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By Electronic Filing and By E-mail

December 1, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
27th floor – 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms Walli,

Union Gas Limited (“Union”)
Motion to Adjourn
Board File No.: EB-2010-0039
Our File No.: 339583-000070

Enclosed please find the Points of Argument on behalf of Canadian Manufacturers & Exporters (“CME”) pertaining to the Motions to be heard on Friday, December 3, 2010.

Yours very truly,

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

Peter C.P. Thompson, Q.C.

PCT/kt
Encl.

c. Mark Kitchen and Chris Ripley (Union)
Crawford Smith (Torys)
EB-2010-0039 Intervenors
Paul Clipsham (CME)

OTT01\4294399\1

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.

POINTS OF ARGUMENT OF CANADIAN MANUFACTURERS & EXPORTERS (“CME”)

I. OVERVIEW

1. Without the consent of parties to the July 27, 2010 Board approved Settlement Agreement (the “Settlement”), Union Gas Limited (“Union”) seeks a Board Order overriding the provision of the Settlement requiring a hearing of matters pertaining to Deferral Accounts 179-121 and 179-122 (collectively, the “St. Clair Deferral Accounts”) by moving to adjourn the agreed upon December 6 and 7, 2010 hearing dates to a date in February 2011. Union seeks to deprive ratepayers of the benefit of lower rates that would result, effective January 1, 2011, from clearing deferral account balances to ratepayers in a timely manner. Granting the adjournment motion harms ratepayers by delaying the implementation date for lower rates.

2. Union’s adjournment motion is based on its position that ratepayers are not entitled to the benefits of the deferral account balances unless and until Dawn Gateway Limited Partnership (“DGLP”) actually completes its purchase of the St. Clair Line from Union.¹ This position is completely devoid of merit and in contravention of:

- (a) The Board’s November 27, 2009 and March 2, 2010 Decisions and Orders unconditionally establishing Union’s ratepayers as the beneficiary of the St. Clair Deferral Accounts;²
- (b) Representations and commitments made by Union and DGLP to the Board, to support grants of relief in their favour, that upon DGLP’s expression of satisfaction with the Board’s Leave to Construct and Regulatory Framework approvals, the sale of the St. Clair Line to DGLP is to be treated, for regulatory purposes, as having been completed in March 2010;³ and
- (c) The Board’s unequivocal determination of March 1, 2010 as St. Clair Line sale transaction date for regulatory purposes.⁴

¹ Union’s November 19, 2010 Notice of Motion (“Union’s Motion”), page 4.

² See footnotes 9 and 10.

³ See footnote 7.

⁴ See footnotes 9 and 10.

3. Without any credible evidence to support the position on which its adjournment motion is based, Union fails to discharge the heavy onus on a party seeking an Order that varies a provision of the Settlement. For regulatory purposes, the St. Clair Line sale transaction date is March 1, 2010. The outcomes of DGLP's initial and continuing negotiations with its committed shippers, and its further Open Season are irrelevant to the timely clearance to ratepayers of credit balances in the St. Clair Deferral Accounts.

4. Union's adjournment motion should be dismissed, and Union should be directed to forthwith clear the credit balances in the deferral accounts to Union's ratepayers so that they can be reflected in Union's rates effective January 1, 2011.

II. FACTS AND CONTEXT

5. The complete chronology of facts pertaining to the St. Clair Deferral Accounts can be extracted from the relevant documents in the record of this proceeding and others that are attached as Exhibits to the Affidavits submitted by Union and CME. The essential facts relevant to a consideration of the Motion and Cross-Motion include the following:

- (a) On November 27, 2009, the Board issued its Decision and Order approving Union's sale of the St. Clair Line to DGLP. The Decision and Order included an express condition as follows:

“(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.”⁵

- (b) DGLP and Union elected to proceed in accordance with the Board's November 27, 2009 Decision and Order;
- (c) The only conditions that DGLP and Union attached to their election to proceed were that the Board's approvals pertaining to DGLP's Leave to Construct and Regulatory Framework Application needed to be granted on or before March 11, 2010, on terms satisfactory to DGLP;
- (d) During DGLP's presentation of its Leave to Construct and Regulatory Framework Application and Union's concurrent submissions, in the process the Board established to determine the credit amount specified in its November 27, 2009 Decision and Order, Union made representations to the Board that the sale of the St. Clair Line would be completed immediately following the Board's issuance of approvals, prior to March 11,

⁵ Affidavit of Mark Kitchen sworn November 19, 2010 (“Kitchen Affidavit”), Exhibit “A”, page 37.

2010, satisfactory to DGLP.⁶ These representations were made by Union to induce the Board to grant the relief both DGLP and Union were seeking;

- (e) On March 1, 2010, DGLP witnesses (also employees of Union) confirmed, under oath, their support for the representations Union made previously to the effect that, upon the issuance of approvals in the Leave to Construct and Regulatory Framework Application satisfactory to DGLP, the sale transaction should be treated, for regulatory purposes in Ontario, as having been completed in March 2010;⁷
- (f) The witnesses also confirmed, under oath, that for regulatory purposes, the St. Clair Line should be removed from Union's utility Rate Base on an adjustment date to be determined by the Board;⁸
- (g) These confirmations by DGLP witnesses under oath and the representations from Union that had preceded them could not have been made had DGLP not waived the conditions precedent in its Purchase and Sale Agreement with Union upon which Union now purports to rely;
- (h) On March 2, 2010, the Board issued its Decision and Order pertaining to the credit amount of about \$6.4M to be recorded in the deferral account described in its November 27, 2009 Decision and Order. The Board determined that, for regulatory purposes, the sale transaction date would be March 1, 2010 as Union had proposed. The Board stated as follows:

"The Board finds that the March 1, 2010 transaction date proposed by Union is appropriate for purposes of determining the cumulative under recovery because the Board will also establish a mechanism whereby the St. Clair Line will be effectively removed from rate base and rates (via deferral account) as of the same date."⁹

- (i) The Board also determined, for regulatory purposes, that the St. Clair Line should be treated as having been removed from Rate Base on the same date. The Board stated:

"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."¹⁰

⁶ Affidavit of Jack Hughes sworn November 29, 2010 ("Hughes Affidavit"), paras. 3(c), (d) and (f), and Exhibits 2, 3 and 5.

⁷ Hughes Affidavit, para. 2(g) and Exhibit 6.

⁸ See footnote 7.

⁹ Hughes Affidavit, para. 2(i) and Exhibit 8, pages 10 and 11.

¹⁰ Hughes Affidavit, para. 2(i) and Exhibit 8, page 12.

- (j) On March 9, 2010, the Board issued its Decision and Order granting approvals in DGLP's Leave to Construct and Regulatory Framework Application.¹¹ DGLP promptly confirmed that these approvals were satisfactory;
- (k) As a consequence of the events described in subparagraphs (d), (e), (f), (g), (h), (i) and (j), for regulatory purposes, the St. Clair Line sale transaction date became March 1, 2010;
- (l) On or about March 17, 2010, at a time when DGLP was discussing with its committed shippers a delay in construction start-up, Union confirmed, in its 2009 Annual Report, that the outstanding conditions precedent pertaining to the sale of the St. Clair Line had been satisfied;¹²
- (m) On April 19, 2010, DGLP reported to the Board that it had amended its agreements with its committed long-term shippers to delay construction of the DGP.¹³ Union, as a seller of the St. Clair Line, did nothing to require DGLP to comply with the representations that had been previously made to the Board pertaining to the completion of the sale immediately following the grant of approvals satisfactory to DGLP. Union, as a shipper on the Dawn Gateway Pipeline ("DGP"), did nothing to compel DGLP to honour its pipeline construction commitments without any delay, even though Union supposedly wanted DGLP to proceed with construction for a November 1, 2010 in-service date;¹⁴
- (n) On April 22, 2010, in its Rate Application relating to the clearance of deferral accounts, Union tabled a proposal to effectively refrain from clearing balances in the St. Clair Deferral Accounts until such time as DGLP actually completes its purchase of the St. Clair Line.¹⁵ This proposal did not comply with the representations and commitments previously made pertaining to the immediate completion of the sale of the St. Clair Line to DGLP. It was also in breach of the Board's Decision and Orders establishing March 1, 2010 as the St. Clair Line sale completion date for regulatory purposes;
- (o) CME strongly opposed Union's proposal. CME's position is and always has been that Union is obliged to honour the representations and commitments that it made and DGLP made for the purpose of obtaining relief each of them were seeking from the Board. CME's position is and always has been that, for regulatory purposes, the sale of the St. Clair Line is to be treated as having been completed in March 2010, regardless of what DGLP and Union might subsequently choose to do;

¹¹ Kitchen Affidavit, Exhibit "C".

¹² Hughes Affidavit, para. 2(l), Exhibit 10 and Exhibit 15 (Exhibit B.3.17 therein).

¹³ Kitchen Affidavit, Exhibit "D".

¹⁴ Hughes Affidavit, para. 2(s) and Exhibit 15 (Exhibit B.3.18 therein).

¹⁵ Hughes Affidavit, para. 2(p) and Exhibit 13.

- (p) CME submits that as soon as DGLP accepted the Board's March 9, 2010 approvals as satisfactory, the St. Clair Line became a non-utility asset, effective March 1, 2010, in accordance with the Board's Decisions and Orders of November 27, 2009 and March 2, 2010, and the representations and commitments made by both DGLP and Union to induce the Board to grant the relief that they were requesting;
- (q) Nothing in the final wording of the Board-approved Accounting Orders for the St. Clair Deferral Accounts, attached to the Board's Decision and Order dated May 11, 2010, provides Union with a right to claim (as it now asserts in its Motion materials) "...that ratepayers are not entitled to the balances in the St. Clair Deferral Accounts unless and until the sale takes place...". In the context of the events that preceded their issuance, the wording of the St. Clair Deferral Accounts confirms that, for regulatory purposes, the sale transaction is to be treated as having been completed on March 1, 2010;¹⁶
- (r) The Settlement Agreement reached in July 2009 required Union to produce documents that it had refused to produce in responses to interrogatories delivered before the Settlement Conference convened. Union produced the documents without prejudice to its position on relevance and admissibility. The Settlement specified that a fixed date for a hearing would be scheduled later in 2010 to resolve matters pertaining to Union's proposal.¹⁷ In accordance with the agreement, the Board fixed December 6 and 7, 2010 as the dates for the hearing;
- (s) No one opposite in interest to Union acknowledged that the April 2010 amending agreements between DGLP and its committed shippers had any relevance to matters pertaining to the timely clearance to Union's ratepayers of credit balances in the St. Clair Deferral Accounts. The Settlement was "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";¹⁸
- (t) The credit balances in the St. Clair Deferral Accounts being inappropriately withheld by Union consist of about \$6.4M in Account 179-121 and amounts currently recorded or to be recorded in Account 179-122 to December 31, 2012, having a present value of about \$3.6M;¹⁹
- (u) On November 2, 2010, Union acknowledged, in its written submissions in the Board's 2010 Natural Gas Market Review, that the DGP will be proceeding because it is

¹⁶ Kitchen Affidavit, Exhibit "B".

¹⁷ Kitchen Affidavit, Exhibit "E".

¹⁸ Kitchen Affidavit, Exhibit "E".

¹⁹ Hughes Affidavit, Exhibit 15 (Exhibit B.3.31 therein) and Exhibit 24.

essential to enhancing liquidity at Dawn. These acknowledgements discredit any recent contentions by Union to the effect that the DGP might not be constructed;²⁰

- (v) By letter dated November 15, 2010, Union provided written rationale for postponing the fixed hearing date to which it had agreed in the Settlement. Union contended that, because of continuing negotiations between DGLP and its committed shippers, and a further Open Season DGLP had initiated on November 15, 2010, it would be a waste of time and resources to proceed with the agreed upon hearing on December 6 and 7, 2010;²¹ and
- (w) Since there is no basis for Union's contention that ratepayers are not entitled to the credit balances in the deferral accounts until such time as DGLP actually completes its purchase of the St. Clair Line, the outcomes of DGLP's continued negotiations with its shippers and the recent DGLP Open Season are irrelevant to the ratepayers' entitlement to the credit balances recorded in the St. Clair Deferral Accounts. Contrary to Union's contention it would be a waste of time and resources to schedule a hearing in February 2011 to await outcomes that are irrelevant to the timely clearance to ratepayers of credit balances in the St. Clair Deferral Accounts.

III. GUIDING PRINCIPLES

6. Principles that should guide the Board's consideration of the relief requested in the Motion and Cross-Motion include the following:

- (a) Utilities the Board regulates are obliged to comply with Decisions and Orders the Board renders;
- (b) Representations and commitments made by Applicants, upon which the Board relies in granting relief in their favour, are binding. Those parties cannot subsequently seek relief that is incompatible with those representations and commitments;
- (c) Deferral accounts balances should be cleared promptly;
- (d) When exercising adjudicative functions, the Board can issue an Order, in the nature of a summary judgment, dismissing a request for relief or a proposal where it is satisfied that there is no genuine issue requiring a hearing with respect to that request or proposal;

Rules 2.01 and 2.02 of the Board's Rules of Practice and Procedure, and Rule 20.04(1)(a) of the Rules of Civil Procedure.

- (e) If a Board-regulated utility fails to discharge its obligations to its ratepayers, then it is incumbent upon the Board to intervene to protect ratepayer interests.

²⁰ Hughes Affidavit, para. 2(x) and Exhibit 18.

²¹ Hughes Affidavit, para. 2(z) and Exhibit 20.

*Toronto-Hydro Electric System Limited v. Ontario Energy Board, (2010)
O.N.C.A. 284.*

- (f) A party seeking to vary the provisions of a Board-Approved Settlement Agreement has a heavy onus to discharge.

IV. SUBMISSIONS

7. The proposal made by Union in its April 22, 2010 Pre-filed Evidence that prompted a delay in the clearing of St. Clair Deferral Account balances and the need for a hearing was as follows:

“If Dawn Gateway does not proceed with the purchase of the St. Clair Line, Union will file a motion with the Board in EB-2008-0411 for approval to attribute the amounts in these deferral accounts back to Union and to continue to recover the costs of the St. Clair Transmission Line in delivery rates.”

8. For parties opposite in interest to Union, the purpose of the agreed upon fixed hearing date in the July 27, 2010 Settlement was to allow Board determinations to be made with respect to Union's proposal by year end so that ratepayers could realize the lower rates resulting from a clearance of the credit balances in the deferral accounts in Union's rates effective January 1, 2011.

9. CME's position is and always has been that the proposal Union tabled on April 22, 2007, to the effect that ratepayers are not entitled to the benefit of the St. Clair Deferral Account balances unless and until DGLP actually purchases the St. Clair Line from Union, is entirely without merit.

10. The Board's November 27, 2009 and March 2, 2010 Decisions and Orders unconditionally established Union's ratepayers as the sole beneficiaries of the St. Clair Deferral Accounts. There are no conditions in any of these Decisions and Orders, or in the wording of the accounting Orders, subsequently approved, that provides Union with a right to claim the balances therein under any circumstances.

11. Union's position not only contravenes the Board's November 27, 2009 and March 2, 2010 Decisions and Orders; it also contravenes the representations and commitments made by Union and DGLP to the Board to support grants of relief in their favour. DGLP representatives acknowledged, under oath, that, upon DGLP's expression of satisfaction with the Board's Leave to Construct and Regulatory Framework approvals, the sale of the St. Clair Line to DGLP is to be treated, for regulatory purposes, as having been completed in March 2010.

12. In its March 2, 2010 Decision, the Board unequivocally determined that, for regulatory purposes, the St. Clair Line sale completion date is March 1, 2010.

13. Having regard to the representations that were made to the Board by both Union and DGLP, the Board's determination of the St. Clair Line completion date of March 1, 2010, for regulatory purposes, cannot reasonably be challenged by Union.

14. The March 1, 2010 sale completion date, for regulatory purposes, governs the clearance of the St. Clair Deferral Accounts balances.

15. The fact that DGLP has chosen to re-negotiate the terms of the binding arrangements under its initial long-term contracts with shippers who subscribed for some 78% of the DGP's capacity does not affect the Board's determination of March 1, 2010 as the St. Clair Line sale completion date, for regulatory purposes.

16. Similarly, the fact that Union's owner chooses to refrain from requiring DGLP to honour the commitments that it made to the Board, to the effect that the sale of the St. Clair Line to DGLP would be completed immediately following DGLP's expression of satisfaction with the approvals the Board granted, has no bearing on the Board determined St. Clair Line sale completion date, for regulatory purposes, of March 1, 2010. The outcomes of DGLP's initial and continuing negotiations with its committed shippers and its further Open Season are irrelevant to the timely clearance to ratepayers of credit balances in the St. Clair Deferral Accounts.

17. Union's attempt to further delay the clearing of credit balances to ratepayers should be rejected. Its motion to adjourn should be dismissed.

18. Since Union has failed to provide any credible evidence to support its position that ratepayers are not entitled to the benefits of deferral account balances unless and until DGLP actually completes its purchase of the St. Clair Line, there is no genuine issue for determination at the hearing scheduled for December 6 and 7, 2010. An Order in the nature of a summary judgment should issue rejecting Union's position to the effect that the clearance of deferral account balances to ratepayers is to be delayed until DGLP actually completes its purchase of the St. Clair Line from Union.

19. Union should be required to forthwith clear the deferral account balances as requested in CME's Cross-Motion.

V. COSTS

20. CME respectfully requests an award of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF DECEMBER, 2010.


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