EB-2010-0039

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010

NOTICE OF MOTION

Union Gas Limited will make a motion to the Ontario Energy Board (the "Board") at its offices at 2300 Yonge Street, Toronto on a date and time to be fixed by the Board.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing.

THE MOTION IS FOR:

(a) An Order adjourning the two day oral hearing currently scheduled for December 6 and 7, 2010, to dates to be fixed by the Board in February, 2011; and

(b) Such further relief as counsel may advise and the Board permit.

THE GROUNDS FOR THE MOTION ARE:

The St. Clair Transmission Line

(a) In May 2009, Union entered into a Purchase and Sale Agreement with Dawn Gateway Pipelines Limited Partnership ("Dawn Gateway") for the sale of the St. Clair Transmission Line.

(b) Dawn Gateway is a partnership of Spectra Energy Transmission and an unrelated third party, DTE Pipeline Company ("DTE").

(c) The Purchase and Sale Agreement provided that Union would sell the St. Clair Line to Dawn Gateway, who would integrate it into a new pipeline, to

be known as the Dawn Gateway Pipeline, running from Belle River Mills Compressor Station in Michigan to Union's Dawn Station.

(d) The Purchase and Sale Agreement contained a number of conditions precedent, including several for the exclusive benefit of Dawn Gateway that could only be waived by Dawn Gateway.

The Dawn Gateway Pipeline

(e) Dawn Gateway received regulatory approval for the Dawn Gateway Pipeline on March 9, 2010.

(f) Prior to seeking approval, Dawn Gateway had entered into precedent agreements with 5 shippers (the "Shippers") who agreed to purchase transportation capacity on the Dawn Gateway Pipeline.

(g) Following the receipt of regulatory approval for the Dawn Gateway Pipeline, the Shippers requested that construction of the pipeline be delayed.

(h) The request to delay the pipeline was motivated by recent changes in North American supply dynamics.

(i) In light of these changes in market conditions, Dawn Gateway and the Shippers entered into an Agreement and Amendment to Precedent Agreement, whereby they agreed to delay the construction of the Dawn Gateway Pipeline.

(j) Dawn Gateway and the Shippers agreed to monitor market conditions and to determine by November 1, 2010 whether the pipeline would proceed for in-service in November, 2011.

(k) Because of the delay in construction of the Dawn Gateway Pipeline, the conditions precedent for the Purchase and Sale Agreement have not been satisfied and the sale has not been completed.

Deferral Accounts Related to the St. Clair Transmission Line

(l) The Board granted Union leave to sell the St. Clair Line to Dawn Gateway on November 27, 2009 (EB-2008-0411).

(m) The Board granted leave on condition that Union allocate to the ratepayers on the sale of the St. Clair Lime the amount of $6.402 million as the ratepayers' share of a deemed net gain from the sale, and ordered the creation of two related deferral accounts ("the St. Clair deferral accounts").

(n) Union created the St. Clair deferral accounts and addressed the disposal of the balances in them in this proceeding.

(o) Because there still existed unsatisfied conditions precedent for the Purchase and Sale Agreement of the St. Clair line, Union proposed not to dispose of the balances in the St. Clair deferral accounts.

(p) By Settlement Agreement approved by the Board on August 10, 2010, the parties reached a comprehensive settlement including with respect to the determination of disposal of balances in the St. Clair deferral accounts. In this respect, the parties agreed to postpone consideration of the accounts until after November 1, 2010, when it was expected that Dawn Gateway and its shippers would have determined whether to proceed with the construction of the Dawn Gateway Pipeline.

Continued Negotiations and Open Season

(q) Dawn Gateway did not receive notice from the Shippers that they intended to proceed with construction of the Dawn Gateway pipeline on November 1, 2010.

(r) Nevertheless, Dawn Gateway remains committed to the project and remains in discussions with the Shippers with the intent of securing their commitment for a 2011 in-service date on alternative terms.

(s) On November 15, 2010, Dawn Gateway released a binding open season for firm transportation service between MichCon's Belle River facility and Union's Dawn Hub. Interested parties must submit binding bids by December 2010 with Dawn Gateway to evaluate the bids, and respond to interested parties by December 20, 2010. Thereafter, and through January, Dawn Gateway will engage in negotiations of new contracts with the interested parties.

(t) It is Dawn Gateway's belief that the continued negotiations with Shippers coupled with the open season represents the best chance to proceed with the project for in-service in 2011.

The Scheduled Hearing

(u) Hearing scheduled for December 6 and 7, 2010 is intended to serve as a determination of the disposal of balances in the deferral accounts related to the St. Clair Line sale.

(v) Union seeks an adjournment of the hearing until late February 2011 to afford Dawn Gateway time to work with the existing Shippers, to complete the open season and to negotiate any resulting contracts.

(w) Proceeding with the hearing at this time would result in a significant waste of time and resources. In the event, the project proceeds and the sale of the Dawn Gateway Pipeline closes, Union agrees that ratepayers are entitled to the balances in the St. Clair deferral accounts and a proceeding would be necessary. In the interim, the St. Clair deferral accounts would accrue interest.

(x) On the other hand, if the hearing proceeds in December it will be Union's position that ratepayers are not entitled to the balances in the St. Clair deferral accounts unless and until the sale takes place which, in December, will be an uncertain, potential future event.

(y) The Board's Rules of Practice and Procedure; and

(z) Such further grounds as counsel may advise and the OEB permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the motion:

(a) The affidavit of Mark Kitchen;

(b) The record in the proceeding; and,

(c) Such further evidence as counsel may advise and the OEB may permit.

November 19, 2010

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AND TO: All Intervenors

EB-2010-0039

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010

AFFIDAVIT OF MARK KITCHEN

I, Mark Kitchen, of the Town of Chatham, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Director, Regulator Affairs, Union Gas Limited ("Union"), the Applicant in this proceeding and, as such, have knowledge of the matters to which I hereinafter depose. Where my knowledge is based on information provided by others, I have stated the source of that information and believe it to be true.

2. This affidavit is sworn in support of a motion by Union to adjourn the two day hearing currently scheduled to be heard on December 6 and 7, 2010 to dates to be fixed by the Board in February 2011.

Proposed Sale of St. Clair Transmission Line

3. In May, 2009, Union entered into a Purchase and Sale Agreement with Dawn Gateway Pipelines Limited Partnership ("Dawn Gateway") regarding the St. Clair Transmission Line. Dawn Gateway is a partnership between Spectra Energy Transmission and an unrelated third party, DTE Pipeline Company ("DTE").

4. Pursuant to the agreement, Union would sell the St. Clair Line to Dawn Gateway, who would integrate the St. Clair line into a new pipeline, to be known as the Dawn Gateway Pipeline, running from the Belle River Mills Compressor Station in Michigan to Union's Dawn Station. The Purchase and Sale Agreement was filed in confidence in EB-2008-0411.

5. The Purchase and Sale Agreement contains a number of conditions precedent. Those in favour of Dawn Gateway, which are for the exclusive benefit of Dawn Gateway and may only be waived by that party, include the following:

(a) a vote of Dawn Gateway's partners in favour of proceeding with the Pipeline System (as defined);

(b) a contemporaneous closing of a lease or purchase between Dawn Gateway Pipeline, LLC and Michigan Consolidated Gas Company; and

(c) regulatory approvals for the operation of the Pipeline System, including from the Michigan authority.

Board Approval and Creation of Related Deferral Accounts

6. On November 27, 2009, the Board released its Decision in EB-2008-0411, granting Union leave to sell the St. Clair Transmission Line to Dawn Gateway. A copy of the Board's Decision is attached as **Exhibit "A".**

7. Leave to sell was granted on condition that Union allocate to the ratepayers on the sale of the St. Clair Line the amount of $6.402 million as the ratepayers' share of a deemed net gain from the sale. The Board ordered that the $6.402 million should be placed into a deferral account and also that Union create another deferral account to capture the effect of removing the St. Clair Transmission Line from rates effective March 1, 2010.

8. On March 15, 2009, Union filed for approval by the Board two draft accounting orders to create the deferral accounts ordered in EB-2008-0411.

9. Deferral account No. 179-121 was proposed to capture the $6.402 million to be allocated to the ratepayers at the time of the sale, and deferral account No. 179-122 was proposed to capture the effects of removing the St. Clair Transmission Line from rates effective March 1, 2010. On March 22, 2010, Union filed a correction to the draft accounting order for Account 179-121.

10. By Decision dated May 11, 2010, the Board approved the accounting for deferral accounts 179-121 and 179-122. The description of account 179-122 was approved as follows:

> "To record, as a credit in Deferral Account No. 179-121, the cost of removal for the St. Clair Transmission Line ordered by the Board in EB-2008-0411 to be equal to the amount of the cumulative under-recovery of union's St. Clair Pipeline, from 2003 until the time of the sale of the asset, to be refunded to ratepayers." (Emphasis Added.)

A copy of the Board's Decision regarding the deferral accounts is attached as **Exhibit "B"**.

Plans for Construction of the Dawn Gateway Pipeline

11. On March 9, 2010, the Board approved a complaint based regulatory framework for Dawn Gateway and granted leave to construct new facilities from Bickford to Dawn. A copy of the Board's Decision in EB-2009-0422 is attached as **Exhibit "C"**.

12. Based on the Board's Decision in EB-2009-0422 and EB- 2008-0411, Dawn Gateway prepared to move forward with the construction of the Dawn Gateway Pipeline.

13. Prior to applying for approval for the Dawn Gateway Pipeline, Dawn Gateway had entered into precedent agreements with 5 shippers (the "Shippers") who agreed to purchase transportation capacity on the Dawn Gateway Pipeline. The Precedent Agreement was filed in confidence in EB-2008-0411 and EB-2010-0039.

14. As Union has advised in this proceeding, shortly after the release of the Board's EB-2009-0422 Decision, several of the Shippers requested that construction, originally planned for 2010, be delayed due to recent changes in North American supply dynamics. Specifically, the recent large increase in shale gas supplies in the Northeast United States, increased supplies of Rockies gas as a result of the completion of the Rockies Express Pipeline, the decline in Western Canadian supplies and reduced North American demand due to economic conditions have impacted natural gas pricing and storage spreads across North America. These changing market conditions caused a rapid and significant decline in the spread between gas prices in Michigan compared to Dawn, thus making the Dawn Gateway Pipeline uneconomic for the Shippers at that time.

15. In light of the market conditions, on April 8, 2010, Dawn Gateway and its Shippers entered into an Agreement and Amendment to Precedent Agreement, whereby they agreed to delay the construction of the Dawn Gateway Pipeline. Dawn Gateway and its shippers agreed to monitor market conditions and agreed to determine by November 1, 2010 whether the pipeline will proceed for in-service in November 2011. The Agreement and Amendment to Precedent Agreement have been filed in confidence in this proceeding.

16. Shortly thereafter, Dawn Gateway wrote to the Board, and intervenors advising as follows:

> "Based on the Board's decisions in EB-2009-0422 and EB-2008-0411, Dawn Gateway was prepared to move forward with the construction of the dawn Gateway Pipeline. Shortly after receiving Board approval, Dawn Gateway was approached by our Shippers with a request to delay construction, due to evolving market dynamics. As a result of this request Dawn Gateway has agreed to delay construction, originally scheduled to begin in the summer of 2010. An assessment of the market conditions that would support the project will be made with Shippers this fall."

A copy of Dawn Gateway's letter is attached as **Exhibit "D**".

2009 Deferral Account Proceeding

17. By application dated April 22, 2010, Union commenced this proceeding (EB-2010-0039) relating to 2009 earnings sharing and the disposition of deferral account and other balances. In the proceeding, Union raised the issue of the balances in deferral accounts No. 179-121 and No. 179-122.

18. Given that Dawn Gateway had not committed to proceeding with the purchase of the St. Clair Transmission Line, Union proposed not to dispose of the balances in the 179-121 and 179-122 deferral accounts. Instead, Union proposed to record in deferral account No. 179-121 the $6.402 million amount to be allocated to the ratepayers at the time of the sale, and to record in deferral account 179-122 for disposition in the future the amount attributable to the St. Clair Line that is included in Union's rates. Union proposed to continue to track the ratepayer credit in deferral account 179-122 based on a sale date later than March 1, 2010 and to use the Board's methodology as outlined in its EB-2008-0411 Decision to calculate the ratepayer credit.

19. Pursuant to Procedural Order No. 1, on July 26 and 27, Union and intervenors participated in a Settlement Conference. This conference resulted in a comprehensive settlement of all issues including those relating to the disposal of the balances in deferral accounts No. 179-121 and 179-122. On that issue, the parties agreed to defer the determination of disposal of balances in deferral accounts No. 179-121 and No. 179-122 until after November 1, 2010 -- the deadline by which Dawn Gateway Limited Partnership and its shippers intended to determine whether the Dawn Gateway Pipeline would proceed for in-service in November 2011. Specifically, the parties agreed, in relevant part, as follows:

> "**15. Cumulative Under-recovery - St. Clair Transmission Line (179-121) and Impact of Removing St. Clair Transmission Line from Rates (179-122)**
>
> The parties agree to defer determination of disposal of balances in deferral Account No. 179-121 and Account No. 179-122 until after November 1, 2010. November 1, 2010 is the deadline by which Dawn Gateway Limited Partnership ("Dawn Gateway") and its shippers will determine whether the Dawn Gateway Pipeline will proceed for in-service in November 2011.
>
> The parties request that this matter come back on for hearing before the Board on a date or dates agreeable to the Board between November 29, 2010 and December 31, 2010. The parties further agree that in advance of that hearing Union shall be entitled to file further written evidence to address any changes in circumstances subsequent to the date of the Settlement Agreement and that parties have an opportunity to ask interrogatories in respect of that evidence and file responding evidence.
>
> The agreement by the parties to defer any determination relating to the balances in Account No. 179-121 and Account No. 179-122 is without prejudice to the parties' positions with respect to the proper determinations concerning the accounts or the appropriateness of any relief requested in the proposed application.
>
> . . .
>
> Until a determination by the Board with respect to the balances in Accounts No. 179-121 and 179-122, Union will continue to track the ratepayer credit in deferral account 179-122 based on a sale date of March 1, 2010 as outlined by Union in response to CME interrogatories B3.14 and B3.31. Union will use the Board's

> methodology as outlined in its EB-2008-0411 Decision to calculate the ratepayer credit."

A copy of the Board's Decision approving the Settlement Agreement is attached as **Exhibit "E"**.

20. At the time of the settlement, Union believed that postponing the determination of whether the 179-121 and 179-122 deferral accounts should be disposed was a reasonable compromise. It was Union's belief that, after November 1, 2010, it would have information as to whether Dawn Gateway and its Shippers intended to proceed with construction of the Dawn Gateway Pipeline, and therefore, whether the purchase of the St. Clair Line would proceed for in-service in 2011.

21. On September 3, 2010, the Board ordered that a two day oral hearing be scheduled for December 6 and 7, 2010, to address the balances in deferral accounts 179-121 and 179-122.

Dawn Gateway's Continued Negotiations and Open Season

22. The Shippers did not provide Dawn Gateway with notice that they intended to proceed with construction of the Dawn Gateway pipeline on November 1, 2010. Nevertheless, I am advised by Mark Isherwood, Union's General Manager, Business Development, Storage & Transmission, that Dawn Gateway remains committed to the project and is currently in discussions with the Shippers with the intent of securing their commitment for a 2011 in-service date on alternative terms.

23. On November 15, 2010, ("DTE"), on behalf of Dawn Gateway, released a binding open season for firm transportation service between MichCon's Belle River facility and Union Gas' Dawn Hub. Union had earlier advised that an open season was being contemplated as part of Union's presentation at the Board's Natural Gas Market Review on October 7 and 8, 2010. Copies are of the open season documentation and the relevant portion of the presentation are attached as **Exhibits "F" and "G"**.

24. The decision to conduct an open season was driven by:

(a) recent improvements in the spread between gas prices in Michigan and Dawn;

(b) the fact that there remains capacity not under firm contract; and

(c) A desire on the part of Dawn Gateway to proceed with construction for in service November 2011.

25. The open season indicates that at least 80,000 Dth/d is available for a minimum term of 7 years. Should market interest be greater than 80,000 Dth/d Dawn Gateway will evaluate the bids based on price and term and determine whether or not the bids in excess of the 80,000 Dth/d can be accommodated.

26. Interested parties have been asked to submit binding bids for the open season by December 7, 2010. Dawn Gateway will evaluate the bids and respond to interested parties by December 20, 2010.

27. I am further advised by Mr. Isherwood that it is Dawn Gateway's belief that the sale of existing capacity coupled with the ongoing discussions with Shippers affords the best opportunity for the project to proceed next year. Dawn Gateway requires the period until the end of January 2011 to conduct the open season and to negotiate new contracts with the open season bidders. During this period Union will continue to record interest on deferral accounts No. 179-121 and 179-122. It is my expectation that Dawn Gateway's contracts with the existing Shippers and open season bidders would be finalized in January, 2011.

Current Status of St. Clair Transmission Line Sale

28. Until the conditions precedent set out in the Purchase and Sale agreement between Union and Dawn Gateway are satisfied or have been waived, the sale of the St. Clair Transmission Line cannot be completed.

29. It is my understanding that all of the conditions precedent set out above remain unsatisfied. Further, it is my understanding that only Dawn Gateway is capable of satisfying or waiving those conditions.

Request for Adjournment

30. Union seeks an adjournment of the hearing until late February 2011 to afford Dawn Gateway time to work with the existing Shippers, to complete the open season and to negotiate any resulting contracts.

31. Proceeding with the hearing at this time would result in a significant waste of time and resources. In the event, the project proceeds and the sale of the Dawn Gateway Pipeline closes, Union agrees that ratepayers are entitled to the balances in the St. Clair deferral accounts. In short, a proceeding would be necessary.

32. On the other hand, if the hearing proceeds in December it will be Union's position that ratepayers are not entitled to the balances in the St. Clair deferral accounts unless and until the sale takes place which, in December, will be an uncertain future event.

SWORN BEFORE ME at the City of Chatham, in the Province of Ontario, on November 29, 2010.

Commissioner for Taking Affidavits

MARK KITCHEN

This is Exhibit "A" referred to in the affidavit of **MARK KITCHEN** sworn before me, this 25th day of November, 2010.

A Commissioner, etc.

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.
>
> 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?
>
> 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]…
>
> …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

This is Exhibit "B" referred to in the affidavit of **MARK KITCHEN** sworn before me, this 25th day of November, 2010.

A Commissioner, etc.

Ontario Energy Board

Commission de l'énergie de l'Ontario

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

Introduction

[1] The following Decision and Order addresses certain deferral accounts that the Board established in its March 2, 2010 Decision in the EB-2008-0411 proceeding.

[2] 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. The Board issued its Decision and Order granting leave to sell the St. Clair Line on November 27, 2009.

[3] On March 2, 2010, the Board issued its Decision setting the deemed sale price of the St. Clair Line for regulatory purposes at $13.7 million and determining the appropriate ratepayer allocation of the deemed net gain on the sale. The Board also found it appropriate to establish the following deferral accounts:

a) A deferral account to record the amount of $6.402 million, which represents the ratepayers' share of the deemed net gain on disposition of the utility asset as compensation for harm as a result of the transaction. The amount recorded in the deferral account will attract interest carrying charges based on the Board's approved methodology until the time of disposition.

b) A deferral account which will capture the effect of removing the St. Clair Line (and related St. Clair River Crossing) from rates (including all rate base, OM&A consequences and return on capital) beginning March 1, 2010. The amounts recorded in the deferral account will attract interest carrying charges based on the Board's approved methodology until the time of disposition.

[4] Union filed the Draft Accounting Orders for the above noted deferral accounts on March 15, 2010 and filed a correction to this evidence on March 22, 2010. The Board received submissions from Board Staff, Canadian Manufacturers and Exporters ("CME"), and the Federation of Rental-housing Providers of Ontario ("FRPO"). The Board also received a reply submission from Union.

Cumulative Under-Recovery of the St. Clair Line (Deferral Account No. 179-121)

[5] Union described the Cumulative Under-Recovery of the St. Clair Line Deferral Account (Deferral Account No. 179-121) as follows:

> To record, as a credit in Deferral Account No.179-121, the cost of removal for the St. Clair Transmission Line ordered by the Board in EB-2008-0411 to be equal to the amount of the cumulative under-recovery of Union's St. Clair Pipeline, from 2003 until the time of the sale of the asset, to be refunded to ratepayers.

[6] Board staff submitted that Union has established the deferral account in accordance with the Uniform System of Accounts for Class A Gas Utilities ("USofA") and that the Draft Accounting Order should be approved as filed.

[7] Board staff noted that Union has accounted for the sale of the St. Clair Line and related assets as a reduction to regulated earnings. Board staff submitted that for accounting purposes this is the appropriate treatment as Union will be receiving a payment of only $5.2 million (which is equal to the Net Book Value of the St. Clair Line) from DGLP and the Board has ordered that Union allocate ratepayers $6.4 million of the proceeds from the sale. However, Board staff stated that the treatment of the sale of the St. Clair Line for accounting purposes should not restrict the Board in its treatment of the transaction for ratemaking purposes.

[8] The Board has determined that the deemed sale price of the St. Clair Line for ratemaking purposes is $13.17 million (which results in a deemed net gain on the sale of the St. Clair Line of $7.97 million[1]) and has ordered that Union's ratepayers be allocated $6.4 million of the deemed gain from the sale. Therefore, for ratemaking purposes, there is a residual gain on the sale of the St. Clair Line of $1.57 million[2].

[9] Board staff submitted that the Board should state in its Decision and Order that the accounting treatment of the sale of the St. Clair Line does not preclude the Board from treating the sale differently for earnings sharing purposes.

[10] CME submitted that it will rely on the Board to apply its specialized expertise to determine what amount should be recorded in the deferral account as the sale price of the St. Clair Line. CME stated that if the Board determines that it is appropriate for Union to record the sale of the St. Clair Line at an amount of $5.2 million (the NBV of the St. Clair Line), the Board should make it clear that the Accounting Order will have no effect on a subsequent determination of the appropriate treatment of the sale for ratemaking purposes. CME noted that this provision is important because the treatment of the sale has earnings sharing implications. Similar to the Board staff position, CME submitted that, for ratemaking purposes, there is actually a gain of about $1.6 million on the sale of the St. Clair Line and not a loss as presented in the deferral account. FRPO supported CME in its submissions.

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[1] $13.17 million (deemed sale price) - $5.2 million (net book value) = $7.97 million

[2] $7.97 million (deemed net gain) - $6.4 million (ratepayer allocation) = $1.57 million

[11] Union stated, in its reply submission, that the Draft Accounting Order filed by Union follows the requirements of the USofA. As a result, Union's books of accounts must reflect the transaction that actually occurs. In this case, the accounts must recognize a sale price of $5.2 million as this is the amount Union will receive from the purchaser. The accounts cannot recognize a $13.17 million "cash receipt" for the St. Clair Line, as the purchaser is not actually paying such an amount.

[12] Union requested that the Board approve the corrected Draft Accounting Order as filed on March 22, 2010. Union submitted that the Accounting Order does not preclude the Board from treating the sale of the St. Clair Line differently for earnings sharing purposes.

Board Findings

[13] The Board finds that the deferral account has been established in accordance with the USofA. The Board approves the Draft Accounting Order for the Cumulative Under-Recovery of the St. Clair Line Deferral Account (Deferral Account No. 179-121) as filed on March 22, 2010 and set out in Appendix "A".

[14] The Board notes that the accounting treatment of the sale of the St. Clair Line does not preclude the Board from treating the sale differently for ratemaking purposes including the earnings sharing mechanism. The Board further notes that Union agreed with this approach.

Impact of Removing the St. Clair Line from Rates (Deferral Account No. 179-122)

[15] Union described the purpose of Deferral Account No. 179-122 as follows:

> To record, as a credit in Deferral Account No. 179-122, the impact of removing the St. Clair Transmission Line (and related St. Clair River Crossing) from rates (including all rate base and OM&A consequences) effective March 1, 2010 through December 31, 2010 as ordered by the Board in EB-2008-0411.

[16] Board staff noted that the Board's Decision stated the following in regards to the removal of the St. Clair Line and related assets from rate base:

> The Board finds that the net book value and associated expenses should be removed from rate base and rates as of March 1, 2010, so as to coincide with the deemed transaction date. The Board directs that the reduction in the revenue requirement going forward from that date will be captured in a deferral account for later disposition to ratepayers. The underlying rates will also be adjusted in due course.

[17] Board staff stated that the Board has not made a determination regarding when the rate adjustment, which will reflect the removal of the asset from rate base, will occur. Therefore, Board staff submitted that the account must capture and record the impact of removing the St. Clair Line and related asset from rates for an indefinite period until the Board adjusts Union's rates to reflect the asset sale.

[18] CME and FRPO supported the Draft Accounting Order proposed by Union in its March 22, 2010 filing. Both parties have reserved their rights to seek adjustments to Union's 2011 and 2012 rates to reflect the removal of the St. Clair Line from rates.

[19] Union did not reply to these comments and requested that the Board approve the Draft Accounting Order as filed on March 22, 2010.

Board Findings

[20] The Board finds that the account should record the impact of removing the St. Clair Transmission Line (and related St. Clair River Crossing) from rates (including all rate base and OM&A consequences) effective March 1, 2010 until such date that the Board adjusts Union's rates to remove the St. Clair Line. This is consistent with the Board's determination that the net gain on the sale should be determined as of March 1, 2010 and is appropriately flexible to allow the Board to adjust Union's rates to remove the St. Clair Line at an appropriate date.

[21] For the above reasons, the account description shall be revised as follows:

> To record, as a credit in Deferral Account No. 179-122, the impact of removing the St. Clair Transmission Line (and related St. Clair River Crossing) from rates (including all rate base and OM&A consequences) effective March 1, 2010 until the Board adjusts

Union's rates to reflect the asset sale as ordered by the Board in EB-2008-0411.

These changes are reflected in Appendix "B".

THEREFORE THE BOARD ORDERS THAT:

1) Union shall establish the Cumulative Under-Recovery of the St. Clair Line Deferral Account (Deferral Account No. 179-121) in accordance with Appendix "A".

2) Union shall establish the Impact of Removing the St. Clair Line from Rates Deferral Account (Deferral Account No. 179-122) in accordance with Appendix "B".

DATED at Toronto, May 11, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Cumulative Under-Recovery of the St. Clair Line (Deferral Account No. 179-121)

Board File No. EB-2008-0411

Dated: May 11, 2010

UNION GAS LIMITED

Accounting Entries for
Cumulative Under-recovery – St. Clair Transmission Line
Deferral Account No. 179-121

Account numbers are from the Uniform System of Accounts for Gas Utilities, Class A prescribed under the Ontario Energy Board Act.

Debit	-	Account No. 105 Accumulated Depreciation – Utility Plant
Credit	-	Account No. 179-121 Cumulative Under-recovery – St. Clair Transmission Line

To record, as a credit in Deferral Account No. 179-121, the cost of removal for the St. Clair Transmission Line ordered by the Board in EB-2008-0411 to be equal to the amount of cumulative under-recovery of Union's St. Clair Pipeline, from 2003 until the time of the sale of the asset, to be refunded to ratepayers.

Debit	-	Account No. 171 Extraordinary Plant Losses
Credit	-	Account No. 105 Accumulated Depreciation – Utility Plant

To record, as a debit to Account No. 171, the loss on the sale of the St. Clair Transmission Line and related assets. The loss represents the cost of disposition ordered by the Board in EB-2008-0411 that could not have been provided for previously in the accumulated provision for depreciation.

Debit	-	Account No. 333 Other Income Deductions
Credit	-	Account No. 171 Extraordinary Plant Losses

To record, as a debit to Account No. 333, the write-off to operations for the loss on the sale of the St. Clair Transmission Line and related assets.

Debit	-	Account No. 323 Other Interest Expense
Credit	-	Account No. 179-121 Other Deferred Charges - Cumulative Under-recovery – St. Clair Transmission Line

To record, as a credit in Deferral Account No. 179-121, interest on the balance in Deferral Account No. 179-121. Simple interest will be computed monthly on the opening balance in the said account in accordance with the methodology approved by the Board in EB-2006-0117.

Appendix B

Impact of Removing the St. Clair Line from Rates (Deferral Account No. 179-122)

Board File No. EB-2008-0411

Dated: May 11, 2010

UNION GAS LIMITED

Accounting Entries for
Impact of Removing St. Clair Transmission Line from Rates
Deferral Account No. 179-122

Account numbers are from the Uniform System of Accounts for Gas Utilities, Class A prescribed under the Ontario Energy Board Act.

Debit	-	Account No. 300 Operating Revenues
Credit	-	Account No. 179-122 Other Deferred Charges – St. Clair Transmission Line

To record, as a credit in Deferral Account No. 179-122, the impact of removing the St. Clair Transmission Line (and related St. Clair River Crossing) from rates (including all rate base and OM&A consequences) effective March 1, 2010 until the Board adjusts Union's rates to reflect the asset sale as ordered by the Board in EB-2008-0411.

Debit	-	Account No. 323 Other Interest Expense
Credit	-	Account No. 179-122 Other Deferred Charges – St. Clair Transmission Line

To record, as a credit in Deferral Account No. 179-122, interest on the balance in Deferral Account No. 179-122. Simple interest will be computed monthly on the opening balance in the said account in accordance with the methodology approved by the Board in EB-2006-0117.

This is Exhibit "C" referred to in the affidavit of **MARK KITCHEN** sworn before me, this 25th day of November, 2010.

A Commissioner, etc.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0422

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 Dawn Gateway Pipeline Limited Partnership for an Order or Orders granting leave to construct a natural gas pipeline and ancillary facilities in the Townships of St. Clair and Dawn-Euphemia, all in the County of Lambton, and approving the regulatory framework and the tariff for the transmission of gas on the Ontario portion of the Dawn Gateway Pipeline.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Cynthia Chaplin
Vice Chair

Cathy Spoel
Member

DECISION AND ORDER

[1] On November 27, 2009, the Ontario Energy Board issued a Decision[1] granting Union Gas Limited ("Union") 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"). The Decision was subject to the following conditions:

[1] November 27, 2009 – EB-2008-0411

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.

[2] On March 2, 2010, the Board issued a second Decision[2] finding that the deemed sale price of the St. Clair Line for ratemaking purposes is $13.17 million and that the deemed net gain on the sale of the St. Clair Line is $7.97 million. The Decision also found that the cumulative under-recovery of the St. Clair line for the period 2003 to March 1, 2010 was $6.402 million and that the entire cumulative under-recovery amount should be credited to ratepayers.

[3] On December 23, 2009, Dawn Gateway Pipeline Limited Partnership ("Dawn Gateway") filed an application with the Board under sections 36 and 90 of the *Ontario Energy Board Act,* for approval of a regulatory framework for the Ontario portion of the Dawn Gateway Pipeline, including charging tolls at negotiated prices, and for leave to construct approximately 17 kilometers of 24 inch diameter steel natural gas pipeline in the County of Lambton.

[4] The Board granted intervenor status to Canadian Manufacturers and Exporters ("CME"); Enbridge Gas Distribution Inc. ("Enbridge"); Federation of Rental-Housing Providers of Ontario ("FRPO"); GAPLO – Union (a group of landowners), the Canadian Association of Energy and Pipeline Landowner Associations and certain landowners who are affected directly by the proposed Dawn Gateway project (collectively "GAPLO/CAEPLA"); Industrial Gas Users Association ("IGUA"); and TransCanada Pipelines Limited ("TransCanada"). The Board granted cost eligibility status to CME, FRPO, IGUA and GAPLO/CAEPLA. The Board also established a final issues list which is attached as Appendix A to this Decision.

[5] For the reasons set out below, the Board approves the leave to construct application subject to the Conditions of Approval set out in Appendix B. The Board also

[2] March 2, 2010 – EB-2008-0411

approves the application for the regulatory framework subject to the conditions set out in Appendix C.

The Application

[6] Dawn Gateway has applied for an Order or Orders:

a) pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, approving the regulatory framework and the Tariff for the Ontario portion of the Dawn Gateway Pipeline;

b) pursuant to section 90(1) of the Act, granting leave to construct approximately 17 kilometres of NPS 24 pipeline from the existing Bickford Compressor Station, located in Lot 6, Concession XII, Township of St. Clair easterly to the Dawn Compressor Station, in the Township of Dawn-Euphemia, all in the County of Lambton.

[7] This application arises out of Union's application for leave to sell the St. Clair Line. The Board concluded in EB-2008-0411 that it has jurisdiction over that portion of the proposed Dawn Gateway Pipeline from the St. Clair Valve to Dawn, and the Board stated in paragraph 4 of its Order in EB-2008-0411 that submissions could be filed regarding the appropriate regulatory framework for the proposed Dawn Gateway Pipeline.

[8] As a result of the Board's Decision in EB-2008-0411, Dawn Gateway Pipeline Limited Partnership has withdrawn its application to the National Energy Board ("NEB") and brings this application to the Board for approval of a new regulatory framework and for leave to construct.

The Regulatory Framework

[9] Dawn Gateway seeks approval from the Board for a regulatory framework for the Ontario portion of the proposed Dawn Gateway Pipeline, including charging tolls at negotiated rates in accordance with the proposed Tariff which Dawn Gateway is filing for Board approval. This approach is based on Group 2 regulation as practiced by the NEB.

[10] In the Board's EB-2008-0411 Decision and Order at paragraph 124, the Board stated:

> 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.

[11] Pipeline companies regulated by the NEB are divided into two groups. Group 1 companies are generally those with extensive systems and many shippers, and they are regulated on a cost of service basis. Those with smaller operations and fewer customers are usually designated as Group 2 companies. The financial regulation of Group 2 companies is normally carried out on a complaints basis, with limited financial reporting requirements.

[12] The NEB has allowed Group 2 companies to be regulated on a complaints basis since at least November 1990 when the NEB issued a Memorandum of Guidance on the regulation of Group 2 Companies. The 1990 Guideline was updated and replaced with the NEB's 1995 Memorandum of Guidance. On November 17, 2009, the NEB again issued new guidelines in a letter entitled "Financial Regulation of Pipelines under the Board's Jurisdiction."

[13] Dawn Gateway Pipeline is similar in size and operating characteristics to many NEB pipelines currently regulated as Group 2 companies. The Ontario section of the Dawn Gateway Pipeline is less than 30 km in length and NPS 24. This size is comparable to other NEB Group 2 companies. The Canadian portion of Vector is an NPS 42 pipeline of roughly the same length and throughput as the Ontario portion of the Dawn Gateway Pipeline. Dawn Gateway submits that it should receive regulatory treatment similar to Group 2 pipelines regulated by the NEB, particularly those pipelines, such as Vector, that also serve the Dawn Hub.

[14] In support of the request for a regulatory framework equivalent to NEB Group 2, Dawn Gateway has filed: i) standard contracts for firm and interruptible service, ii) general terms and conditions, and iii) firm and interruptible toll schedules. Transportation services will be offered to shippers using the general terms and conditions and toll schedules. The toll schedules set out the maximum tariffs which will apply to the service.

The Complaint Procedure

[15] As indicated, Dawn Gateway is seeking OEB approval of a regulatory framework that is equivalent to the NEB's Group 2 regulation. Specifically, Dawn Gateway is requesting that the Board regulate its tariff and tolls on a complaints basis.

[16] Dawn Gateway proposes to work directly with shippers to resolve any future disputes that may arise. In the event that Dawn Gateway is unable to resolve a dispute to the satisfaction of an existing or prospective shipper, that shipper will have the right to file a complaint directly with the Board. Upon receiving the written complaint, the Board, at its discretion, may take whatever action it deems necessary to address the complaint. The right of shippers to formally complain to the Board is included in the Dawn Gateway proposed tariff at Article 21 of the General Terms and Conditions:

> These General Terms and Conditions, Toll Schedules, Statement of Tolls and service agreements which comprise the Tariff are subject to the provisions of the Ontario Energy Board Act, 1998. The tolls of the Transporter are regulated by the OEB on a complaint basis. The Transporter is required to make copies of tariffs and supporting financial information available to Interested Persons. Persons who cannot resolve traffic, toll or Tariff issues with Transporter may file a complaint with the OEB. In the absence of a complaint, the OEB does not typically undertake a detailed examination of the Transporter's tolls.

[17] DTE and Spectra held a non-binding open season for the Dawn Gateway Pipeline in September/October 2008, and entered into Precedent Agreements with five shippers for multi-year transportation contracts. Of the five Precedent Agreements, three are for 5 years, one is for 7 years, and one is for 10 years.

[18] Based on the bids received, DTE and Spectra determined that there was sufficient interest to justify proceeding with the project. Under the open season

methodology, all shippers were afforded an equal opportunity to bid on available capacity at prices they believed to be fair. This approach allowed shippers to fix the price of their transportation service over the term of their respective contracts, meeting their need for price certainty. According to Dawn Gateway, these shippers are sophisticated market participants with the required knowledge to freely enter into commercial arrangements that meet their business needs.

[19] Dawn Gateway has indicated that it is willing to assume risks not typically undertaken in a traditional cost of service model of regulation. Dawn Gateway is assuming all project risks, including construction, exchange rate, operating costs, inflation, credit, un-contracted capacity, and capacity renewal risks. All economic risks associated with operating and managing the pipeline or changes in the number of shippers would have no effect on the tolls shippers have negotiated for the term of their respective contracts.

[20] Under traditional cost of service regulation, a pipeline company is generally not able to enter into long-term fixed price contracts with shippers. Dawn Gateway argues that without long-term contractual commitments from shippers, Dawn Gateway is not able to make a long-term commitment to invest the capital needed to develop the Dawn Gateway Pipeline.

Board Findings

[21] The complaint procedure is the basis of the NEB's regulation of Group 2 companies. The NEB's letter of November 17, 2009, updates its Memorandum of Guidance of December 6, 1995 and contains the language included in Dawn Gateway's General Terms and Conditions, but provides the following additional language;

> It is the responsibility of a Group 2 company to provide its shippers and interested parties with sufficient information to enable them to determine whether a complaint is warranted. Upon receipt of a written complaint, an application under Part IV of the NEB Act or on its own initiative, the Board may decide to examine a toll and to make the toll interim, pending completion of this examination. In this circumstance, the Board may request additional information including some or all of the information specified in Part X of the Guidelines.

[22] The Board concludes that this additional language provides important clarity regarding the potential scope of the Board's enquiry in response to a shipper complaint. The Board will require that similar language be incorporated in Article 21 of Dawn Gateway's General Terms and Conditions. This requirement appears as Condition 4 of the Conditions of Approval set out in Appendix C of this Decision.

Financial Reporting

[23] With respect to reporting requirements, Dawn Gateway proposes to file its audited annual financial statements prepared in accordance with GAAP with the Board within 120 days of the end of Dawn Gateway's fiscal year.

[24] This financial reporting mirrors the requirement of the NEB as set out in its November 2009 letter. The provision states:

> The Board only requires that Group 2 companies maintain separate books of account in Canada in accordance with generally-accepted accounting principles and file audited financial statements within 120 days after the end of each fiscal year. Such statements should provide details of revenue and costs associated with the regulated pipeline. Where a Group 2 company operates a joint venture pipeline, it is required to disclose in its audited financial statements its beneficial share of revenue and costs associated with the regulated pipeline and to file a gross operating statement for the joint venture pipeline indicating whether, and if so by whom this statement has been audited.

Board Findings

[25] Dawn Gateway originally proposed that the annual financial reporting be done on a confidential basis, but later agreed to file its audited financial statements publicly. The Board agrees that these statements should be filed on a public basis and notes that this is consistent with the NEB's requirements for Group 2 companies. This requirement is reflected in Condition 3 of the Conditions of Approval set out in Appendix C.

The Application of STAR

[26] A number of parties, including Board staff, argued that if Dawn Gateway is to receive the complaint based regulatory framework that it requests its operations should be subject to the Board's Storage and Transportation Access Rule ("STAR"). Initially,

Dawn Gateway opposed this. During the course of the hearing Dawn Gateway agreed to accept compliance with STAR as a condition of approval but sought exemptions from Sections 4.1.1 (ii), 4.1.4, 4.1.6, 4.3.1. Those sections all relate to posting operationally-available capacity.

[27] The reason for Dawn Gateway's position is that the DTE Pipeline Company which is the company that will be accepting nominations on behalf of Dawn Gateway does not provide for the four NAESB nominations windows on its own system and the upstream operator, MichCon, also does not provide those windows. Dawn Gateway also argues that the shippers would find this information to be of limited value in any event as Dawn Gateway will only offer service on a reasonable efforts basis after the first nomination window.

[28] During the course of the hearing, Dawn Gateway agreed to post on its website the available capacity after the first nomination window each day. This available capacity would be calculated by deducting from the name plate capacity of 360,000 Dthd all of the capacity that had been nominated in the first nomination window. Dawn Gateway is willing to make that posting a condition of approval but still requests an exemption from the specified sections of STAR because those sections go beyond what Dawn Gateway is proposing. Dawn Gateway says that for all practical purposes it will only have one nomination window and not four windows, although interruptible capacity may be sold from time to time beyond the first window.

[29] The response of the intervenors is that there is a material distinction between posting operationally-available capacity and posting capacity that is calculated by deducting the nominations from the name plate capacity.

Board Findings

[30] The Board is of the view that Dawn Gateway should comply with STAR. In particular, the Board concludes that Dawn Gateway should post operationally-available capacity as provided for in Section 4.3.1. The Board will, however, grant a limited exemption from the relevant sections for a period of one year. For that period, the company will only be required to post operationally-available capacity after its first nomination window. The Board will review this exemption a year from now to examine the extent to which capacity is being made available in subsequent windows and to

determine whether the limited exemption is still warranted. This requirement is reflected in the Conditions of Approval.

The Application of ARC

[31] A number of parties, including Board staff, argued that the relationship between Dawn Gateway and Union should be subject to the Board's Affiliate Relationships Code for Gas Utilities ("ARC"). They note that Dawn Gateway has no employees and that it will be contracting for services from Union and DTE. There are agreements in place or being negotiated related to those services and Union proposes to allocate the relevant costs to its unregulated business. The parties identified two specific concerns: the use of Union personnel may allow for the inappropriate sharing of non-public information and the financial arrangements may allow for inappropriate transfer pricing.

[32] Dawn Gateway provides two reasons why ARC should not apply. First it is argued that Dawn Gateway does not fall within the legal definition of those bound by ARC. That is, that the Dawn Gateway partnership is not an affiliate of Union, as affiliate is defined under the *Business Corporations Act*, because each partner, DTE and Spectra, only has a 50% voting interest and neither party controls. Therefore, it is argued that the entities are not affiliates under the relevant definition and the Code does not apply.

[33] Dawn Gateway recognizes the concerns the Board has with respect to preferential access to the pipeline or the possibility of cross-subsidy between Union and Dawn Gateway. Dawn Gateway proposed a Code of Conduct which deals with preferential treatment, related-party transactions, confidential information, and a complaint mechanism. Dawn Gateway also filed with the Board the codes of conduct that relate to the employees of Spectra and DTE. Finally, Dawn Gateway argues that there are practical reasons why it is unlikely that Spectra or DTE will be able to gain preferential access to the system. They argue that because this is a 50/50 partnership neither party would want the other party to be able to use information to gain preferential access to the disadvantage of the other partner. Dawn Gateway also advised that Union would allocate the costs of providing services to Dawn Gateway to its unregulated business consistent with the way it allocates costs to its unregulated storage business in accordance with the Board's decision in Natural Gas Electricity Interface Review ("NGEIR").

Board Findings

[34] The Board acknowledges the efforts of Dawn Gateway to address the issue of preferential access and potential cross-subsidy by developing a Code of Conduct and proposing that adherence to it be a condition of approval. The Board will accept this proposal and will reflect this requirement in the Conditions of Approval. The Board will also amend the Code of Conduct to include a provision that Dawn Gateway will inform the Board of any complaints received. While the Code of Conduct addresses the issues of concern to the Board, it is not sufficiently comprehensive to completely alleviate the Board's concerns with respect to interactions between Dawn Gateway and Union.

[35] In the circumstances, the Board concludes that the provisions of the Board's Affiliate Relationships Code for Gas Utilities form a necessary part of the approved regulatory framework for Dawn Gateway in terms of the relationship between Union and Dawn Gateway. For example, Dawn Gateway has explained that the costs incurred by Union to provide service to Dawn Gateway will be accounted for on the same basis as Union allocates costs to its unregulated storage business. The Board finds that this is not sufficient. Union will be providing services to a separate and related company; this is not simply a cost allocation exercise within Union. The Board concludes that article 2.3.9 of the ARC, in particular, is relevant in this respect. In addition, Union and Dawn Gateway may each have access to non-public information. The Board concludes that article 2.2 of the ARC is relevant in this respect. For purposes of Union's compliance with ARC, effective June 1, 2010, the Board will deem Dawn Gateway to be an affiliate of Union. Union will be required to provide written assurance to the Board that Union will treat Dawn Gateway as an affiliate for purposes of the ARC.

Reasonableness of the Caps

[36] The regulatory treatment being proposed by Dawn Gateway consists of negotiated rates for both Firm Transportation and Interruptible Transportation subject to maximum amounts or caps in both cases. The proposed tariffs have been filed. For Firm Transportation the Reservation Rate is capped at $30 USD per Dth per month, the Usage Rate is capped at $1 USD per Dth per day and the Authorized Overrun Charge is capped at $1 USD per Dth per day. In the case of Interruptible Transportation, there

is no usage reservation rate but the usage rate is capped at $2 USD per Dth per day and the Authorized Overrun Charge is capped at $2 USD per Dth per day[3].

[37] CME argues that the caps are too high and that the Reservation Rate of $30 USD per Dth per month should be about $4.50 USD per Dth per month. In the case of the Usage Rate and the Authorized Overrun Charge, CME says it should be $0.15 USD per Dth per day and not the $1 USD per Dth per day proposed by Dawn Gateway.

[38] The benchmark that CME is using for these calculations is a cost of service approach. CME also referenced the National Energy Board Decision of March 1999 in the *Vector Pipeline* case.[4]

[39] Exhibit K1.13 is a letter of October 16, 2009 from the President of Vector Pipelines to the Acting Secretary of the National Energy Board setting out its tolls pursuant to Decision GH-598 indicating that for firm transportation service for a term of less than 10 years the maximum negotiated toll for the service is capped at 300% of the stated maximum 15 year Firm Transportation service toll. In the case of Interruptible Transportation service, the maximum negotiated toll for the service is capped at 300% of the stated maximum 15 year Firm Transportation service toll. CME claimed the 15 year fixed toll was cost-based.

[40] Dawn Gateway responds that the relatively high caps it has proposed are designed to allow the pipeline to capture market opportunities to offset the risks it faces; they are not intended to be cost-based. Dawn Gateway argued that most of the time the prices which it will negotiate for its service will be lower than the cap, as the value of the service is constrained by the basis differential between Dawn and Michigan, which is usually within a narrow range and generally about $0.15. Dawn Gateway also argues that the Vector caps do not represent an accurate comparison in that they represent the charges only for the Canadian portion of the Vector Line. It is argued that the US portion which runs from Chicago to the Canadian border is much higher.

Board Findings

[3] Exhibit K1.5 – Section 4 – Schedule 3 pg. 35

[4] National Energy Board, Reasons for Decision, Vector Pipeline Limited Partnership. GH-5-98, March 1999.

[41] CME has argued that the Group 2 form of regulation practiced by the NEB is linked or anchored to a cost of service analysis and that the cap for Dawn Gateway should be based on a form of cost of service analysis. The Board does not agree. The NEB's framework identifies that cost of service analysis could be used to determine the reasonableness of rates in the event that there is a complaint. However, the examples that were put before the Board show Group 2 tolls that are based on negotiations with shippers and not necessarily cost of service principles. There are also examples of tolls which are not fixed but rather are range tolls or maximum tolls. In the case of Dawn Gateway, there are no captive customers, and Dawn Gateway is fully at risk with respect to the long term viability of the project. The value of the service is governed by the basis differential between Michigan and Dawn. No wholesale shippers have expressed any objections to the proposal. The Board concludes that cost of service analysis is not warranted or required for purposes of establishing a just and reasonable maximum tariff for Dawn Gateway.

[42] The Board notes that range rates, or maximum rates, have been approved by the Board before. The Board has authorized a range rate for Union's C1 interruptible and C1 short-term firm transportation service up to a maximum of $75 per GJ, which is also a high cap. When a shipper enters into a contract with Union for that service, the shipper negotiates a fixed price based on the market conditions existing at the time. While each shipper has a fixed price for its own contract, Union is not required to post the prices paid by shippers under Union's C1 range rate.

[43] The Board concludes that a similar approach is also appropriate for Dawn Gateway. Dawn Gateway is fully at risk, and shippers will have adequate protection through the operation of STAR, the Code of Conduct, ARC, and the complaint process. It may be, as CME alleges, that if the pipeline capacity is sold out completely the owners will enjoy substantial returns. At the same time we must recognize that the shareholder is bearing all of the risk. The Board concludes that the complaint procedure provides adequate protection to shippers and that firm and interruptible tolls which are flexible up to a maximum rate are just and reasonable in the circumstances.

[44] In the Board's view, this pipeline is a welcome addition to the Ontario capacity. There is a reason why 78% of the pipeline's capacity has been sold even before construction. The Board in its previous Decision identified the benefits of the line in terms of increased capacity and increased liquidity at Dawn. We do not believe that in

embarking upon a Cost of Service analysis to determine the reasonableness of the caps will be a useful exercise at this time.

The Reporting of Tolls

[45] This hearing ended with a dispute between the applicant and Board Staff as to whether the NEB requires Group 2 companies to file their actual tolls. Reference was made to the documents on the NEB's website and the NEB Decisions in *AEC Suffield Gas Pipeline Inc.*[5] and *Pipestone Pipeline Inc.*[6]

[46] Board Staff argues that the NEB's normal practice for Group 2 companies is to require that the tolls be filed. The applicant disputes this. Board staff states at page 5 of the Sur Reply Argument;

> Dawn Gateway is seeking that this Board approve the estimated, maximum rates set out in its application (e.g., the maximum rate of $1.00 USD per Dth (per day) for firm transportation).[7] However, in the absence of price disclosure (i.e., the actual tolls), it is difficult to determine whether the rates are 'just and reasonable' in order for the Board to approve the tolls in accordance with section 36 of the *OEB Act.*

Board Findings

[47] The Board does not intend to determine whether each and every price in each and every contract is just and reasonable. Rather, the Board is being asked to approve maximum rates. The Board concludes that it is not necessary for the Board to see each rate in each contract and to make a determination that they are just and reasonable. Rather, the Board is relying on a complaint system just as the NEB does. Nor does the NEB make an Order relating to each rate in each contract.

[48] Both Board staff and CME have argued that Dawn Gateway should file individual shipper contracts with the Board and that the pricing in the contracts should be public.

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[5] National Energy Board, Reasons for Decision, AEC Suffield Gas Pipeline Inc. GH-2-98, July 1998.

[6] National Energy Board, Reasons for Decision, Pipestone Pipelines Ltd. OHW-1-99, February 2000.

[7] Section 4, page 11, paragraph 29 and Section 4 – Schedule 3 – Statement of Tolls – Firm Transportation Service Tolls

Dawn Gateway opposes this step. Both CME and Dawn Gateway through counsel filed late submissions on March 4, 2010 responding to the Sur Reply filed by Board staff following the last day of Oral Hearing. In most cases there is reference to unsubstantiated third-party information either in support or against this proposition.

[49] All would agree that the record is unclear. One point that is clear is that NEB Guidelines clearly state "it is the responsibility of a Group 2 company to provide its shippers and interested parties with sufficient information to enable them to determine whether a complaint is warranted." Any shipper will know whether its contract price is below the cap. What the shipper will not know, is whether other shippers are receiving more favourable terms for essentially the same service.

[50] What may or may not constitute unjust discrimination or whether that contravenes the statutes is not something that needs to be determined here. But that situation may unfold and the shippers are entitled to argue it as they wish. The question is what information are they entitled to.

[51] The Board will not require that the individual negotiated tolls be published. The Board does not require this in relation to Union's negotiated C1 tolls and the publication of negotiated tolls does not form part of the Board's STAR. Wholesale shippers and marketers, the parties which have or are likely to contract for service on Dawn Gateway, have not requested that this information be made public. However, given the unsatisfactory nature of the evidentiary record, the Board will require Dawn Gateway to file individual contracts with the Board on a confidential basis. That will allow the Board to monitor the situation. Given that this is a new regulatory procedure that is likely a prudent step in any event. Shippers making a complaint can then make a motion that the contracts should be put on the public record or at least disclosed to them for the purpose of arguing the complaint. The Board will also be able to determine at that point whether any further information is required.

The Leave to Construct

[52] Dawn Gateway is also seeking an order from the Board granting leave to construct approximately 17 kms of NPS 24 pipeline from the Bickford Compressor Station to the Dawn Station (the "Bickford Dawn Pipeline") and ancillary facilities to meet the transportation service demands identified in Dawn Gateway's binding open

season. Dawn Gateway plans to construct the pipeline during the 2010 construction season for service to customers effective November 1, 2010.

The Proponent

[53] Dawn Gateway explained that Union will oversee the construction and maintenance of the pipeline. Dawn Gateway submitted that DTE and Spectra have the financial capability to construct and operate the Dawn Gateway Pipeline in accordance with all legislative and regulatory requirements.

[54] No parties disputed Dawn Gateway's fitness to construct and operate the pipeline. The Dawn Gateway partners are well established in the sector and have the necessary expertise and financial resources to undertake the project. The Board finds that there are no additional conditions of approval required in the circumstances to address this issue.

Environmental Impact

[55] An Environmental Report ("ER") and update was prepared for the Bickford Dawn Pipeline. The concerns of various provincial and municipal agencies and affected landowners have been solicited and considered in the development of the ER. Dawn Gateway will contract with Union to oversee the construction of the pipeline. Union's standard construction procedures combined with the supplemental mitigation measures recommended in the ER will be employed to address environmental and landowner concerns. The ER concluded that construction and operation of the pipeline will have no long-term significant environmental effects. The ER has been provided to the Ontario Pipeline Coordination Committee ("OPCC") and other provincial and municipal agencies.

[56] None of the intervenors raised any environmental concerns. The Board accepts the evidence that the pipeline will have no adverse long-term environmental effects provided Dawn Gateway adheres to the recommendations in the ER. The Board's approval is conditional on Dawn Gateway implementing the recommendations in the ER and this is reflected in the Conditions of Approval set out in Appendix B.

The Need for the Pipeline

[57] The proposed Dawn Gateway Pipeline will provide shippers with an enhanced connection between Michigan storage and Ontario's Dawn market hub. The proposed Dawn Gateway Pipeline would initially have the capacity to transport 360,000 Dthd (379,876 GJ/d, 10,198 103m3/d) between MichCon's Belle River Mills Compressor Station and Union's Dawn Hub on a firm basis, and its capacity could be expanded in the future. The Dawn Gateway Pipeline will also provide shippers with enhanced access to existing and new storage developments in the Great Lakes region and the ability to connect and access new sources of supply upstream of the Belle River Mills Compressor Station.

[58] The Dawn Gateway Pipeline would provide a new transportation service that would allow downstream customers in Ontario and Quebec to access gas supplies from emerging supply regions like the U.S. Rockies, various U.S. Southeast shale basins and Gulf Coast LNG. Access to these new sources of supply will improve the depth and liquidity of the Dawn market hub.

[59] As outlined above, five shippers entered into binding Precedent Agreements to subscribe for a total of 280,000 Dthd (295,459 GJ/d, 7,932 103m3/d) of firm transportation service on the Dawn Gateway Pipeline (subject to regulatory approval), thereby demonstrating that there is market support for the new transportation service that Dawn Gateway is proposing. Any non-contracted capacity will be made available to shippers through future open seasons or through direct negotiation.

[60] In EB-2008-0411, the Board found that there were clear benefits from the proposed Dawn Gateway Pipeline:

> 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 rate base and rates. This benefit is small; the estimated rate impact is less than $1 per year for residential customers in the Southern Operations Area.
>
> 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.

[61] None of the parties to this proceeding questioned that there is a need for this pipeline. As indicated, the Board has already addressed this issue in EB-2008-0411. The Board therefore accepts that the Applicant has established the need for the pipeline.

Landowner Issues

[62] On February 12, 2010, GAPLO/CAEPLA advised the Board that it and Dawn Gateway had resolved the landowner issues in the application in accordance with the Minutes of Settlement which have been filed with the Board. As a result, GAPLO/CAEPLA withdrew from further participation in the proceedings.

[63] None of the other parties raised landowner issues. In these circumstances, the Board accepts that there are no outstanding landowner issues and approves the form of easement filed as part of the Minutes of Settlement. This is reflected in the Conditions of Approval.

Cost Awards

[64] The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's Practice Direction on Cost Awards. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

[65] Cost claims, and any objections to the cost claims, for the proceeding shall be made in the timeframe set out below.

THEREFORE THE BOARD ORDERS THAT:

1. Dawn Gateway Pipeline Limited Partnership is, pursuant to Section 90(1) of the *Ontario Energy Board Act,* granted Leave to Construct approximately 17km of NPS 24 pipeline from the existing Bickford Compressor Station located at Lot 6, Concession XII, Township of St. Clair easterly to the Dawn Compressor Station in the Township of Dawn-Euphemia, all in the County of Lambton, subject to the Conditions of Approval set out in Appendix B of this Decision.

2. The Board pursuant to Section 36(1) of *Ontario Energy Board Act* approves the Regulatory Framework and the Tariffs for the Ontario portion of the Dawn Gateway Pipeline contained in the application, as amended during the hearing, and subject to the Conditions of Approval set out in Appendix C of this Decision.

3. Dawn Gateway will file a draft Rate Order within 10 days of the date of this Decision. The draft Rate Order will include the General Terms and Conditions, and the Toll Schedules, Agreements and Statements of Tolls for Firm Transportation service and Interruptible Transportation service and will incorporate the conditions of approval contained in Appendix C of this Decision.

4. Upon receipt of the Draft Rate Order, Intervenors and Board staff shall have 5 working days to respond to Dawn Gateway's Draft Order. Dawn Gateway shall respond within 3 working days to any comments submitted by the intervenors and Board staff.

5. Intervenors shall file with the Board and forward their respective cost claims for the proceeding by March 29, 2010.

6. Dawn Gateway shall file with the Board and forward to the applicable intervenor any objections to the claimed costs by April 12, 2010.

7. The applicable intervenor shall file with the Board and forward to Dawn Gateway any responses to any objections for cost claims by April 26, 2010.

All filings to the Board must quote the file number, EB-2009-0422, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one

electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and email address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary office at BoardSec@oeb.gov.on.ca, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, March 9, 2010.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

Decision and Order

EB-2009-0422

DATED March 9, 2010

Appendix A

Dawn Gateway Pipelines Limited Partnership

EB-2009-0422

Final Issues List

Regulatory Framework

1. Is the regulatory framework proposed in the Application appropriate?

2. Should the Ontario Energy Board's Storage and Transmission Access Rule apply to the Ontario portion of the Dawn Gateway Pipeline?

3. How are the provisions of the Ontario Energy Board's Affiliate Relationship Code satisfied by Dawn Gateway LLP and its affiliates in the proposed regulatory framework?

Leave to Construct the Bickford Dawn Pipeline

4. Is the Applicant a capable prospective pipeline operator in terms of technical and financial capabilities to develop and operate the proposed pipeline facilities?

5. Is there a need for the proposed pipeline?

6. What are the environmental impacts associated with construction of the proposed pipeline and are they acceptable?

7. Are there any outstanding landowner matters for the proposed pipeline routing and construction?

APPENDIX B

Decision and Order

EB-2009-0422

DATED March 9, 2010

Appendix B

Dawn Gateway Pipelines Limited Partnership

EB-2009-0422

Conditions of Approval
Leave to Construct

1 General Requirements

1.1 Dawn Gateway Limited Partnership ("Dawn Gateway LP") shall construct the facilities and restore the land in accordance with its application and the evidence filed in EB-2009-0422 except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate December 31, 2011, unless construction has commenced prior to that date.

1.3 Dawn Gateway LP shall implement all the recommendations of the Environmental Report filed in the pre-filed evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.

1.4 Dawn Gateway LP shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Dawn Gateway LP shall not make such change without prior approval of the Board or its designated representative. In the event of an emergency, the Board shall be informed immediately after the fact.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Natural Gas Applications.

2.2 Dawn Gateway LP shall designate a person as project engineer and shall provide the name of the individual to the Board's designated representative. The project engineer will be responsible for the fulfillment of the Conditions of Approval on the construction site. Dawn Gateway LP shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

2.3 Dawn Gateway LP shall give the Board's designated representative and the Chair of the OPCC ten days written notice in advance of the commencement of the construction.

2.4 Dawn Gateway LP shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.

2.5 Dawn Gateway LP shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.

2.6 Dawn Gateway LP shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

3 Monitoring and Reporting Requirements

3.1 Both during and after construction, Dawn Gateway LP shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within fifteen months of the in-service date. Dawn Gateway LP shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

3.2 The interim monitoring report shall confirm Dawn Gateway LP's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.

3.3 The final monitoring report shall describe the condition of any rehabilitated land and the effectiveness of any mitigation measures undertaken. The results of the monitoring programs and analysis shall be included and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

4 Easement Agreements

4.1 Dawn Gateway LP shall offer the form of agreement approved by the Board, as filed as part of Exhibit K1.4 (the Minutes of Settlement), to each landowner, as may be required, along the route of the proposed work.

5 Other Approvals and Agreements

5.1 Dawn Gateway LP shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

APPENDIX C

Decision and Order

EB-2009-0422

DATED March 9, 2010

Appendix C

Dawn Gateway Pipelines Limited Partnership

EB-2009-0422

Conditions of Approval
Regulatory Framework

1) Dawn Gateway will comply with the Code of Conduct attached as Schedule 1 to this Order.

2) For purposes of Union Gas Limited's compliance with the Board's Affiliate Relationships Code for Gas Utilities ("ARC"), effective June 1, 2010, Dawn Gateway will be deemed to be an affiliate of Union Gas Limited. Union Gas Limited will provide written assurance to the Board that Union will treat Dawn Gateway as an affiliate for purposes of ARC.

3) Dawn Gateway will comply with the Board's Storage and Transportation Access Rule ("STAR"). For the purposes of section 4.1.1(ii) and related sections 4.1.4, 4.1.6, and 4.3.1 of STAR, Dawn Gateway is only required to post the operationally-available transportation capacity once each day. The Board will review this provision on an annual basis and determine whether further daily postings are necessary depending on the extent to which Dawn Gateway offers those services.

4) Dawn Gateway will maintain separate books of account in Canada in a manner consistent with Generally Accepted Accounting Principles and will file with the Board and post on the company's website audited financial statements for the preceding financial year within 120 days after the financial year end. Such statements will provide details of revenues and costs associated with the regulated pipeline.

5) Article 21 of the Dawn Gateway General Terms and Conditions shall be amended to read as follows;

These General Terms and Conditions, Toll Schedules, Statement of Tolls and Service Agreements which comprise the Tariff are subject to the provisions of the *Ontario Energy Board 1998*, including the Transporter's Code of Conduct, the Board's Affiliate Relationships Code for Gas Utilities and the Board's Storage and Transportation Access Rule . The tolls of the Transporter are regulated by the OEB on a complaints basis.

The Transporter is required to make copies of Tariffs and supporting financial information readily available to interested parties. Interested persons who can not resolve traffic toll and traffic issues with the Transporter may file a complaint with the Board. In absence of a complaint, the Board does not normally undertake a detailed examination of the company's tolls.

It is the responsibility of the Transporter to provide its Shippers and interested parties with sufficient information to enable them to determine whether a complaint is warranted. Upon receipt of a written complaint, or the Board on its own initiative, the Board may decide to examine a toll and to make the toll interim, pending completion of the examination. In this circumstance, the Board may request additional information including any information that the Board would ordinarily obtain from regulated pipelines in a Cost of Service proceeding.

6) Dawn Gateway's Rate Order, its audited financial statements, its Code of Conduct, and the Board's STAR will be posted on Dawn Gateway's website.

SCHEDULE 1

Decision and Order

EB-2009-0422

DATED March 9, 2010

Dawn Gateway Pipeline Limited Partnership
Code of Conduct

General

This Code of Conduct will govern the relationship between Dawn Gateway Pipeline Limited Partnership ("DG") and all shippers or potential shippers on its transportation system ("Shippers") and each of the following parties (each being a "Related Party"): (i) any of DG's partners (a "Partner"); (ii) any corporation, company, partnership or other entity that directly or indirectly owns a majority voting interest in a Partner (a "Parent"); and (iii) any corporation, company, partnership or other entity that is controlled by a Parent including Union Gas Limited and Michigan Consolidated Gas Company. DG is committed to ensuring the long-term viability of its transportation system (the "System") through the efficient and cost effective maximization of System utilization.

No Preferential Treatment

In the administration of DG's tariff, contracts and operations and including the provision of information in a timely manner to all Shippers, DG will at all times treat its Shippers equally. DG will not give preferential access to the System to any Related Party, or to any Shipper on the System. DG will process all similar requests for service in a uniform manner.

Related Party Transactions

DG will post the names of any Related Party with whom it contracts to provide transportation services. DG will not participate in any agreement whereby the provision of transportation services on the System by DG is conditional upon Shippers entering into an agreement with a Related Party for other services.

Information Kept Confidential

DG will not use any information or data that is disclosed to DG by third parties for System purposes to advance the activities of a Related Party unless that information or data is also available generally to third parties or has been given to DG on the express written understanding that it may also be used in connection with the activities of Related Parties.

Reporting

DG shall provide to the Ontario Energy Board (OEB), annually, by the last day of the fourth month after the financial year end, a statement signed by both of its Co-Presidents certifying that they are satisfied that DG and the DG Representatives (as defined below) have complied with this Code of Conduct with any exceptions noted.

Compliance

DG will, at the commencement of employment of personnel and the engagement of any Related Party to provide services to DG (collectively, the "DG Representatives") and at least once annually, formally communicate to DG Representatives the principles set forth in this Code of Conduct and the expectation that DG Representatives conduct themselves at all times in a manner consistent with those principles. Appropriate action will be taken promptly in response to any material breach of this Code of Conduct.

Complaint Mechanism

Any complaint respecting the application of this Code of Conduct shall be referred in writing to either Co-President of Dawn Gateway Pipeline General Partner Inc. The Co-President shall respond to the complainant within 30 working days of its receipt. The response shall include a description of the complaint and DG's response to all issues of contention raised within the complaint. A record of all complaints and responses of DG shall be maintained for a period of 2 years. If a complaint is not resolved to the satisfaction of the complainant, the complaint may be referred to the OEB. DG will advise the OEB of any complaints received.

Periodic Review

This Code of Conduct shall be subject to periodic review by DG and its Shippers and modifications may be implemented as warranted.

This is Exhibit "D" referred to in the affidavit of **MARK KITCHEN** sworn before me, this 25th day of November, 2010.

A Commissioner, etc.

DawnGateway Pipeline

Filed: 2010-06-28
EB-2010-0039
Exhibit B3.14
Attachment

April 19th, 2010

BY RESS, email & Courier

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Board File # EB-2009-0422
Dawn Gateway Pipeline Limited Partnership

Further to the Board's decisions regarding the above noted matter, we would like to update you on the status of the proposed Dawn Gateway Pipeline.

Based on the Board's decisions in EB-2009-0422 and EB-2008-0411, Dawn Gateway was prepared to move forward with the construction of the Dawn Gateway Pipeline. Shortly after receiving Board approval, Dawn Gateway was approached by our Shippers with a request to delay construction, due to evolving market dynamics. As a result of this request Dawn Gateway has agreed to delay construction, originally scheduled to begin in the summer of 2010. An assessment of the market conditions that would support the project will be made with Shippers this fall.

The final preferred route for this pipeline will not change as a result of the revised project construction schedule and all existing landowner commitments negotiated with Dawn Gateway will be honoured at the time of any construction.

To ensure the public is aware of this change, Dawn Gateway will send letters to affected landowners, intervenors and other stakeholders.

We will keep you informed of any future developments with this pipeline projects. Please bring this letter to the attention of the Board panel members involved with this project.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Mark Murray
Manager Regulatory Projects & Land Acquisition
for Union Gas Limited, as agent for
Dawn Gateway Pipeline Limited Partnership

cc: Neil McKay, Manager Facilities Applications
Zora Crnojacki, Project Advisor
Sharon Wong – Blake, Cassels
All Intervenors

This is Exhibit "E" referred to in the affidavit of **MARK KITCHEN** sworn before me, this 25th day of November, 2010.

A Commissioner, etc.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2010-0039

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 for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010.

BEFORE: Paul Sommerville
Presiding Member

Marika Hare
Member

DECISION AND ORDER

Union Gas Limited ("Union") filed an application dated April 22, 2010 with the Ontario Energy Board (the "Board") under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2010 in connection with the sharing of 2009 earnings under the incentive rate mechanism approved by the Board as well as final disposition of 2009 year-end deferral accounts and other balances (the "Application"). Union also sought approval of a cost allocation methodology used to allocate costs between Union's regulated and unregulated businesses.

On June 1, 2010, the Board issued Procedural Order No.1 setting out the schedule for the case. Interrogatories were filed on June 16, 2010 and responses to interrogatories were filed on June 28, 2010. On June 25, 2010, Union filed corrected evidence which primarily affected the International Financial Reporting Standards Conversion Costs,

and the GST in the Late Payment Penalty Litigation deferral account. A Technical Conference was held on July 9, 2010 and a Settlement Conference took place on July 26 and July 27, 2010.

Certain materials, such as responses to specified interrogatories and a specific undertaking made by Union at the Technical Conference were filed in confidence by the Applicant. For the purposes of this proceeding the Board shall consider these documents confidential and they will not be placed on the public record.

On July 30, 2010 Union filed a Settlement Agreement (the "Agreement") in this matter which is attached as Schedule "A". The following intervenors were party to this Agreement:

Canadian Manufacturers & Exporters
Consumers Council of Canada
City of Kitchener
Energy Probe Research Foundation
Federation of Rental-housing Providers of Ontario
Industrial Gas Users Association
London Property Management Association
Union Gas Limited
Vulnerable Energy Consumers Coalition

The Agreement indicated that a comprehensive settlement on all of the issues in relation to the EB-2010-0039 Application was reached.

The Board has considered the proposed Agreement and the quality and detail of the supporting evidence. The Board approves the Agreement which is appended to this Decision as Appendix "A".

The Board orders that the amounts Union seeks to dispose of in this proceeding, as revised and adjusted for the Agreement, shall be recovered from or refunded to Union's ratepayers in accordance with methodologies included Union's Application.

Union shall file a draft rate order giving effect to this Decision as soon as it is able. Also, as part of that filing Union is to clearly identify the rate riders resulting from this Decision that pertain to each rate classification. Parties who wish to comment on draft

rate order must do so within 7 calendar days from the date of the filing of the draft rate order. Union must reply to these comments within 10 calendar days of the filing of the draft rate order.

Intervenors eligible for cost awards shall file with the Board and forward to Union their respective cost claims within 10 calendar days from the date of this Decision and Order.

Union may file with the Board and forward these intervenors any objections to the claimed costs within 24 calendar days from the date of this Decision and Order. Intervenors, whose cost claims have been objected to, may file with the Board and forward to Union any responses to any objections for cost claims within 31 calendar days of the date of this Decision and Order. Union shall pay the Board's costs of, and incidental to, this proceeding immediately upon receipt of the Board's invoice.

ISSUED at Toronto, August 10, 2010.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"

THE SETTLEMENT AGREEMENT

FOR

EB-2010-0039
Union Gas 2009 Deferral Account and Earnings Sharing Disposition Settlement Agreement

DATED: JULY 30, 2010

EB-2010-0039

ONTARIO ENERGY BOARD

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 for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2010.

SETTLEMENT AGREEMENT

July 30, 2010

This Settlement Agreement ("Agreement") is for the consideration of the Ontario Energy Board ("the Board") in its determination, under Docket No. EB-2010-0039, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2010 in connection with the sharing of 2009 earnings under the incentive regulation mechanism approved by the Board as well as final disposition of 2009 year-end deferral account and other balances (the "Application"). Union is also seeking approval of a cost allocation methodology used to allocate costs between Union's regulated and unregulated storage operations. By Procedural Order No.1 dated June 1, 2010, the Board scheduled a Settlement Conference to commence July 26, 2010. The Settlement Conference was duly convened, in accordance with Procedural Order No. 1, with Mr. Kenneth Rosenberg as facilitator. The Settlement Conference proceeded until July 27, 2010.

The settlement presented in this Agreement is comprehensive in that the agreement that has been reached settles all issues in this proceeding.

The Agreement is supported by the evidence filed in the EB-2010-0039 proceeding.

The purpose of this proceeding was for:

(a) approval of final balances for all 2009 deferral accounts and an order for final disposition of those balances;

(b) approval of the market transformation incentive for 2009 and an order for final disposition of the balance;

(c) approval of the impact of federal and provincial tax changes in 2009 and an order for final disposition of the balance;

(d) approval of the customer portion of earnings sharing in 2009 and the proposed disposition of that amount; and,

(e) approval of Union's regulated and unregulated storage operations cost allocation methodology.

It is acknowledged and agreed that none of the provisions of this Agreement is severable. If the Board does not, prior to the commencement of the hearing of the evidence in EB-2010-0039,

accept the Agreement in its entirety, there is no Agreement (unless the parties to the Agreement agree that any portion of the Agreement the Board does accept may continue as a valid agreement).

It is further acknowledged and agreed that parties to the Agreement will not withdraw from this Agreement under any circumstances except as provided under Rule 32.05 of the Board's Rules of Practice and Procedure.

The participants in the Settlement Conference agree that all positions, negotiations and discussion of any kind whatsoever which took place during the Settlement Conference and all documents exchanged during the conference which were prepared to facilitate settlement discussions are strictly confidential and without prejudice, and inadmissible unless relevant to the resolution of any ambiguity that subsequently arises with respect to the interpretation of any provision of this Agreement.

The role adopted by Board Staff in Settlement Conferences is set out on page 5 of the Board's Settlement Conference Guidelines. Although Board Staff is not a party to this Agreement, as noted in the Guidelines, "Board Staff who participate in the settlement conference are bound by the same confidentiality standards that apply to parties to the proceeding".

The evidence supporting the Agreement is set out in the Agreement. Abbreviations will be used when identifying exhibit references. For example, Exhibit B1, Tab 4, Schedule 1, Page 1 will be referred to as B1/T4/S1/p1. Attached as an Appendix is A/T1/Schedule 1 "Per Settlement" which is a schedule showing the final agreed upon deferral account balances and earnings sharing amount. The structure and presentation of the settled issues is consistent with settlement agreements which have been accepted by the Board in prior cases. The parties agree that this Agreement and any Appendices form part of the record in the proceeding.

In Procedural Order No. 1 in this proceeding, the Board granted intervenor status to all intervenors of record in EB-2010-0039. The following entities participated in the Settlement Conference:

Canadian Manufacturers & Exporters ("CME")
Consumers Council of Canada ("CCC")
City of Kitchener ("Kitchener")
Energy Probe Research Foundation ("Energy Probe")
Federation of Rental-housing Providers of Ontario ("FRPO")
Industrial Gas Users Association ("IGUA")
London Property Management Association ("LPMA")
Union Gas Limited ("Union")
Vulnerable Energy Consumers Coalition ("VECC")

The parties to this Agreement include all of the above noted entities (the "parties"). The parties to this Agreement represent major stakeholders and constituencies with an interest in Union's rates.

The parties to this settlement encourage the Board to accept this Agreement in its entirety. The parties to this Agreement also support finalization of the rate order in these proceedings to enable implementation of this Agreement in Union's October 1, 2010 QRAM.

1. Unabsorbed Demand Cost Variance Account (179-108)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B.01
3. JT1.10

2. Short-Term Storage and Other Balancing Services (179-70)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B1.01, B2.02, B5.02, B8.01, B9.02

3. Long-Term Peak Storage Services (179-72)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B1.02, B2.02, B4.02, B6.01, B7.02, B8.01, B9.02

4. Deferred Customer Rebates/Charges (179-26)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B4.03

5. Lost Revenue Adjustment Mechanism (179-75)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B3.03, B3.04, B8.01, B9.06, B9.11

6. Intra-Period Weighted Average Cost of Gas ("WACOG") Costs (179-102)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B4.04

7. Unbundled Services Unauthorized Storage Overrun (179-103)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1

8. Demand Side Management Variance Account (179-111)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B2.03, B5.03, B8.01, B8.02, B9.09, B9.10, B9.11
3. JT1.2

9. Gas Distribution Access Rule ("GDAR") Costs (179-112)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1

10. Late Payment Penalty ("LPP") Litigation (179-113)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B1.03, B1.04, B4.06, B5.07, B7.03, B8.01

11. Shared Savings Mechanism ("SSM") Variance Account (179-115)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B1.05, B3.05, B8.01, B9.06, B9.11

12. Carbon Dioxide Offset Credits (179-117)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1

13. Average Use Per Customer (179-118)

(Complete Settlement) Parties agree to Union's proposed disposition of this account.

Evidence References:

1. A/T1
2. B8.03

14. International Financial Reporting Standards ("IFRS") Conversion Costs (179-120)

The parties agree that, upon approval of this Agreement by the Board, Union will remove from the deferral account the capital costs associated with upgrading Union's accounting system in order to report results under IFRS. These capital costs will be replaced by the annual revenue requirement related to those capital costs, increasing the amount recovered between 2010 and 2014 to $1.747 million as illustrated in the table provided at JT1.11 (attached). For clarity, Union's 2009 deferral account balance will include $2.577 million of O&M. Union will include the revenue requirements noted on JT1.11 for years 2010 through to 2014 inclusive in the respective future deferral account disposition proceedings.

Further, the parties agree that, upon approval of this Agreement by the Board, Union will make an adjustment of $0.386 million to the deferral account to the credit of ratepayers. The adjustment is being made to reflect the difference between the inclusion of 2008 IFRS related costs of $0.965 million in Union's 2008 earnings sharing calculation (with the result that, at the margin, ratepayers absorbed 90% of this cost) and the credit for reversal of these costs included in the 2009 earnings sharing calculation (with the result that, without the agreed adjustment, ratepayers would have been credited with only 50% of this cost). The parties agree that the adjustment to Union's 2008 IFRS expenses is without prejudice to the method for calculating utility earnings for the purposes of earnings sharing as approved by the Board in the EB-2009-0101 settlement agreement.

Evidence References:

1. A/T1
2. B1.06, B8.01, B9.08
3. JT1.11

15. Cumulative Under-recovery – St. Clair Transmission Line (179-121) and Impact of Removing St. Clair Transmission Line from Rates (179-122)

The parties agree to defer determination of disposal of balances in deferral Account No. 179-121 and Account No. 179-122 until after November 1, 2010. November 1, 2010 is the deadline by which Dawn Gateway Limited Partnership ("Dawn Gateway") and its shippers will determine whether the Dawn Gateway Pipeline will proceed for in-service in November 2011.

The parties request that this matter come back on for hearing before the Board on a date or dates agreeable to the Board between November 29, 2010 and December 31, 2010. The parties further agree that in advance of that hearing Union shall be entitled to file further written evidence to address any changes in circumstances subsequent to the date of the Settlement Agreement and that parties have an opportunity to ask interrogatories in respect of that evidence and file responding evidence.

The agreement by the parties to defer any determination relating to the balances in Account No. 179-121 and Account No. 179-122 is without prejudice to the parties' positions with respect to the proper determinations concerning the accounts or the appropriateness of any relief requested in the proposed application.

In accordance with the terms of the settlement of this issue, Union has produced, in confidence and without prejudice to, its position pertaining to relevance and admissibility, the following documents:

(a) the Precedent Agreements between DGLP and its shippers filed confidentially in the EB-2008-0411 proceedings;

(b) communications including emails between DGLP and its shippers pertaining to amendments to the precedent agreements aforesaid;

(c) the Amended Precedent Agreements between DGLP and each of its shippers; and

(d) the Agreement of Purchase and Sale pertaining to the St. Clair Line between DGLP and Union.

Until a determination by the Board with respect to the balances in Accounts No. 179-121 and 179-122, Union will continue to track the ratepayer credit in deferral account 179-122 based on a sale date of March 1, 2010 as outlined by Union in response to CME interrogatories B3.14 and B3.31. Union will use the Board's methodology as outlined in its EB-2008-0411 Decision to calculate the ratepayer credit.

Evidence References:

1. A/T1
2. B1.07, B3.12, B3.13, B3.14, B3.15, B3.16, B3.17, B3.18, B3.19, B3.20, B3.21, B3.26, 3.28, B3.29, B3.30, B3.31, B3.33, B4.05
3. JT1.1, JT1.4

16. Market Transformation Incentive

(Complete Settlement)

Evidence References:

1. A/T1
2. B8.01, B9.03, B9.04, B9.05, B9.06, B9.07

17. Federal and Provincial Tax Changes

(Complete Settlement)

Evidence References:

1. A/T1
2. B8.01

18. 2009 Earnings Sharing

The parties agree that, upon approval of this Agreement by the Board, Union will credit ratepayers in the amount of $0.334 million, in addition to the $7.063 million credit reflected at A/T2/Appendix B/S1 (Corrected), which additional credit represents the adjustment to 2008

utility earnings sharing that would have resulted if Union had calculated the future income tax expense in respect of its OEB approved deferral accounts for 2008. The $0.334 million arises as a result of differences between 2008 and 2009 tax rates applicable to deferral accounts. This adjustment is consistent with Union's tax treatment of its deferral accounts in 2009, as outlined at A/T2/p9.

Evidence References:

1. A/T2
2. B1.08, B1.09, B1.10, B1.11, B5.05, B5.06, B6.02, B6.03, B6.04, B7.04, B7.05, B7.06, B7.07 B7.12, B8.04, B8.06
3. JT1.9

19. Allocation and Disposition of 2009 Deferral Account Balances, Market Transformation Incentive, and 2009 Federal & Provincial Tax Changes

(Complete Settlement) Parties agree to Union's proposed allocations.

Evidence References:

1. A/T3
2. B2.01, B7.01, B7.08, B8.07, B8.08, 9.12
3. JT1.3

20. Allocation of Costs Between Union's Regulated and Unregulated Storage Operations

The parties agree that, upon approval of this Agreement by the Board, Union will commission an independent study ("the Study") of its cost allocation methodology for allocation of costs between its regulated and unregulated storage operations. The Study will also examine the attribution of revenues to deferral accounts 179-70 and 179-72 and provide a volumetric reconciliation between physical space and space sold "short term" and "long term". Union will solicit a person, group or organization to conduct the study ("Study Staff") by way of a request for proposals ("RFP"). Union will provide an opportunity to the other parties to comment on a draft version of the RFP and to suggest changes. Final drafting of the RFP and selection of Study Staff will be at the sole discretion of Union.

Union will take steps to ensure that, at or near the outset of the Study, the other parties will be provided an opportunity to present Study Staff with their concerns, questions, and/or opinions on the subject matters of the Study.

The Study will be filed by Union in connection with its application to dispose of 2010 deferral account balances with sufficient time to permit full discovery and review of the Study as part of the application.

Any changes that Study Staff may recommend to Union's cost allocation methodology will not be implemented until after receiving approval from the Board. Any findings or recommendations made by Study Staff will be adopted, if at all, on a prospective basis, and will have no impact on balances disposed of prior to 2010.

This Agreement is without prejudice to any party's right to disagree with, or challenge any of the findings of Study Staff.

Evidence References:

1. A/T4
2. B1.13, B1.14, B1.15, B1.16, B1.17, B1.18, B1.19, B2.05, B2.06, B3.34, B3.35, B3.37, B3.38, B3.39, B3.40, B3.41, B3.42, B4.07, B4.08, B4.09, B4.10, B4.11, B4.12, B4.13, B4.14, B4.15, B4.16, B4.17, B4.18, B5.08, B5.09, B5.10, B6.05, B6.06, B6.07, B6.08, B7.09, B7.10, B7.11, B7.13, B7.14, B8.09, B9.14
3. JT1.5, JT1.6, JT1.7, JT1.8, JT1.12

Filed: 2010-06-25
EB-2010-0039
Exhibit A
Tab 1
Schedule 1
Per Settlement

UNION GAS LIMITED
Deferral Account Balances, Market Transformation Incentive and Federal and Provincial Tax Changes
Year Ending December 31, 2009

Line No.	Account Number	Account Name	Balance ($000's)	(1)
	Gas Supply Accounts:			
1	179-108	Unabsorbed Demand Costs Variance Account	(1,285)	(2)
	Storage Accounts:			
2	179-70	Short-Term Storage and Other Balancing Services	(4,949)	
3	179-72	Long-Term Peak Storage Services	(14,787)	
4		Total Storage Accounts (Lines 2 + 3)	(19,736)	
	Other:			
5	179-26	Deferred Customer Rebates/Charges	-	
6	179-75	Lost Revenue Adjustment Mechanism	2,394	
7	179-102	Intra-period WACOG Changes	(7,615)	
8	179-103	Unbundled Services Unauthorized Storage Overrun	-	
9	179-111	Demand Side Management Variance Account	1,468	
10	179-112	Gas Distribution Access Rule (GDAR) Costs	-	
11	179-113	Late Payment Penalty Litigation	5,651	
12	179-115	Shared Savings Mechanism	8,922	
13	179-117	Carbon Dioxide Offset Credits	-	
14	179-118	Average Use Per Customer	(2,144)	
15	179-120	IFRS Conversion Cost	2,191	
16	179-121	Cumulative Under-recovery – St. Clair Transmission Line	-	
17		Total Other Accounts (Lines 5 through 16)	10,866	
18		Total Deferral Account Balances (Lines 1 + 4 + 17)	(10,155)	
19		Market Transformation Incentive	500	
20		Federal and Provincial Tax Changes	(1,500)	
21		**Total Deferral Account Balances, Market Transformation Incentive and Federal and Provincial Tax Changes (Lines 18 + 19 + 20)**	(11,154)	
22		**Earnings Sharing per Settlement Agreement**	(7,397)	

Notes:
(1) Account balances include interest to December 31, 2009.

(2) With the exception of UDC (No. 179-108), all gas supply-related deferral account balances are disposed through the QRAM process.

Filed: 2010-07-21
EB-2010-0039
Exhibit JT1.11

UNION GAS LIMITED

Undertaking of Union Gas
To Board Staff

Please provide a table that excludes capital expenditures, but includes any other expenditures, like depreciation.

Union has proposed recovery of $1.412 million of the capital costs related to upgrading Union's accounting system in order to report results under IFRS.

Removing the capital costs from the deferral account as proposed and replacing them with the annual revenue requirement related to the capital cost will increase the amount to be recovered over time to $1.747 million as illustrated in the table below. The increase in costs to be recovered relates to the interest, return and income taxes.

Impact of the Removal of Capital Costs

	2008	2009	2010	2011	2012	2013	2014	Total
Proposed by Union	1.918	2.071						3.989
Less capital expenditures	0.953	0.459						1.412
O&M	0.965	1.612						2.577
Revenue requirement	-	-	0.124	0.335	0.538	0.505	0.244	1.747
	0.965	1.612	0.124	0.335	0.538	0.505	0.244	4.324

This is Exhibit "F" referred to in the

affidavit of **MARK KITCHEN**

sworn before me, this 25th

day of November, 2010.

A Commissioner, etc.

Dawn Gateway Pipeline
Open Season

DawnGateway Pipeline™

November 15, 2010

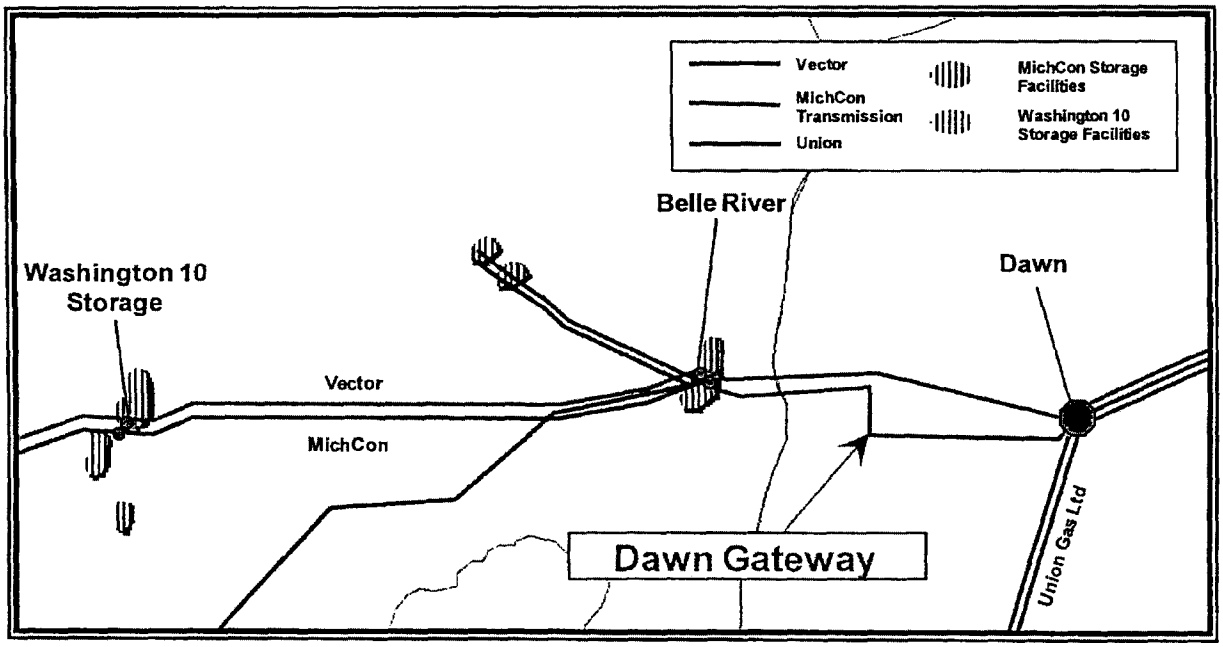
Dawn Gateway Pipeline Limited Partnership and Dawn Gateway Pipeline, LLC (collectively "Dawn Gateway") is conducting a binding open season for firm transportation between MichCon's Belle River facility and Union Gas' Dawn Hub ("Dawn"). At least 80,000 Dth/d is available for a minimum term of 7 years.

Dawn Gateway is an international pipeline joint venture between subsidiaries of Spectra Energy Corp. (www.spectraenergy.com) and DTE Energy Company (www.dteenergy.com). The proposed Dawn Gateway pipeline will have initial firm transportation capacity of 360,000 Dth/d, will utilize a combination of new and existing pipelines and may be available for service starting in November 2011 or November 2012, as the market dictates.

Interested participants must submit **binding** bids by email no later than 3pm Eastern Time on December 7, 2010. All responding parties will be notified as to the acceptance of their bid by December 20, 2010 and participants must sign the attached Precedent Agreement by January 11, 2011.

Concurrent with the Dawn Gateway open season, Michigan Consolidated Gas Company (MichCon) is conducting an open season for upstream services.

DTE Pipeline Company is acting as agent and coordinating the open seasons for both Dawn Gateway and MichCon. For additional information, participants should contact Mark Bering at (313) 235-6531 or beringm@dteenergy.com.



Dawn Gateway Pipeline
Open Season

DawnGateway Pipeline

Project Description

Benefits:

The proposed Dawn Gateway pipeline adds much needed capacity between MichCon and Dawn. Supply declines from Western Canada to Dawn have caused price strengthening at Dawn and increases in the demand for transportation between Michigan and Dawn. MichCon can be a greater source of supply for the Dawn market via the proposed Dawn Gateway pipeline. MichCon is well connected to the North American pipeline grid and provides access to new supply basins such as Southeast shale gas (Barnett/Haynesville/Fayetteville), Rockies gas and the promising new Collingwood shale in Michigan.

The proposed Dawn Gateway pipeline offers Dawn customers access to multiple supply basins as well as over 600 Bcf of Michigan storage.

Facilities:

The proposed Dawn Gateway pipeline consists of approximately 21 miles of 24" high pressure pipeline and related facilities. For the initial capacity of 360,000 Dth/d, no compression is required. Approximately 10.6 miles of pipeline exists, including the St. Clair River crossing, with the remaining 10.5 miles being new construction in Ontario.

History of the Project:

Dawn Gateway first announced its international pipeline project in September 2008. The initial open season resulted in the sale of approximately 80% of the available capacity. In March 2010, Dawn Gateway received all required Ontario Energy Board ("OEB") approvals for the Canadian portion of the pipeline. Shortly thereafter, Dawn Gateway was approached by the anchor Shippers requesting a delay of the in-service date.

With the recent improvements in the value of transportation between Michigan and Dawn, Dawn Gateway is seeking additional market support in order to proceed with the project.

Regulatory Update:

The Canadian portion of the pipeline has received all approvals from the OEB, including facilities, rates and tariff approvals. The US portion of the pipeline will be regulated by the Michigan Public Service Commission ("MPSC"). Once there is sufficient market support to continue with the project, filings will be made with the MPSC seeking approval to transfer the existing assets to Dawn Gateway and seeking approval of rates and a tariff. No new facility approvals are required for the US portion of the pipeline.

Dawn Gateway Pipeline
Open Season

DawnGateway Pipeline™

Open Season Parameters and Rates

Capacity & Term:

Dawn Gateway has available at least 80,000 Dth/d of annual capacity for a minimum term of 7 years, starting in November 2011 or November 2012.

Rates:

The bid rate for transportation will be converted to a Monthly Demand Charge over the term.
There are no Commodity Charges for firm transportation. Authorized Overrun shall be charged the bid rate per Dth.

Fuel:

Fuel will be based on actual fuel used and adjusted seasonally, as per Dawn Gateway's tariffs. For the initial capacity the estimated fuel rate is 0.2%, with the understanding that this fuel rate will change with future expansions.

Bid Process

Interested parties must complete and submit a binding bid form by email no later than 3pm Eastern Time on December 7, 2010. Participants may submit multiple bids using multiple bid forms.

Capacity shall be allocated to those with the highest economic value based on the Net Present Value ("NPV") of the bids received. If the economic values of separate bids are equal, then service shall be offered on a pro-rata basis. Based upon the bids received during the open season, Dawn Gateway may modify the project design being proposed. Only participants in the open season shall have the explicit right to participate in a modified project.

All responding parties will be notified as to the acceptance of their bid by December 20, 2010.
All successful parties agree to sign the attached Precedent Agreement by January 11, 2011.

More Information

Dawn Gateway reserves the right to reject any and all bids, at its sole discretion. Bids will be evaluated objectively and in a non-discriminatory manner.

Bid forms must be returned by email to Mark Bering at beringm@dteenergy.com no later than 3pm Eastern Time on December 7, 2010.

For more information, participants should contact Mark Bering at (313) 235-6531 or beringm@dteenergy.com.

PRECEDENT AGREEMENT

THIS PRECEDENT AGREEMENT ("Precedent Agreement") dated this _____ day of _____, 2010 by and between Dawn Gateway Pipeline, LLC, a Delaware limited liability company ("DG LLC") and Dawn Gateway Pipeline Limited Partnership, an Ontario limited partnership ("DG LP") (collectively "Dawn Gateway") and _____, a _____ corporation ("Shipper"). Dawn Gateway and Shipper may sometimes be referred to separately as "Party" or jointly as "Parties" in this Precedent Agreement.

RECITALS

WHEREAS, Dawn Gateway is the sponsor of a certain pipeline to be built from an interconnect with Michigan Consolidated Gas Company ("MichCon") at or near the Belle River point located in China Township, Michigan to an interconnect with Union Gas Limited ("Union Gas") at the Dawn Hub in Ontario, proposed to be in service by November 1, 2011 or November 1, 2012 and herein known as the "Dawn Gateway Pipeline"; and

WHEREAS, this Precedent Agreement is executed as evidence of Shipper's binding request for firm transportation service and the Parties agreement to enter into agreements for firm transportation service on the Dawn Gateway Pipeline, subject to the terms and conditions described in this Precedent Agreement; and

WHEREAS, Shipper acknowledges that Dawn Gateway is relying on Shipper's commitments and obligations set forth in this Precedent Agreement in order to own, build and operate the Dawn Gateway Pipeline; and

WHEREAS, the facilities and capacities described herein may change based on the final capacity requirements or project design as determined by Dawn Gateway in its sole discretion; and

WHEREAS, in the event that the conditions and obligations of this Precedent Agreement are satisfied or waived, Shipper agrees to enter into transportation agreements whereby (i) DG LLC will provide service and Shipper will receive service in the United States in accordance with the provisions of the effective tariff to be filed with the Michigan Public Service Commission ("MPSC"), as amended or superseded from time to time in accordance with the MPSC rules and regulations, and (ii) DG LP will provide service and Shipper will receive service in Canada in accordance with the tariff that has been filed and approved by the Ontario Energy Board ("OEB"), as amended or superseded from time to time in accordance with the OEB rules and regulations (such transportation agreements shall be referred to herein as the "Transportation Agreements").

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, and intending to be legally bound, Dawn Gateway and Shipper agree as follows:

1. **Effective Date and Term**

   This Precedent Agreement shall become effective as of the date first stated above and shall remain in effect until the earlier of: (a) execution of the Transportation Agreements by Shipper and Dawn Gateway, or (b) Shipper or Dawn Gateway exercises their respective termination rights pursuant to this Precedent Agreement, or (c) December 1, 2012.

2. **Firm Transportation Services**

   Subject to the terms and conditions of this Precedent Agreement, Shipper and Dawn Gateway agree to execute the firm Transportation Agreements necessary to satisfy Shipper's firm transportation requirements on the Dawn Gateway Pipeline under the terms set forth below. Such Transportation Agreements shall be in a form contained in the applicable Dawn Gateway tariff and shall be executed by Shipper no later than thirty (30) days following written notice from Dawn Gateway to Shipper of the satisfaction or waiver of the condition precedent set forth in Section 3(c) of this Precedent Agreement.

   The Transportation Agreements shall provide firm transportation services on the Dawn Gateway Pipeline with the following terms:

   (a) Maximum Daily Quantity ("MDQ") of _____ dekatherms per day on an Annual basis;
   (b) Start Date of the in-service date of the Dawn Gateway Pipeline and an End Date of October 31 of the year that is [___] years from October 31 of the year the Dawn Gateway Pipeline begins service;
   (c) Receipt Point of MichCon – Belle River, Delivery Point of Union Gas – Dawn;
   (d) Reservation Rate of $_____ per Dth/d annually, invoiced as a monthly demand charge of $_____ US per month (the "Monthly Demand Charges"). If the Start Date occurs on a day that is not the first day of a month, then the Monthly Demand Charges for that month will be prorated based on the number of days from and including the Start Date until the end of that month;
   (e) At least twelve (12) months prior to the expiration of the Transportation Agreement, Shipper may, by written notice to Dawn Gateway, exercise an option to negotiate an extension of the term of the Transportation Agreement at terms agreeable to Dawn Gateway. In the event that the terms of any extension cannot be agreed upon by the Parties at least twelve (12) months prior to the expiration of the Transportation Agreement, Dawn Gateway may sell the capacity provided under the Transportation Agreement to a third party in its sole discretion.

   Dawn Gateway reserves the right to allocate the Reservation Rate between DG LLC and DG LP, at its sole discretion, provided that such rate will, in any event, be payable in US dollars.

Shipper shall be responsible for any regulated charges, such as fuel and ACA, pursuant to the applicable Dawn Gateway tariff, and as amended from time to time.

3. **Dawn Gateway's Conditions Precedent**

The duties and obligations of Dawn Gateway set forth in this Precedent Agreement are subject to the satisfaction or, at the sole discretion of Dawn Gateway, the waiver of all of the following conditions:

(a) Sufficient firm capacity subscription must exist at acceptable rates, as determined by Dawn Gateway at its sole discretion, to proceed with the Dawn Gateway Pipeline; and

(b) Dawn Gateway obtaining the approval of its senior management or Board of Directors or any other organizational approvals, as it shall deem necessary, on or before February 28, 2011; and

(c) DG LLC and DG LP, as applicable, receiving, in a form and substance acceptable to Dawn Gateway in its sole but reasonable discretion, all necessary permits, certificates, approvals, authorizations, orders, rates, terms and conditions from governmental, regulatory or other authorities having jurisdiction to transfer, construct, lease, own, operate and maintain the required facilities (including, but not limited to, all required approvals from the MPSC and the OEB) necessary to provide the firm transportation services contemplated herein and in the Transportation Agreements (the "Approvals"); and

(d) Dawn Gateway procuring all necessary rights-of-way, easements or permits in form and substance acceptable to Dawn Gateway (the "Easements").

The terms and conditions contained in this Section 3 may be extended or modified only by mutual written agreement between the Parties.

4. **Shipper's Conditions Precedent**

The duties and obligations of Shipper set forth in this Precedent Agreement are subject to the satisfaction or, at the sole discretion of Shipper, the waiver of all of the following conditions:

(a) Shipper obtaining the approval of its senior management or Board of Directors or any other organizational approvals, as it shall deem necessary, on or before January 11, 2011; and

(b) Either: (i) on or before January 11, 2011, Shipper obtaining corresponding upstream transportation on MichCon necessary for Shipper to utilize the Dawn Gateway Pipeline acceptable to Shipper, including an equivalent MDQ to the MDQ set forth in Section 2(a) above; or (ii) on or before January 11, 2011, Shipper obtaining corresponding storage on MichCon necessary for Shipper to utilize the Dawn

Gateway Pipeline acceptable to Shipper, including an equivalent MDQ to the MDQ set forth in Section 2(a) above.

The terms and conditions contained in this Section 4 may be extended or modified only by mutual written agreement between the Parties.

5. **In Service Timing**

Subject to the satisfaction or waiver of the conditions precedent set forth in this Precedent Agreement and the other terms and conditions of this Precedent Agreement, Dawn Gateway anticipates that (i) the Dawn Gateway Pipeline will be ready for service on or before December 1, 2011, conditioned upon receipt and acceptance of all Approvals and Easements on or before June 30, 2011, and (ii) if any Approvals or Easements are not received until after June 30, 2011, then the Dawn Gateway Pipeline will be delayed until on or before December 1, 2012.

Notwithstanding anything else contained in this Precedent Agreement, Shipper agrees that it shall have no cause of action or claims against Dawn Gateway or its affiliates as a result of any delay in the in-service date for the Dawn Gateway Pipeline.

6. **Termination**

(a) Shipper's right to terminate this Precedent Agreement shall arise only if:

(i) Shipper does not satisfy or waive each of the conditions precedent set forth in Section 4 of this Precedent Agreement by the respective dates specified for the satisfaction or waiver of such conditions precedent; or
(ii) Dawn Gateway does not satisfy or waive each of the conditions precedent set forth in Section 3 of this Precedent Agreement by the respective dates specified for the satisfaction or waiver of such conditions precedent (if any); or
(iii) Dawn Gateway defaults on any of its obligations under this Precedent Agreement.

(b) Dawn Gateway's right to terminate this Precedent Agreement shall arise only if:

(i) Dawn Gateway does not satisfy or waive each of the conditions precedent set forth in Section 3 of this Precedent Agreement by the respective dates specified for the satisfaction or waiver of such conditions precedent (if any); or
(ii) Shipper does not satisfy or waive each of the conditions precedent set forth in Section 4 of this Precedent Agreement by the respective dates specified for the satisfaction or waiver of such conditions precedent; or
(iii) Shipper defaults on any of its obligations under this Precedent Agreement.

(c) Any such termination will be effective upon ten (10) days written notice to the other Parties; provided, however, that a Party's notice of termination for failure of any other Party to satisfy or waive a condition precedent, or for default under Section

6(a)(iii) or Section 6(b)(iii), shall not become effective if such condition precedent is satisfied or waived, or if such default is cured, by such other Party prior to the expiration of the 10-day notice period.

(d) This Precedent Agreement will automatically terminate upon execution of the Transportation Agreements and thereafter Dawn Gateway shall not have any continuing obligations or liability to the Shipper under this Precedent Agreement and the rights and obligations of Dawn Gateway and Shipper shall be as provided for in the Transportation Agreements, as amended and in effect from time to time.

(e) Except in the case of termination of this Precedent Agreement pursuant to Section 6(a)(iii) or Section 6(b)(iii), if this Precedent Agreement is terminated pursuant to this Section 6 or terminates automatically pursuant to Section 1(c), such termination shall be without liability for damages, costs or expenses of any Party to the other Parties or to any of the other Parties' shareholders, directors, officers, employees, agents, or representatives; and the Parties shall have no further rights or obligations whatsoever pursuant to this Precedent Agreement.

7. **Credit for Precedent Agreement**

(a) If at any time and from time to time following Shipper's satisfaction or waiver of the condition precedent set forth in Section 4(a) of this Precedent Agreement any one of the following events occurs (each, a "Material Event");

(i) Shipper defaults on any of its obligations under this Precedent Agreement or is in default of any other material contract with another party; or

(ii) Shipper's or its Guarantor's corporate or debt rating falls below investment grade according to at least one nationally recognized rating agency; or

(iii) Shipper or its Guarantor ceases to be rated by a nationally recognized agency; or

(iv) Shipper has exceeded credit available as determined by Dawn Gateway from time to time,

then Shipper shall provide at its cost, within ten (10) days of Dawn Gateway's written request, either (1) a standby irrevocable letter of credit (in form and substance and in an amount reasonably acceptable to Dawn Gateway) from a Qualified Institution (the "Letter of Credit") or (2) a written guarantee (in form and substance and for an amount reasonably acceptable to Dawn Gateway) from the parent company or an affiliate of Shipper ("Guarantor") with a corporate or debt rating that is investment grade according to at least one nationally recognized rating agency ("Guarantee") or (3) some other form of credit acceptable to Dawn Gateway and Shipper. The credit requirement shall not exceed the Monthly Demand Charges multiplied by twelve (12). "Qualified Institution" shall mean a major U.S. commercial bank, or the U.S. branch offices of a foreign bank which has assets of at least US$10 Billion Dollars and a credit rating of at least "A-" by S&P, or "A3" by

Moody's. Dawn Gateway may require Shipper at its cost to provide a substitute Letter of Credit ("Substitute Letter of Credit") if the Letter of Credit provided is, at any time, from a financial institution which is no longer a Qualified Institution. In the event that Shipper does not provide such Letter of Credit, Guarantee, Substitute Letter of Credit or some other form of credit acceptable to Dawn Gateway and Shipper within ten (10) days of Dawn Gateway's written request, Shipper shall be deemed to be in default of this Precedent Agreement. Shipper shall promptly notify Dawn Gateway of any Material Event throughout the term of this Precedent Agreement.

(b) This Section 7 shall not be construed as limiting any rights or remedies of Dawn Gateway at law or otherwise.

8. Shipper's Support

Shipper agrees to not oppose, object to, obstruct or otherwise interfere with in any manner, and upon request by Dawn Gateway, Shipper agrees to reasonably support and cooperate with, the efforts of Dawn Gateway to obtain all Approvals necessary to provide firm transportation service contemplated in this Precedent Agreement.

9. Assignment

Any entity that shall succeed by purchase, merger, consolidation, or other transfer to the properties of Dawn Gateway or Shipper; either substantially or as an entirety, shall be entitled to the rights and shall be subject to the obligations of its predecessor in interest under this Precedent Agreement. Except as specified in this Section 9, a Party may not assign this Precedent Agreement or any of its rights or obligations hereunder unless the other Parties to this Precedent Agreement have first consented to such assignment in writing, which consent shall not be unreasonably withheld. If this Precedent Agreement is assigned by Shipper as permitted in accordance with this Section 9, Shipper shall remain liable for any obligations under this Precedent Agreement. If this Precedent Agreement is assigned by Dawn Gateway, then Dawn Gateway shall remain liable for any obligations under this Precedent Agreement.

10. Modification or Waiver

No modification or waiver of the terms and provisions of this Precedent Agreement may be made except by the execution of a written amendment to this Precedent Agreement. The waiver by any Party of a breach or violation of any provision of this Precedent Agreement shall not operate as or be construed to be a waiver of any subsequent breach or violation thereof.

11. Supersedes Other Agreements

This Precedent Agreement reflects the whole and entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings among the Parties with respect to the subject matter hereof.

12. **Notices**

Notices under this Precedent Agreement must be sent

If to Dawn Gateway:

Dawn Gateway Pipeline, LLC and Dawn Gateway Pipeline Limited Partnership
c/o DTE Pipeline Company
One Energy Plaza, 2084 WCB
Detroit, MI 48226
Attention: Director, Marketing & Optimization
Facsimile: (313) 235-6450

If to Shipper:

_____
_____
_____
_____
_____

Any Party may change its address by written notice to that effect to the other Party. Notices given under this Section are deemed to have been effectively given upon receipt, if mailed via prepaid overnight mail by a reputable carrier or if delivered by courier. Notices will be deemed effectively given on the third (3rd) business day following the day when the notice properly addressed and postpaid is placed in the United States or Canadian mail. It is expressly understood and agreed, however, that any notices referred to in this Precedent Agreement must first be delivered by telex, facsimile or other similar means, in accordance with the dates and times provided in this Precedent Agreement and must be mailed as soon as practicable thereafter.

13. **Governing Law**

THIS PRECEDENT AGREEMENT SHALL BE INTERPRETED, PERFORMED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF MICHIGAN. EACH PARTY HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY SUIT, ACTION, CLAIM OR PROCEEDING RELATING TO THIS CONTRACT.

14. **No Third Party Beneficiaries**

Except as expressly set forth in Section 6(e) of this Precedent Agreement, this Precedent Agreement shall not create any rights in third parties, and no provision of this Precedent Agreement shall be construed as creating any obligations for the benefit of, or rights in favor of, any person or entity other than the Parties.

15. **No Drafting Presumption**

No presumption shall operate in favor of or against any Party as a result of any responsibility that any Party may have had for drafting this Precedent Agreement.

16. Force Majeure

a. If by reason of "force majeure," as defined in this Section 16, a Party is rendered unable, wholly or in part, to carry out its obligations under this Precedent Agreement, and if such Party gives notice and reasonably full particulars of such force majeure in writing, in accordance with Section 12 of this Precedent Agreement, to the other Party promptly after the occurrence of the cause relied on, the affected Party, and only so far as and to the extent that it is affected by such force majeure, shall be excused from performance hereunder without liability; provided, however, such cause shall be remedied with all reasonable dispatch.

b. For purposes of this Precedent Agreement, "force majeure" shall mean an event that creates an inability to perform that could not be prevented or overcome by the due diligence of the affected Party, including but not limited to, any act, omission or circumstance occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, sabotage, blockades, insurrections, riots, epidemics, landslides, lightening, earthquakes, fires, storms, hurricanes, tornadoes, floods, washouts, civil disturbances, explosions, the failure or inability to obtain or maintain any governmental authority which has been resisted in good faith by all reasonable legal means, the inability to obtain any materials or services, and any other cause, whether of the kinds herein enumerated or otherwise, not reasonably within the control of the affected Party. The failure to prevent or settle any strike or strikes shall not be considered to be a matter within the control of either Party.

17. Recitals

The recitals and representations appearing first above are hereby incorporated in and made a part of this Precedent Agreement.

18. Counterparts

This Precedent Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have caused this Precedent Agreement to be duly executed in counterparts by their duly authorized officers as of the date first written above.

Dawn Gateway Pipeline, LLC

By: _____
Allen Capps, Manager

By: _____
Peter Cianci, Manager

Dawn Gateway Pipeline Limited Partnership
By Dawn Gateway Pipeline General Partner, Inc.,
Its General Partner

By: _____
Allen Capps, Manager

By: _____
Peter Cianci, Manager

[Shipper name]

By: _____

Title: _____

Dawn Gateway Pipeline
Open Season Bid Form

THIS IS A BINDING BID

Maximum Daily Quantity (MDQ): _____ Dth/d

Start Date: ☐ November 2011 ☐ November 2012

Term (# of years): _____ years **(Minimum Term of 7 years)**

Bid Rate: $_____ per Dth/d, plus Fuel

Other Terms & Conditions (please specify):

_____

_____

_____

_____

_____

Contact Information

Company Legal Name: _____

Contact Name (please print): _____ Phone: _____

Signature: _____

Please submit bid via email to beringm@dteenergy.com by 3pm Eastern Time December 7, 2010.

Dawn Gateway reserves the right to reject any and all bids, at its sole discretion.

This is Exhibit "G" referred to in the

affidavit of **MARK KITCHEN**

sworn before me, this 25

day of November, 2010.

A Commissioner, etc.

2010 Natural Gas Market Review

Stakeholder Conference

Presentation by Union Gas

October 7-8, 2010

Dawn Gateway pipeline project

uniongas

Update

- Gateway links Gulf Coast shale gas, Rockies gas and Michigan storage to Dawn (using other upstream pipelines).
- Working with market to see if interest exists for new open season
- Decision in Nov 2010 for 2011 construction.

Dawn Gateway is an important link to emerging supply basins and upstream storage and will support gas moving to Ontario