

**THE 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;

**AND IN THE MATTER OF** relief sought by Union Gas Limited for an Order deferring the disposition of amounts in deferral accounts 179-121 and 179-122 until the sale of the St. Clair Line has closed or the project is cancelled.

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**Written Argument Of  
The Consumers Council of Canada**

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**ARGUMENT OF THE CONSUMERS COUNCIL OF CANADA**

**I INTRODUCTION**

1. This is the Argument of the Consumers Council of Canada (“CCC”) in this matter.

2. We have read a draft of the Argument of the Canadian Manufacturers and Exporters (“CME”). The CCC supports the analysis and conclusions of the CME. What follows are the CCC’s submissions on one point.

**I BACKGROUND**

3. The issues in this proceeding arise initially from an application by Union Gas Limited (“Union”) for leave to sell the St. Clair Transmission Line to Dawn Gateway Pipeline Limited Partnership (“DGLP”). DGLP is a limited partnership. Union is a subsidiary of one of the limited partners.

4. In its EB-2008-0411 Decision and Order dated November 27, 2009, the Board made the following findings:

1. That ratepayers had been subsidizing the line for some time and the St. Clair Line has had a negative rate of return of 6 years.

**(Decision and Order in EB-2008-0411, dated November 27, 2009, p. 21)**

2. The St. Clair Line is underutilized 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.

**(Decision and Order in EB-2008-0411, dated November 27, 2009, p. 22)**

5. Based on those findings, the Board concluded that the transaction resulted in harm to ratepayers. The Board stated as follows:

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.

**(Decision and Order in EB-2008-0411, dated November 27, 2009, p. 23)**

6. The Board then found that “this harm can be mitigated through an appropriate allocation to ratepayers upon the completion of the transaction based on a fair market value for the asset”. **(Decision and Order in EB-2008-0411, dated November 27, 2009, p. 24)**

7. The Board approved 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 directed Union to file the necessary evidence to substantiate the cumulative under-recovery of the assets since 2003. **(Decision and Order in EB-2008-0411, dated November 27, 2009, p. 31)**

8. In a Decision and Order dated March 2, 2010, the Board determined the fair market value of the St. Clair Line, the cumulative under-recovery, and the appropriate amount to be credited to ratepayers. (**Decision and Order in EB-2008-0411, dated March 2, 2010, p. 2**)

9. In a Decision and Order dated May 11, 2010, the Board established two deferral accounts, one for the cumulative under-recovery of the St. Clair Line, and the other for the impact of removing the St. Clair Line from rates. (**Decision and Order in EB-2008-0411, dated May 11, 2010, p. 22**)

10. DGLP sought from the Board, and obtained, approval to build a pipeline from the St. Clair Valve site to the Bickford Compressor site. DGLP premised its application on the existence of precedent agreements with five shippers. One of those shippers was Union. All of the precedent agreements were binding. (**Decision and Order in EB-2009-0422, dated March 9, 2010**)

11. In its leave to construct application, DGLP also sought a form of light-handed regulation, as follows:

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. (emphasis added)

**(Decision and Order in EB-2009-0422, dated March 9, 2010, p. 6)**

12. The shippers wanted to delay fulfillment of their obligations under the precedent agreements, because of change in market conditions. DGLP agreed to amend the contracts.

13. Union, as one of the shippers with a binding precedent agreement, was in a fundamental conflict of interest. It could have insisted on the fulfillment of that contract. Doing so would have forced completion of the project, and resulted in the clearing of the deferral accounts to its ratepayers. However, its interest, albeit indirect, in DGLP, dictated that the interests of its shareholder be preferred to those of its ratepayers.

14. Union could have required DGLP to honour its obligations under the precedent agreement. It made a decision to not do so in order to protect the prospect of future earnings of its shareholder. Union's reasoning underlying this decision is distilled in the following exchange with Ms Hare:

MS. HARE: Okay. Thank you.

Then under P on the same page, 7 of 7, it refers to binding agreements, and I think Mr. Thompson referred to -- I think we're talking about the same thing -- ironclad contracts; is that correct?

MR. ISHERWOOD: They're binding precedent agreements that would lead to a firm contract, so they were binding.

MS. HARE: So when the shippers, then, said that they no longer were interested, you did have the discretion to say: No, you are still bound by these agreements?

MR. ISHERWOOD: That is definitely an option, but it was an option that was not a very good option.

MS. HARE: And why is that?

MR. CAPPS: Well, one reason would be the recontracting risk. So we have relationships with these shippers, and we have talked about that. But the second part of that is that if you look at the — and I think we've talked about this in a prior hearing -- if you look at the returns for this project, without considering anything being recontracted, so the five years and the seven-year and 10-year contract that we have, and no recontracting, it is actually a negative return. So that means that we have a lot of recontracting risk at the ends of those terms, and the very shippers that we would be forcing into this agreement would be the ones that we would be trying to negotiate to recontract. And that puts a lot more risk on the project. So what would happen was it really pushed the risk -- that is one part of the decision-making process that increased the risk tolerance for us on the project itself. But the same part of that is, as we have said, is that we have relationships with those shippers and didn't want to force a project on them, when they are experts in the market and really didn't feel comfortable with moving forward with the project.

MS. HARE: Okay. Thank you.

**(Transcript, EB-2010-0039, Volume 1, April 6, 2011, pp 137-139)**

15. If the transaction does not proceed, the St. Clair Line will continue to be used, with the risk of ongoing losses and continued subsidy from Union's ratepayers. The risk is thus shifted from Union's shareholder to its ratepayers.

### III SUBMISSIONS

16. CCC submits that the central issue is whether the Board should require Union to fulfil the obligation to protect the interests of its ratepayers or to allow it to protect the interests of its shareholder at the expense of its ratepayers.

17. The Ontario Court of Appeal, in the case of *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, expressed the obligation of regulated utilities, towards their ratepayers, as follows:

The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

***(Toronto Hydro-Electric System Limited v. Ontario Energy Board, 2010 ONCA 284, para 50)***

18. CCC submits that Union has violated the obligation owed to its ratepayers. Requiring DGLP to honour the obligations in precedent agreement represented a risk for Union's shareholder. Rather than bear that risk, Union decided to allocate the risk to its ratepayers.

19. The event triggering the obligation to pay the Deferral Account balance to ratepayers was DGLP's acceptance of the Board's decision approving its leave to construct application.

20. CCC submits that the Board should require Union to protect the interests of its ratepayers by requiring the disposition of Deferral Accounts 179-121 and 179-122 regardless of the completion of the transaction between Union and DGLP.

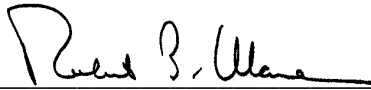
### IV RELIEF REQUESTED

21. The CCC submits that the answer to the first question in Procedural Order No. 4 is "no".

22. With respect to the third question in Procedural Order No. 4, CCC adopts the submissions of the CME.

23. The CCC asks that it be awarded its reasonably-incurred costs for its participation in this proceeding.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**



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