michcon. This is very different from both the *Westcoast* and the *TransCanada Alberta System* cases.

[47] The Board also notes that Westcoast and TransCanada operated very substantial interprovincial pipelines. That is not the case here. The only interprovincial component is the St. Clair River Crossing, which is less than a kilometer long and connected on the US side to a line under State jurisdiction. The Board would add the

[20] Union Argument in Chief, Pg. 5.

St. Clair Line is not integral to the St. Clair River Crossing. Rather, it is integral to the Dawn storage facilities, a very important provincial asset.

[48] It should also be noted that Dawn Gateway LP and Dawn Gateway LLC are essentially post office boxes. It is apparent that these virtual partnerships and corporations will contract most, if not all, of the operations back to the parties that have been directly or indirectly undertaking those operations for the past two decades. The one exception appears to be the appointment of a single sales agent.

[49] For the above reasons, the Board concludes that the St. Clair Line will continue to be under provincial jurisdiction following the proposed transaction, and that any extension of the line between Bickford and Dawn would also be subject to provincial jurisdiction.

[50] Having determined the issue of jurisdiction, the Board will now consider whether the proposed transaction is in the public interest.

What is the Appropriate Test for the Transaction?

[51] The Applicant has the burden of proof in this case but what does it have to prove in order to demonstrate that this transaction is in the public interest? Union says the Board should adopt the "no-harm test" used in the *Joint MAADs* case.[21] There the Board stated at page 6:

> "The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the

[21] Ontario Energy Board, *Application by Greater Sudbury Hydro Inc. to acquire all outstanding shares in West Nippissing Energy Services Ltd., Application by PowerStream Inc. and Aurora Hydro Connections Ltd. to acquire all outstanding shares in Aurora Hydro Connections Ltd., Application by Veridian Connections Inc. and Gravenhurst Hydro Electric Inc. to acquire all outstanding shares in and subsequently amalgamate with Gravenhurst Hydro Electric Inc.,* EB-2005-0234, EB-2005-0254, EB-2005-0257, August 31, 2005 *("Joint MAADs")*.

> one that has been negotiated to completion by the parties. In that sense, in section 86 applications of this nature the Board equates 'protecting the interests of consumers' with ensuring that there is 'no harm to consumers.'"

[52] The *Joint MAADs* case, however, is significantly different from this proceeding. In the *Joint MAADs* case, the Board was asked to approve mergers and acquisitions by three different groups of utilities. In some cases, the citizens opposed the deals that had been approved by the municipal councils that owned the utilities. The Gravenhurst Hydro Citizen's Committee, for example, said that the appropriate test was the "best result" or "best deal" test. They said the Board should consider whether consumers would have been better off with other options that were considered by the seller.

[53] The Board in the *Joint MAADs* case concluded that it was not necessary to look at other deals whether they were actually on the table or whether they were opportunities that had not been explored. Rather, the Board would look at the deal that was approved by the council and determine if there was any adverse impact on the public.

[54] The Board does not see any reason to depart from the no harm test, but notes that in any particular case, the determination by the Board of whether there is harm requires a comparison of the effect of the proposed transaction to the status quo.

[55] Keeping these factors in mind, the Board has considered the following questions:

- Would there be benefits as a result of the asset sale?
- Would there be harm to the integrity, reliability, and operational flexibility of Union's system?
- Would there be harm to potential future distribution customers seeking connection to Union?
- Would there be harm to Ontario's gas market as a result of the sale?
- Would there be harm to landowners?
- Would there be harm to ratepayers as a result of the asset sale?

[56] The Board addresses each question below. Further, to the extent the Board finds there is harm, the Board also examines whether it can be mitigated in a way that would allow the transaction to proceed. In relation to that, a relevant consideration is that this is a non-arm's length transaction.

Would there be benefits as a result of the asset sale?

[57] Union submits that there will be clear benefits from the transaction: the removal of an under-utilized asset from ratebase and the creation of an additional transportation link between Michigan storage and Dawn offering point-to-point firm service, including long-term service at negotiated fixed rates. None of the parties dispute these benefits.

Board Findings

[58] The Board accepts that there will be benefits from the transaction. There will be two types of benefits: direct and indirect. The direct benefit is the rate reduction resulting from removing the asset, which is currently under-utilized, from ratebase and rates. This benefit is small; the estimated rate impact is less than $1 per year for residential customers in the Southern Operations Area.

[59] The indirect benefits are more significant and flow from the broader project, including the expansion of capacity from Bickford to Dawn. These benefits include enhanced transportation capacity between Michigan storage and Dawn and enhanced access to supply. These benefits have the potential to lead to greater liquidity and reduced price volatility at the Dawn Hub. The proposed Dawn Gateway pipeline would have a capacity of 385,000 GJ/d on a firm basis, and that capacity could be expanded. Although these indirect benefits rely on projections, there are already five Precedent Agreements in place, thereby demonstrating that the enhanced access is desired by the marketplace.

[60] These broader benefits echo the benefits identified by the Board in the original St. Clair Line proceeding:

> "The Board finds that the proposed facilities will contribute to a more competitive and open gas supply market, wherein both Union and its storage and transportation customers will have increased bargaining power, purchasing options, flexibility and strengthened back-up supplies."[22]

[22] Ontario Energy Board, *Decision with Reasons*, *E.B.L.O. 226/E.B.L.O. 226-A,* [September 1, 1988], p. 71.

Would there be harm to the integrity, reliability, and operational flexibility of Union's system?

[61] Union serves distribution customers in the area of the St. Clair Line from the Sarnia Industrial Line. Union submitted that the transaction would have no negative impact on the operations of the Sarnia Industrial Line, or to the Union system generally. Union explained that it used the St. Clair Line as an emergency backstop supply in the event of failure on the TransCanada line, but that the need was reduced since 2005 when the Vector Line was connected. The Dawn Gateway pipeline would remain available for emergency purposes. Because of the greater capacity of the Dawn Gateway pipeline, Union concluded that security of supply would be enhanced.

[62] Board staff expressed concern that any service to the Sarnia Industrial Line from the Dawn Gateway pipeline, if available, would only be available at negotiated rates. Board staff submitted that the asset sale could result in harm to the operations of the Sarnia Industrial Line. CME did not agree with Board staff's analysis and submitted that there was unlikely to be any adverse effect on system integrity, security of supply or design day capability.

[63] Union responded that the Sarnia Industrial Line is connected to the Vector and TransCanada transmission systems and the Dow A and Heritage storage pools and does not need a connection to the Dawn Gateway pipeline to service its customers on a design day. Union went on to explain that the Sarnia Industrial Line will remain connected to the St. Clair Line in any event and would therefore be able to receive gas from the Dawn Gateway pipeline on an emergency basis.

Board Findings

[64] The evidence is clear that the Sarnia Industrial Line does not require a feed from the Dawn Gateway pipeline for design day operations. It already has multiple feeds (TransCanada, Vector, Dow A and Heritage). It could be argued that the asset sale will result in diminished security compared to the situation today because currently there is a connection to the St. Clair Line that is under Union's direct ownership and control. However, the Board finds that this harm is not material given the level of security on the Sarnia Industrial Line already. The Board also notes that in an emergency, all transmission system operators work to ensure overall security, regardless of ownership.

[65] The Board concludes that the transaction will not result in harm to the integrity, reliability or operational flexibility of Union's system.

Would there be harm to potential future distribution customers seeking connection to Union?

[66] No distribution customers are connected to the St. Clair Line; no distribution customers have ever been connected to the line. Union has a distribution network in the same municipality which is used to serve distribution customers.

[67] Board staff expressed concern that the transaction could negatively affect a large customer seeking a high pressure connection, because service from the Dawn Gateway pipeline would not be available at cost-based rates. FRPO agreed with staff's concerns. CME was of the view that there would be no adverse effect on Union's ability to connect customers near the St. Clair Line. CME submitted that as a regulated utility Dawn Gateway would have an obligation to serve and therefore a customer or Union could obtain regulatory approval to connect distribution lines to the Dawn Gateway pipeline if necessary.

[68] Union responded that Board staff's concern was based on conjecture and maintained that a large customer seeking high pressure connection would be able to connect to the Dawn Gateway pipeline or the Union system.

Board Findings

[69] The Board finds that the transaction will not result in harm to potential future distribution customers. Union has an obligation to connect. For the subject area, all large load distribution customers are connected to the Sarnia Industrial Line. The Board notes that 25% of the St. Clair Line is within a short distance of the Sarnia Industrial Line, so for that portion of the line there is unlikely to be a material difference in the cost to connect customers between the Sarnia Industrial Line and the St. Clair Line.

[70] The only potential for harm would be if a customer's connection costs were higher because it had to connect to the Sarnia Industrial Line rather than the St. Clair Line in order to get service. The Board cautions Union that if a distribution customer's connection costs were expected to be higher as a result of having to connect to the Sarnia Industrial Line rather than the St. Clair Line, then the Board may require Union to

absorb that higher cost and instead provide connection for the customer based on the notional lower cost.

[71] The Board also notes that a customer might choose to connect to the Dawn Gateway pipeline if it could negotiate suitable arrangements; this would provide another option for the customer.

Would there be harm to Ontario's gas market as a result of the sale?

[72] The sale of the St. Clair Line would result in the discontinuation of Union's current services on the line, namely C1 transportation service and various Hub services. Union submitted that shippers would be able to receive services from the Dawn Gateway pipeline or via the other available transportation links. Union noted that over the last three years, 81% of the firm volumes on the St. Clair Line have been transported for DTE affiliates.

[73] Intervenor submissions focused on the impact of shifting from OEB to NEB jurisdiction and the potential implications for the market due to the differences in regulatory approach. Concerns were expressed primarily regarding non-discriminatory access to the pipeline and related matters such as disclosure. There was no allegation that there would be harm to Ontario's gas market as a result of the sale if the OEB were to retain jurisdiction.

Board Findings

[74] While C1 service will no longer be available on the line, there has been limited use of these services in any event and the primary users have been DTE affiliates. The Board finds that there will be no material harm from the cessation of these services.

[75] The Board concludes that there would be no harm to the Ontario gas market as a result of the transaction. The Board will regulate Dawn Gateway in the public interest and in accordance with the Board's statutory objectives.

Would there be harm to landowners?

[76] The submissions focused on the impact of shifting from OEB to NEB jurisdiction and the implications for landowners due to the differences in regulatory approach.

There were no allegations that there would be harm to landowners if the OEB retained jurisdiction.

Board Findings

[77] The Board concludes that there will be no harm to landowners from the transaction as the line will remain under the Board's regulation. The alternative, namely if the NEB is ultimately found to have jurisdiction for the line, is addressed later in the decision.

Would there be harm to ratepayers as a result of the asset sale?

[78] Union is seeking leave to sell the St. Clair Line to the Dawn Gateway joint venture at net book value, which is approximately $5.2 million. There would be corresponding adjustments to Union's ratebase and rates at its next rebasing application. Rates for Union's residential customers in the Southern Operations Area will decline slightly because the costs currently allocated to the line exceed the revenues earned on the line. In other words, ratepayers are currently subsidizing the line because it is underutilized.

[79] Union does not propose that ratepayers would receive any net gain as a result of the sale because there will be no capital gain on the sale and the proceeds only represent the return *of* the shareholder's investment. Union further argued that even if the sale were done at greater than net book value, the capital gain would be entirely for the shareholder under the principles of the Supreme Court of Canada's *ATCO* decision[23] because ratepayers do not have an ownership interest in the asset, and there are no other facts which justify a sharing of any gain.

[80] Union and DGPL both argued that the rate reduction is a benefit to ratepayers and that there is no harm to ratepayers. Board staff and intervenors argued that while there is small financial benefit, there is significant harm to ratepayers as a result of the transaction. Further, because the sale is to be made at net book value, there is no gain to be allocated to ratepayers to mitigate the harm.

[23] *ATCO Gas and Pipelines Ltd.v. Alberta (Energy & Utilities Board),* [2006] 1 S.C.R. 140, 2006 SCC 4 *("ATCO").*

[81] CME argued that the harm arises from the fact that ratepayers will derive no benefit from the future revenues earned on the line:

> "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 owner to maximize the value of under-utilized utility assets for the benefit of their ratepayers."[24]

CME submitted that Union's Transactional Services provides an apt analogy and noted that ratepayers receive 90% of the revenues earned from theses services.

[82] Union disagreed with CME's position that the utility has an obligation to maximize the value of its utility assets for the benefit of its ratepayers. In Union's view, its obligation is to provide service at just and reasonable rates and to act in the interest of its customers. Union pointed out that Transactional Services (and the sharing of those revenues) relate to temporarily underutilized utility assets and short-term transactions and that ratepayers continue to bear the costs of the assets. Union argued that the St. Clair Line is not needed to provide regulated utility service to Union's customers and that once it is sold there can be no requirement on the new owner to maximize its use for benefit of Union's customers.

Board Findings

[83] It was undisputed during the hearing that ratepayers have been subsidizing the line for some time; the St. Clair Line has had a negative rate of return for six years. The cumulative subsidy has been significant; total operating costs alone have exceeded net revenues by approximately $1.8 million between 2003 and 2008. Indeed Union has characterized the removal of this underutilized asset as one of the benefits of the proposed transaction.

[84] In Board staff's view, "It appears that the pipeline has largely failed to meet the business and service objectives that Union advanced when the pipeline was approved by the Board and added to rate base in 1989."[25]

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[24] CME Argument, p. 3.

[25] Board Staff Submission, p. 19

[85] However, Union in its Reply Argument raised a further consideration:

> "Union's evidence in the 1988 proceeding indicates that the incremental construction costs of the St. Clair Line would be more than recouped in savings on gas costs in less than 2 years after construction. Accordingly, Board Staff and the Intervenors' assertion that ratepayers have paid higher rates in the past because of the historic under-utilization of the St. Clair Line is an incorrect, over-simplification of the true facts."[26]

[86] DGPL makes a similar argument, noting that the Board estimated a six year payout for the project, which is long past, and that Board staff have not referenced or attributed any value from reduced gas supply costs to its analysis.

[87] Past ratepayers may well have achieved benefits from reduced gas costs as a result of the construction of the St. Clair Line. However, the asset remains used and useful and therefore remains in ratebase and in rates. The fact is that the line is under-utilized and has been for some time, and because the costs of the line exceed the revenues, Union's ratepayers have been paying higher rates to ensure that Union continues to earn its full return on the asset and that all costs are recovered.

[88] The line is being sold as part of an overall reorganization to achieve one of the original objectives identified by Union, namely a firm seamless service between Michigan storage and Dawn.

[89] Union has emphasized that the original purpose of the St. Clair Line was to provide enhanced security of supply and diversity of supply for Union's distribution business. However, a review of the Board's decision in that application demonstrates that at that time Union also claimed benefits related to Union's transportation services to and from Dawn, including services for other distributors. The Board clearly found that there were benefits of the project related to the Ontario gas market generally:

> "The Board finds that the proposed facilities will contribute to a more competitive and open gas supply market, wherein both Union and its storage

[26] Union's Reply Argument, p. 38.

and transportation customers will have increased bargaining power, purchasing options, flexibility and strengthened back-up supplies."[27]

[90] GAPLO/CAEPLA summarized the situation well:

> "In summary, what Union now proposes as the Dawn Gateway Line has the same purpose and is to provide the same benefits as proposed by Union in 1988 and achieved by the St. Clair Line since that time – a source of gas to Union's distribution system through interconnection to American facilities to access additional supplies and storage. Under Union's Dawn Gateway proposal, there will be no change in the function of the St. Clair Line. The proposed expansion in capacity between Bickford and Dawn by substituting the new Bickford to Dawn line for the Bickford Storage Pool line is simply providing the additional capacity which was anticipated in 1988 because additional storage and transportation needs have "materialized."[28]

[91] Under the status quo, ratepayers would have expected benefits if the capacity expansion project were done as part of Union's regulated business, as has always been contemplated when market conditions permit. At a minimum, the subsidy would have been recouped and quite possibly there would have been a net contribution to rates. There would also be the potential for Transactional Services-type sharing of revenues if there were opportunities to earn additional revenues on a short-term basis. The Board agrees that this is an important aspect of the status quo. Ratepayers will receive no financial benefit from the ongoing business if it is not part of Union's regulated business.

[92] The Board concludes that the transaction does result in harm to ratepayers. The harm is the inability of ratepayers to recoup the cumulative past subsidy since 2003 through future revenues. The harm arises because Union intends to do outside the utility what it originally intended to do within the utility. The asset is not being sold to be used for an entirely different purpose; it is being sold to a utility and will continue to be used for utility service – the very service it was originally expected to provide.

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[27] Ontario Energy Board, *Decision with Reasons*, [September 1, 1988], *E.B.L.O. 226/E.B.L.O. 226-A,* p. 71.

[28] See pg. 11of GAPLO/CAEPLA Argument.

[93] The Board further finds, however, that this harm can be mitigated through an appropriate allocation to ratepayers upon completion of the transaction based on a fair market value for the asset. This issue is addressed next.

What is the remedy for the harm to ratepayers?

[94] The parties proposed a variety of remedies. One proposal was that the cumulative subsidy should be returned to ratepayers.

[95] DGPL questioned whether a refund of past tolls was lawful and noted that the net book value is already greater than fair market value estimated for the line. Dawn Gateway argued that in line with *ATCO* principles, customers are not entitled to recovery of past rates from the proceeds of sale of utility assets.

[96] Another proposal was that that the Board should impute the value of the asset at replacement cost and allocate a portion of the value to Union's ratepayers.

[97] CME provided a comprehensive proposal based on future use of the line:

> "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."[29]

[98] CME submitted that what the Board must do is determine "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."[30] CME proposed that the valuation concept should reflect the present value of the stream of net revenues that will be realized from the significantly increased utilization of the St. Clair Line, what CME termed "future utilization benefits." CME submitted that the final amount can not be determined at this time, because Union did not file the necessary evidence on the net revenues, but that the determination could be done in a subsequent proceeding.

[29] CME Argument, p. 4.

[30] CME Argument, p. 50.

[99] CME presented some high level estimates of the potential magnitude of the "future utilization benefits" of the St. Clair Line ranging from $16.6 million to $25 million. CME submitted that Union should be required to provide an independent estimate of the present value of the future utilization benefits which can be tested along with other indications of value after which the Board can determine the allocation to ratepayers. CME further argued that Dawn Gateway would be required to provide any evidence it wished to rely on that a higher return is warranted for the risk that Dawn Gateway is bearing and that otherwise ratepayers should be allocated between 90% and 100% of the present value of the future utilization benefits.

[100] CME pointed out that this was not the disposition of "non-utility" assets; it is the transfer of utility assets from one utility to another in order to increase the utilization. This, in CME's view, makes it wholly different than the circumstances in *ATCO*. CME also pointed out that the Board has determined in another case that the allocation may be greater than net book value if there is demonstrated harm to customers. CME also suggested that the Board should consider taking action if the transaction is not completed – and to signal its intention to do so in this decision. FRPO supported CME's approach.

[101] Union responded that it is unreasonable to expect Union to sell the asset without knowing the financial consequences of the transaction and that it has no way of knowing in advance the outcome the determination contemplated by CME. In Union's view, "no reasonable entity would ever agree to a sale without knowing the financial impacts of that sale."[31] Union further responded that the threat of subsequent rate sanctions if the transaction is not completed is also unreasonable.

Board Findings

[102] The Board acknowledges that Union cannot be ordered to sell the asset at a different value from what it has negotiated. However, the transaction is not taking place at arm's length. Where a transaction has not taken place at fair market value, the Board has the power to modify the transaction price for rate setting purposes. Further, the Board has the power to allocate a portion of the proceeds based on fair market value to ratepayers where the transaction will harm ratepayers.

[31] Union Reply Argument, p. 38.

[103] Intervenors argued that the price should be fair market value, which they believe is above net book value and should include some share of future revenue. Union and Dawn Gateway respond that this is not a meaningful argument because the Board has no jurisdiction under the *ATCO* decision of the Supreme Court of Canada[32] to allocate any part of the gains (if any gains exist) to the ratepayers.

[104] It is true that *ATCO* clearly established that ratepayers have no entitlement to the property of the utility. They are entitled only to service at just and reasonable rates. It is important to note however that *ATCO* was not a rate case. Justice Bastarache's comments in that case distinguish rate cases from other regulatory proceedings and made it clear that if *ATCO* had been a rate case, the Alberta regulator would have been "fully authorized to consider the treatment or effect of the proceeds from the sale."[33]

[105] The Ontario Energy Board has very broad powers in exercising its rate setting responsibility. As the Court stated in *Garland v. Consumers' Gas Company*:

> The purpose behind the Ontario Energy Board Act, both in its current and past form, is clear. The Act provides a detailed and comprehensive scheme upon which the Energy Board relies in order for it to carry out its very specific objectives. Rate setting is at the core of the Energy Board's jurisdiction. […]
>
> In addition to providing the Energy Board with guidelines, the OEBA provides the Board with specific and broad ranging powers. Pursuant to section 36(2) of the current Act, the OEB may make orders approving or fixing just and reasonable rates for the sale, distribution, and storage of gas. Subsection 36(7) authorizes the Board to fix or approve such rates of its own motion or upon the request of the Minister. In addition to the provisions outlining the Board's expansive rate making power, section 23 of the current Act is an expression of the provincial legislature's intention to bestow upon the OEB broad powers, which allow the Board to attach conditions to its orders as a means to fashioning effective and far reaching decisions.[34]

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[32] *ATCO Gas & Pipelines Ltd. V. Alberta (Energy & Utilities Board*), [2006] 1 S.C.R. 140, 2006 SCC 4.

[33] *ATCO Gas & Pipelines Ltd. V. Alberta (Energy & Utilities Board*), [2006] 1 S.C.R. 140, 2006 SCC 4.at para. 81.

[34] *Garland v. Consumers' Gas Company,* [2000] O.J. No. 1354 at paras. 45 and 46

[106] The Board's recent decision in the Cushion *Gas* case[35], where Union sought to retain for its shareholders the proceeds from the sale of cushion gas from a storage facility, is an example. The Board agreed and ordered that 100% of the proceeds should go to the shareholder because this was a surplus asset and there was no harm to the ratepayer.

[107] There are however a number of cases where the Board has allocated a portion of the proceeds of sales of capital property to ratepayers, including a sale of land by Consumers' Gas (now Enbridge) in 1991[36], the sale of land by Enbridge in 2003[37], the sale of land by Natural Resources Gas in 2004[38] and the sale of cushion gas in 2003.[39]

[108] The recent *Toronto Hydro*[40] decision confirms that the Board has broad discretion when exercising its ratemaking authority, to allocate to ratepayers a share of the gains on the sale of utility assets. The Divisional Court upheld the Board decision which allocated 100% of the after tax gains from the sale of certain properties to the ratepayer. The Board found the properties would continue to be used and useful and would be replaced by other facilities at a substantial cost to the ratepayer. The Court stated in part;

> The appellants were seeking a significant increase in the rates. The OEB expressed concern about the increase of operating and capital expenditures and the impact on ratepayers. The OEB decision, quoted above, referred to the need to replace the properties with other facilities, at a substantial cost the ratepayer and concluded; "To defray these substantial costs to the ratepayer, the Board finds that 100% of the net after tax gains from the sale of the properties should go to the ratepayer. The Company's revenue requirement

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[35] Ontario Energy Board, Decision and Order in *Application by Union Gas,* EB-2005-0211/EB-2006-0081 (January 30, 2007) pp. 13-14.

[36] Ontario Energy Board, *Application by Consumers' Gas Company Ltd. for Just and Reasonable Rates*, E.B.R.O. 465, March 12, 1991.

[37] Ontario Energy Board*, Application by Enbridge Gas Distribution Inc. for Just and Reasonable Rates*, RP-2002-0133, November, 2003.

[38] Ontario Energy Board, *Application by Natural Resources Gas Ltd for Just and Reasonable Rates,* EB-2002-0446, June 27, 2003.

[39] Ontario Energy Board*, Application by Union Gas Limited for Just and Reasonable Rates*, EB-2002-0364, May 8, 2003.

[40] *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*. [2009] O.J. No. 1872 (Div.Court).

> for the 2008 test year shall be adjusted downward by $10.3 million to reflect these findings."
>
> Read in the context of the rate setting process as a whole, and the allocation of revenue to the formula used by the OEB in the decision, it is clear that the OEB was not granting the ratepayers a property interest in the capital gains from the sale of the properties but was allocating a revenue offset – in a similar treatment to revenue from other sources – to adjust revenue requirements of THESL for the 2008 year. The OEB also considered the need to replace the functions of that property and the costs to the ratepayer of doing so. It contrasted the case with another in which Union Gas Ltd. wished to sell cushion gas. In that case, the OEB considered ATCO and allocated 100% of the gains to the utility, because the cushion gas was truly surplus, in that the utility was not going to replace it.[41]

[109] In summary, the Board has the authority to allocate to ratepayers a portion of the net gain on a sale where there is harm to ratepayers. The Board has found that there will be harm to ratepayers from this transaction. However, Union's proposal is for a transfer price at net book value, and in Union's view there is no net gain available for allocation to ratepayers in any event.

[110] The Board believes that the clear rule in non-arm's length transactions is that the assets must be sold at fair market value. The question is "how is the fair value best determined?" CME argues that it should be based on future revenues. Board staff argues that the "net present value of revenues of the proposed Dawn Gateway Line when apportioned to the St. Clair Line would be markedly higher than the proposed sale price set at Net Book Value."[42]

[111] It is clear from recent experience and from the valuation prepared by Marcus & Associates LLP Hoare•Dalton ("Valuation Report") that the line is of limited value in its current state, that is without the expansion portion and without the co-operation of MichCon. The value of the line is in its ability to facilitate the overall project.

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[41] *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*. [2009] O.J. No. 1872 (Div. Court) at pg. 6

[42] Board Staff Submission, p. 17.

[112] The Valuation Report concludes that the St. Clair Line has a fair market value of between $1.6 million and $2.0 million, which is lower than net book value. However, the valuation is primarily driven by the assumption that revenues for the line will remain at historical levels. No value is attributed related to future prospects. The Valuation Report states:

> Potential opportunities for synergies, economies of scale or other benefits, which an acquisition may create for the Joint Venture, have been excluded from consideration on the basis that in a market with a single special interest purchaser the potential purchaser would not be willing to pay in excess of the intrinsic value indicated by the earning power of the existing operation.[43]

[113] The Board does not accept the underlying assumption, namely that there would only be a single special interest purchaser. The Board concludes that the St. Clair Line might be attractive to other proponents of a cross-border transportation link between Michigan storage and Dawn. In such circumstances, it is unlikely that Union would be willing to sell to such a third party for net book value.

[114] The Valuation Report also contains the following:

> The price, which a potential purchaser might pay to acquire a business, is not only a function of the intrinsic value of the particular business to be acquired, but also the opportunities for synergies, economies of scale or other benefits, which the acquisition creates for the potential purchaser. ***The fair market value attributable to these additional benefits depends upon the unique circumstances of each specific special purchaser.*** The ultimate price for which a business might be sold may be higher or lower than its notional fair market value.[44] (emphasis added)

[115] The report therefore acknowledges that there is fair market value attributable to these benefits, but concludes they are unique to each purchaser and for purposes of this particular valuation, the fair market value of these benefits have been placed at zero. The evidence shows that a value of zero is inappropriate.

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[43] Valuation Report, p. 18.

[44] Valuation Report, para 9.

[116] Board staff submitted: "A fair market assessment should reflect the prospective transmission revenues of the proposed Dawn Gateway Line and should not be based on the continued historical under performance of the St. Clair Line."[45]

[117] The ICF Report projects significant growth in demand for transportation services between Michigan and Dawn over the period 2008 to 2018 and beyond. As Union stated, "there is need for more transmission capacity from Michigan."[46] There are now Precedent Agreements with five shippers. They range from five to ten years for total firm capacity of 295,459 GJ/d (or approximately 78% of initial capacity). These were entered into after the Valuation Report was prepared. It is clear from these agreements that once the full project is completed, the revenues will be substantially higher than they are currently. The Board therefore concludes that the Valuation Report is deficient.

[118] CME argues that ratepayers are "entitled" to the increased utility asset utilization benefits from the proposed transaction. The Board does not agree that ratepayers are directly entitled to a share of future revenues from the pipeline. Ratepayers are entitled to compensation for the harm imposed in the form of a suitable share of the proceeds of the sale based on fair market value.

[119] CME's approach is to determine value by estimating the net present value of the future stream of net revenues. The Board agrees that this type of analysis is relevant to determining the fair value of the asset being sold, but it presents significant difficulties.

[120] While there are precedents for calculating the transfer price on the basis of future revenues, those cases were situations where the parties reached agreement[47]. The determination of a fair share of future revenues is complex. It is subject to significant judgment regarding the appropriate forecast of revenues and costs, the appropriate division of risk between ratepayers and Dawn Gateway, and the appropriate allocation to the St. Clair Line portion of the total pipeline.

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[45] Board Staff Submission, p. 18.

[46] Union Argument in Chief, p. 37.

47 In two recent arms-length transactions the Board approved a transfer price based on net book value plus a share of future revenue. This was the case in the 2007 application by Hydro One Inc. to sell certain assets to Burlington Hydro and the 2008 application by Hydro One Networks to sell certain assets to Oakville Hydro. In both cases the transfer price was net book value plus a share of future revenue. See, Ontario Energy Board, *Application by Hydro One Networks Inc. to Sell Distribution Assets to Burlington Hydro Inc*., EB-2007-0668, September 21, 2007 and Ontario Energy Board, *Application by Hydro One Networks to Sell Distribution Assets to Oakville Hydro Electric Distribution Inc.*, EB-2008-0268, September 22, 2008.

[121] In the circumstances the Board agrees with the submissions of Board staff that replacement value provides a more practical, objective and reasonable approach to determining fair market value. However, this is not the replacement cost of the St. Clair Line itself but rather the cost of the most economical alternative route. No purchaser would be willing to pay more than this for the St. Clair Line, regardless of the future earning potential of the total line, because this is the alternative that the purchaser has. It might be argued that a purchaser would not be willing to pay as much as replacement cost for a 20 year old pipeline, but on the other hand, a new line has more development uncertainty attached to it as it has not yet been built. The Board estimates that the cost of building an alternative line would be on the order of $13 million to $18 million. As a result, the “net gain” is expected to be in the range of $8 million to $13 million.

[122] The Board further concludes that in order to mitigate the harm of the transaction, ratepayers should be allocated an amount equivalent to the cumulative under-recovery of the asset since 2003 from the proceeds of a sale based on fair market value as determined by replacement cost. The Board estimates that the cumulative subsidy since 2003 is approximately $5 million. Therefore, the “net gain” is clearly in excess of the cumulative subsidy and the allocation to ratepayers will likely be in the range of 35%-65%.

[123] The Board will approve the transaction conditional on the ratepayers being allocated a portion of the deemed net gain equivalent to the cumulative under-recovery as of the date of the transaction. The Board directs Union to file the necessary evidence to substantiate the cumulative under-recovery of the assets since 2003. Given the Board expects the net gain, calculated as the difference between replacement cost and net book value, will be well in excess of this cumulative under-recovery, it will not be necessary for Union to file evidence on the replacement cost, unless it chooses to do so. The Board will then fix the amount to be allocated to ratepayers to compensate for the harm arising from the transaction. This amount will only vary depending upon the timing of the actual transaction. The determination of the relevant amount will be made as part of this proceeding so as to provide certainty to the parties. A deferral account will be established to capture the amount of the allocation as of the date of the transaction. Rates can be adjusted at a subsequent rates proceeding.

[124] In this proceeding the Board is also prepared to hear submissions regarding the form of rate setting the Board should apply to the new proposed service. The new service involves a limited number of sophisticated commercial customers who arguably

do not require the cost of service protection that the Board has traditionally provided to end-use consumers. The Board is also always mindful of the need to introduce efficiency to the rate setting process that will accommodate the needs of both the customers and the utilities. The Board also recognizes the importance of this new investment and its ability to increase the efficiency of the St. Clair Line and also increase the liquidity of the Dawn Hub, an important objective the Board recognized in the NGEIR decision.[48]

Landowner Issues if there is Federal Jurisdiction

[125] The Board has found that the Dawn Gateway pipeline will remain under provincial jurisdiction. However, the Board is of the view that it is necessary to address the issue of impact on landowners if the Dawn Gateway pipeline is ultimately found to be under federal jurisdiction. In that circumstance, the issue is whether landowners will be worse off under NEB regulation than under their current arrangements.

[126] The discussion regarding impacts on landowners focused on three areas: land use restrictions; abandonment; and recovery of regulatory costs. With respect to land use, GAPLO/CAEPLA submitted:

> Land use restrictions imposed under the NEB Act and the associated Pipeline Crossing Regulations exceed any restrictions that result from Ontario legislation and regulations and will generate additional delay, risk and cost for landowners.[49]

[127] There is also an additional 30 meter control zone beyond the easement, so not only are the restrictions greater, it also affects a larger area of land and affects some landowners along the St. Clair Line that do not currently have easement agreements with Union.

[128] GAPLO/CAEPLA also expressed concern about the potential future abandonment of the St. Clair Line and the progressive deterioration of the line if it is abandoned in place. GAPLO/CAEPLA alleged there would be a regulatory vacuum once the NEB allowed abandonment, and noted that while provincially abandonment is

[48] Ontario Energy Board, *Natural Gas Electricity Interface Review,* EB-2005-0551, November 7, 2006.

[49] GAPLO/CAEPL Argument, p. 36.

dealt with by the TSSA, these TSSA requirements would not apply to former NEB-regulated pipelines. GAPLO/CAEPLA submitted that Union and DGPL should agree to provide landowners with the option of removing the pipeline upon abandonment and should remain liable regardless of any subsequent assignment.

[129] With respect to regulatory costs, GAPLO/CAEPLA noted that there is no cost recovery for proceedings at the NEB, except for detailed routing proceedings.

[130] Union submitted that landowners have less risk of liability under federal regulations than under provincial regulations. Union compared the provisions of the TSSA Act and its regulations with the provisions of the National Energy Board Act. Union did acknowledge that federal regulations can be more inconvenient for landowners who are farmers. Union noted that the use of blanket crossing approvals, which the NEB encourages, may mitigate this inconvenience by pre-approving certain activities.

[131] DGPL reported that it has begun to negotiate a blanket approval. Union provided a form of blanket approval with its Argument in Chief and indicated it would accept a condition of approval that would require Dawn Gateway to offer a blanket approval in substantially the same form as the one provided, subject to NEB orders. Board staff supported this proposal.

[132] With respect to abandonment, Union submitted that landowners have greater protection under federal regulation than under Ontario regulation: under federal jurisdiction leave to abandon is required; under provincial jurisdiction it is not. Once the pipeline is abandoned, the NEB has held that the abandoned pipeline comes under provincial jurisdiction in any event.

[133] With respect to regulatory costs, Union acknowledged that the NEB offers limited cost recovery but maintained that this would have limited impact on the St. Clair Line landowners.

[134] GAPLO/CAEPLA submitted that Union's application should be denied because it has not assessed, quantified or valued the impacts on landowners:

> GAPLO/CAEPLA respectfully requests that the Board should nevertheless dismiss the application because of the complete absence in the evidentiary

> record of any effort by Union to identify, assess, mitigate or compensate for the impacts on landowner interests which will result from the proposed change in jurisdiction.[50]

[135] GAPLO/CAEPLA argued that in the alternative, any approval should be subject to GAPLO/CAEPLA's proposed conditions, which it attached to its argument, and deal with detailed matters of land use and include cost recovery for NEB proceedings in accordance with the OEB's tariff and practice direction. In the further alternative, GAPLO/CAEPLA proposed that there should be a requirement for meaningful discussions and a process for mediation and arbitration to resolve issues.

[136] DGPL disagreed with GAPLO/CAEPLA's submissions and its proposed remedies:

> The federal process is designed to mitigate all impacts upon landowners and to compensate for all damage caused in the construction, operation and abandonment of a pipeline. The existence of that process…provides the OEB with the comfort that any legitimate compensation related issues arising will be addressed in a fair and impartial manner. With respect, the OEB should refrain from conditioning its approval herein in such a way as to adjudicate issues said to arise under federal jurisdiction.[51]

[137] Union maintained that the NEB's restrictions are for safety purposes and further argued that the project's benefits associated with achieving the Board's statutory objectives should have precedence over landowner concerns.

[138] Union further argued that there was no reason to grant landowners new rights, for example with respect to abandonment, or to prevent future assignment, as proposed by GAPLO/CAEPLA. With respect to abandonment, Union maintained that there will be no less protection under federal jurisdiction and that the TSSA will also apply to formerly NEB-regulated line. Union further pointed out that the NEB required an abandonment plan and that the issues can be dealt with in that process.

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[50] GAPLO/CAEPLA Argument, p. 33.

[51] Dawn Gateway Argument, p. 14.

[139] With respect to GAPLO/CAEPLA's proposed conditions, Union responded that oversight of any blanket approval should be left to the NEB and that Union's proposed form of agreement better balances landowner and safety concerns. Union also noted that cost compensation is being looked at as part of NEB's Land Matters Consultation Initiative.

Board Findings

[140] When determining whether there would be harm to landowners from the transaction, the Board must first determine which landowners are the relevant ones. GAPLO/CEAPLA argues that the Board should consider the landowners along the expansion route as well as the landowners along the St. Clair Line. The Board does not agree. The Board finds that it should consider the potential harm to landowners along the St. Clair Line only.

[141] The St. Clair Line is currently in place and there are landowners who will be facing a change in the form of regulation to which they will be subject if the NEB has jurisdiction; this is not a change that could have been anticipated by those landowners at the time of the line's construction. The expansion line, on the other hand, has not yet been built, and therefore those landowners are not facing a change in circumstances. They will be in the same position as any other landowners over whose land a federally regulated pipeline is proposed. They can take part in the NEB process in which there will be a full assessment of the environmental impacts on the land and the appropriate mitigation. Similarly, the easements and land use approvals will be developed with the particular circumstances addressed.

[142] With respect to the landowners along the St. Clair Line, the Board concludes that there would be some harm to landowners arising from the proposed transaction. This harm relates to the greater restrictions placed on land use, the extended scope of land affected, and the limited ability to recover regulatory costs.

[143] Union argues that the Board's other objectives and the benefits of the project overall are more important than the alleged harm to landowners. The Board finds that it is not necessary to weigh landowner harm against the project's benefits. What is necessary is to mitigate the harm to landowners.

[144] GAPLO/CAEPLA argues that the application should be denied because Union has not done a detailed analysis of the impacts. The Board does not agree. There is

substantial evidence on the record regarding the impacts on land use from the shift in jurisdiction.

[145] With respect to land use, the Board is concerned to ensure that the landowners along the St. Clair Line are in substantially the same position regardless of the change in ownership. The Board finds that this can best be achieved if a blanket approval is negotiated to the satisfaction of both sides. The Board notes DGPL's commitment to offer a blanket approval and Union's proposed condition of approval related to this. GAPLO/CAEPLA finds these commitments to be insufficient and instead proposes detailed conditions relating to land use, cost recovery, and other matters.

[146] The Board concludes that it would be inappropriate to impose detailed land use conditions on Union (and indirectly on Dawn Gateway). The NEB has a process to deal with these issues and that process should be respected; as well, a negotiated solution will undoubtedly be more enduring that one imposed by the Board. The Board will adopt Union's proposed condition that a blanket approval will be offered to landowners (including those in the 30 m control zone) in a form substantially the same as that provided in Union's argument. The Board expects that further negotiation will be required and will therefore also require that Union compensate landowners for their reasonably incurred costs for negotiating a final blanket approval which is acceptable to the parties and the NEB. The landowners will submit their cost claim to the OEB as part of this proceeding.

[147] With respect to abandonment, the Board finds that there will be no material harm as a result of the change in ownership. The NEB has a process through which abandonment issues will be considered before leave to abandon will be granted, and once abandoned, there will be provincial authority in place.

[148] With respect to regulatory costs, the primary impact for landowners along the St. Clair Line is with respect to the current proceeding before the NEB. The Board finds that the landowners' concerns will be substantially addressed through a negotiated blanket approval regarding land use, and the Board has already made provision for cost recovery for that activity. The Board finds that no further condition regarding cost recovery is warranted in the circumstances.

THEREFORE THE BOARD ORDERS THAT:

1. Union Gas Limited is hereby granted leave to sell the St. Clair Line to the Dawn Gateway Limited Partnership pursuant to section 43 of the Act on the following conditions:

    a) The sale price for ratemaking purposes shall be the fair market value which is defined as the replacement cost of the line.

    b) The ratepayers will receive a credit for ratemaking purposes equal to the amount of the cumulative under-recovery from 2003 until the time of the transaction which amount shall be placed in a deferral account for disposition in a rates proceeding.

    c) Union shall file with the Board, with a copy to all intervenors, its calculation of the cumulative under-recovery from 2003 to the current time and its estimate as of the closing date of the transaction. Union at its discretion may file its estimate of the replacement cost of the line.

2. The Board's leave to sell the St. Clair Line to the Dawn Gateway Limited Partnership shall expire on December 31, 2013. If the transaction has not been completed by that date, a new application for leave to sell will be required in order for the transaction to proceed.

3. Union shall file the required information within 30 days of the date of this decision. Intervenors may make submissions regarding the accuracy of the estimate within 10 days of receiving the information from Union. Union will have an opportunity to reply to the submissions of the intervenors provided those submissions are made within 7 days of receipt of the intervenor's submissions.

4. Union at its discretion may file submissions regarding its view of the appropriate regulatory framework for the service proposed for the new line. Intervenors may respond by making submissions within 10 days of receiving Union's submissions. Union will have an opportunity to reply to the submissions of the intervenors provided those submissions are made within 7 days of receiving the intervenor's submissions. The Board may then issue a further Procedural Order, if necessary, with respect to filing of evidence or further submissions.

DATED at Toronto, November 27, 2009.

Ontario Energy Board

Original signed by

Kirsten Walli
Board Secretary

APPENDIX A

to

Decision and Order

EB-2008- 0411

DATED November 27, 2009

Final Issues List

Union Gas Limited

Leave to Sell 11.7 kilometers Natural Gas Pipeline
(EB-2008-0411)

1.0 Jurisdiction

1.1 If the proposed sale is approved, should the St. Clair Line be under the jurisdiction of the Ontario Energy Board ("OEB") or the National Energy Board ("NEB")?

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

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?

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?

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 rate making purposes?

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?

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?

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?

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

APPENDIX B

to

Decision and Order

EB-2008- 0411

DATED November 27, 2009


Saint Clair
Belle River Mills Compressor Station
St Clair Valve Site
St Clair Line Station
St Clair Line
Bickford Compressor Station
Dawn Gateway LP proposed Bickford to Dawn portion of the Dawn Gateway Line
Dawn
Legend
Belle River Mills Line
St Clair River Crossing
St Clair Line
Proposed Bickford to Dawn portion of the Dawn Gateway Line