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By e-mail and by electronic filing

April 20, 2011

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

Dear Ms Walli,

Union Gas Limited ("Union")
Board File No.: EB-2010-0039
Our File No.: 339583-000070

Please find attached the redacted version of the Argument of Canadian Manufacturers & Exporters ("CME"). Paper copies are being sent to the Board and to Union.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure
c. Crawford Smith (Torys)
Mark Kitchen (Union)
EB-2010-0039 Intervenors
Paul Clipsham (CME)
Vince DeRose

OTT01\4477963\1

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.

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.

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

April 15, 2011

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I. OVERVIEW

1. Based on the representations and acknowledgements that were made to the Board by both Union Gas Limited ("Union") and Dawn Gateway Limited Partnership ("DGLP") to obtain expedited regulatory rulings in their favour, ratepayers became entitled to the credit balances recorded in deferral accounts 179-121 and 179-122 when DGLP accepted the Board's March 9, 2010 Leave to Construct ("LTC") and light-handed Regulatory Framework Decision.

2. Upon the issuance of a Board Decision acceptable to DGLP, any and all risks associated with the completion of the non-arm's length Agreement of Purchase and Sale between DGLP and Union no longer rested with Union's ratepayers. Upon DGLP's acceptance of the Board's March 9, 2010 LTC and Regulatory Framework Decision, the ratepayers' entitlement to the credit balances in the deferral accounts became absolute. There is no justification for Union's continuing attempts to withhold clearance of the credit balances to ratepayers.

3. A consideration of what two (2) arm's length OEB regulated utilities contractually bound to one another would do in the circumstances applicable to DGLP and Union reinforces the conclusion that the appropriate response to Union's request is to refrain from granting the declaratory order it seeks and to order that the credit balances in the St. Clair Line deferral accounts be cleared to ratepayers.

II. FACTS

A. The Project

4. The Dawn Gateway Pipeline Project was conceived by its sponsors as an "at risk"[1] pipeline to provide a better option than other competing projects that had emerged to connect gas supplies and storage in Michigan to Dawn. In its November 2, 2010 submission to the 2010 Natural Gas Market Review, Union described the project as follows:

> ***"To take advantage of the development of the Rockies Express Pipeline (a new pipeline that brings new supply from the U.S. Rockies basin to markets in the mid west U.S., Northeast U.S. and the Great Lakes region in general), and the need for greater access to emerging shale supply in the Gulf area, and increased access to Michigan storage, multiple pipeline projects emerged to transport gas supplies from Michigan to Dawn. New projects were proposed by TCPL (Dawn Eclipse and Dawn Express), Enbridge (Niagara Gas Link Pipeline), Vector (an expansion of their existing system), and Spectra/DTE – Dawn Gateway.***
>
> ***Market participants have chosen to support Dawn Gateway as the preferred economic and routing option. The Dawn Gateway Pipeline will link DTE's Belle River Mills and Dawn. The Dawn Gateway project was approved by the Board in March of 2010 and is currently on hold waiting for the market dynamics to provide additional support. When in service this pipeline will further add to Dawn liquidity by providing linkages as noted above. Dawn Gateway will benefit the Ontario natural gas market by adding additional supply to Dawn at a time of declining WCSB deliveries to Ontario, and enhancing market liquidity at the Dawn Hub."*** [2]
> (emphasis added)

5. It needs to be noted that, as of November 2010, there was nothing "conditional" about Union's description of the market support for this project. In its submissions to the Board at that time, Union stated that the reason the project was "currently on hold" was not an

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[1] Transcript Volume 2, p.5, line 25 to p.6, line 2. In argument in the EB-2009-0422 proceeding, counsel for Dawn Gateway described DGLP's 'at risk' status as follows: *"Dawn Gateway is willing to assume the risks not typically undertaken in a traditional cost of service model. They're assuming all of the project risks for non-renewals and for under-utilization, including construction risks, exchange rate risk, operating costs, inflation, credit risks, uncontracted capacity and non-renewal."*.

[2] Exhibit KD1.2, CME Cross-Motion Record, Tab B, Sub-Tab 18, p.9.

absence of market support but to await "the market dynamics to provide additional support." (emphasis added)

B. Anchor Contracts

6. Following an Open Season conducted in September 2008, five (5) long-term shippers contracted for about 78% of the capacity of the proposed Dawn-Gateway Pipeline. Long-term Precedent Agreements were executed on or about February 24, 2009.[3] Union was one of the committed long-term shippers. The agreement between Union and DGLP is hereinafter referred to as "Union's Shipper Agreement". The party contracting with DGLP is Union Gas Limited, the corporation.[4]

7. Three (3) of the five (5) contracts were for a term of [redacted] years; one (1) was for [redacted] and Union's contract for about 28%[5] of the capacity of the proposed pipeline was for a term of [redacted] years. Union's contract represented a 36%[6] share of the total capacity contracted by committed shippers.

8. In the EB-2009-0422 proceeding, the anchor shippers were described in argument by counsel for DGLP as follows:

> ***"The shippers are sophisticated market participants. The evidence is that one of them is Union Gas. The other four are marketers who are very knowledgeable about the market and quite able to protect themselves and don't need the protections traditionally offered by cost of service regulation."***[7]

9. In combination, the committed shippers agreed to pay about [redacted] per annum[8] in fixed monthly demand or reservation charges, regardless of the extent to which they actually

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[3] Exhibit X1.1, CME Brief of Confidential Documents, Tabs 2A to E inclusive.
[4] Transcript Volume 1, April 6, 2011, p.79.
[5] Exhibit KD1.2, CME Cross-Motion Record, Tab B2, pp.6 and 7, showing total capacity at 360,000 DTH/day and Union's 100,000 DTH/day portion thereof which equals 28%.
[6] See Footnote 4 – Union's 100,000 DTH/day share of total contracted capacity of 280,000 DTH/day equals 36%.
[7] EB-2009-0422, Transcript Volume 2, p.5.
[8] We calculate the total annual demand or reservation charges payable pursuant to the provisions of the Precedent Agreements found at Tab 2A to E of Exhibit X1.1 to be [redacted] which we have rounded to [redacted]

use the system. One reason why fixed charges over the longer term were important to the sophisticated anchor shippers was that it would allow them to take advantage of the volatility in spreads between the Michigan and Dawn commodity prices. DGLP relied on this volatility of spreads to support the upper limits of the rates they were proposing and adduced evidence to show the volatility in spreads for a period dating back some eight (8) years. In argument, counsel for DGLP described the volatility in spreads as follows:

> ***"You have seen evidence in the response to CME 5(f) – that is the one with the chart that showed the price differential between Michigan and Dawn – that the price is very volatile and that there are times when it is very high. There is also times when it is below zero."*** [9]

10. During the course of the EB-2009-0422 proceeding, DGLP's witnesses confirmed that the nominal average spread between Michigan and Dawn was between 10¢ and 15¢/GJ[10] [redacted]

11. Pursuant to the provisions of the binding Precedent Agreements, DGLP's construction of the pipeline would require the shippers to pay the full amounts specified in the long-term contracts.[12] The total payable by the committed shippers over the duration of their initial contracts was about [redacted][13] being a sum well in excess of the $7.5M of DGLP's capped obligations to Union and Union's additional $7.5M of exposure to its ratepayers described in paragraphs 54 to 59 hereunder.

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[9] EB-2009-0422 Transcript Volume 2, p.103.
[10] EB-2009-0422 Transcript Volume 2, p.75, line 27 to p.76, line 26.
[11] The average prices each of the anchor shippers agreed to pay can be derived from Confidential Contract Information, Tab 2A to E of Exhibit X1.1.
[12] Transcript Volume 1, April 6, 2011, p.138.
[13] We calculate the totals payable under each of the five contracts attached at Tab 2A to E of Exhibit X1.1 to be [redacted] which we have rounded to [redacted]

C. **Non-Arm's Length Agreement of Purchase and Sale**

12. Shortly after obtaining binding anchor contracts with the five (5) shippers, DGLP and Union entered into a non-arm's length Purchase and Sale Agreement effective May 1, 2009 ("Union's Sale Agreement").[14] Union Gas Limited, the corporation, is the party to the sale contract with DGLP.[15] DGLP agreed to purchase the St. Clair Line from Union at its Net Book Value ("NBV"). This utility asset has been largely under-utilized by Union for years.

13. Union's Sale Agreement contains no provision requiring a waiver of its terms and provisions to be in writing.

14. An example of the "Modification or Waiver" clause that requires confirmatory writing is found in Article 10 of Union's Shipper Agreement. That article reads as follows:

[redacted]

An article of this nature is not included in Union's Sale Agreement.

15. [redacted] is, by its terms, limited in scope to providing the contact information for parties to the agreement. [redacted] The

[14] Exhibit X1.1, Tab 1.
[15] Transcript Volume 1, April 6, 2011, p.79.
[16] Transcript Volume 1, April 6, 2011, p.153, lines 22 to 24.

contention that Article 9.1 of Union's Sale Agreement requires written waivers is without merit.

16. During the course of the oral hearing on April 6, 2011, counsel for Union filed a resolution of the General Partner of DGLP dated May 1, 2009, authorizing Steven Baker and Peter Cianni to enter into the St. Clair Pipeline Purchase and Sale Agreement.[17] This resolution is signed by one of the two (2) parties to the contract and does not form part of Union's Sale Agreement. Its contents and, in particular, Article 3 on page 1 under the heading "Purchase of the St. Clair Pipeline" do not, in any way, alter the reality that there is no clause in Union's Sale Agreement calling for waivers to be in writing. Union's Sale Agreement does not preclude waivers by conduct, as counsel for Union argues.

D. Sale Approval Application and Board's November 27, 2009 Decision

17. On November 27, 2009, the Board issued its Decision and Order approving Union's sale of the St. Clair Line to DGLP.[18] After considering revenues under the five (5) anchor contracts and estimates of replacement costs, the Board estimated a Fair Market Value ("FMV") for the St. Clair Line of between $13M and $18M. This FMV exceeded its NBV of about $5.2M. The Board found that the sale of the St. Clair Line should take place at FMV rather than NBV and that, to prevent harm to ratepayers, a portion of the difference between the FMV and NBV should be allocated to ratepayers.[19] The underlying rationale for the Board's Decision was that a sale of the St. Clair Line, a utility asset, at a value less than its FMV was inappropriate and would harm ratepayers unless a portion of the difference between the NBV and FMV was allocated to utility ratepayers.

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[17] Exhibit XD1.3.
[18] Affidavit of Mark Kitchen ("Kitchen Affidavit"), November 19, 2010, Exhibit A.
[19] Board's November 27, 2009 Decision at paras.121 to 123.

18. During the course of the Leave to Sell proceeding, Union expressed some uncertainty about the completion date for the sale of the St. Clair Line transaction. However, the evidence with respect to this uncertainty materially changed as a result of the method the Board adopted in its November 27, 2009 Decision for calculating the portion of the gain to be allocated to ratepayers. 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."* [20]

The rationale for this feature of the Board's Decision was to enable the Board to determine both the transaction date and the amount of the gain to be allocated to ratepayers in order to provide certainty to the parties. The Board expressed this rationale in paragraph 123 of its November 27, 2009 Decision as follows:

> *"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."* (emphasis added)

19. The calculation of the amount to be allocated involved two (2) steps. The first was for the Board to determine the transaction date as a finding of fact. Once that date had been determined, the amount to be allocated to ratepayers could be calculated. As a result, Union and others needed to make submissions to the Board as to when the transaction would be completed so that a finding could be made as to the transaction date. Following its November 27, 2009 Decision, the Board was proceeding in a manner that would enable it to make findings that would eliminate the uncertainty with respect to

[20] November 27, 2009 Decision, p.37, paragraph 1(b).

both the purchase and sale transaction date and the consequential amount of the gain to be recorded in the deferral account.[21]

E. DGLP and Union Response to Board's November 27, 2009 Decision

20. DGLP and Union elected to proceed in accordance with the Board's November 27, 2009 Decision and Order. The only conditions that DGLP and Union attached to their election to proceed were that the Board's approvals pertaining to DGLP's LTC and Regulatory Framework application needed to be granted on or before March 11, 2010, on terms satisfactory to DGLP.[22]

(i) DGLP's Leave to Construct and Light-handed Regulatory Framework Application

21. DGLP applied to the Board for Leave to Construct ("LTC") the Bickford to Dawn portion of the proposed pipeline and for approval of a light-handed Regulatory Framework comparable to the regulatory regime that the National Energy Board ("NEB") applies to Group 2 companies. In the material it filed, DGLP represented to the Board that satisfactory approvals needed to be granted before March 11, 2010, in order for the project to proceed.[23]

(ii) Leave to Sell Fair Market Value ("FMV") and Gain Allocation Calculation Submissions

22. Concurrently, Union and parties opposite in interest made submissions in the sale approval proceeding pertaining to the transaction date and the resulting calculation of the portion of the gain to be allocated to ratepayers. Relying on Union's position at the hearing that preceded the Board's November 27, 2009 Decision, parties opposite in

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[21] Board Staff is incorrect at pages 6 and 7 of its Argument where they suggest that the uncertainty that existed in November 2009 was carried forward to March 2010. Exactly the opposite is what transpired.
[22] Affidavit of Jack Hughes ("Hughes Affidavit"), CME Cross-Motion Record, Exhibit KD1.2, Tab 1, para.3(b) and Exhibit 1.
[21] Hughes Affidavit, Exhibit KD1.2, Tab 1, para.3(c) and Exhibit 2.

interest to Union questioned the transaction completion date of March 1, 2010, Union proposed.[24]

23. Union forcefully represented and reiterated to the Board that the transaction would be completed in March 2010, immediately after the Board granted regulatory approvals that were satisfactory to DGLP. In making these submissions, Union relied on the decision deadline that DGLP requested.[25] In its December 23, 2009 submission to the Board, Union stated as follows:

> ***"Assuming that the Board grants Leave to Construct the Bickford Dawn Pipeline and authorizes the regulatory framework as satisfactory to DGLP by February 26, 2010, Union expects to proceed with the sale of the St. Clair Line to DGLP immediately thereafter. Accordingly, for the purposes of calculating the cumulative under-recovery of the St. Clair Line, Union has assumed that the sale will occur on March 1, 2010."***

It reiterated submissions to this effect in its January 15, 2010 submission to the Board.

24. These representations and statements could not be made without DGLP's concurrence. In that connection, one needs to recognize the closeness of the relationship of DGLP and Union. In proceedings before the Board, DGLP and Union were represented by the same solicitors and were supported by one or more witnesses from Union who also had a role in the Dawn Gateway Pipeline project.

25. These representations were made by Union in evidence to respond to the Board's Decision with respect to the need for certainty as to transaction date and the amount to be derived therefrom; to induce the Board to grant the relief Union was seeking with respect to the calculation of the gain to be allocated to ratepayers; and to support the expedited relief DGLP was seeking with respect to its LTC and Regulatory Framework application.

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[24] Hughes Affidavit, Exhibit KD1.2, Tab 1, para.3(d), (e) and (f), and Exhibits 3, 4 and 5.
[25] Hughes Affidavit, Exhibit KD1.2, Tab 1, para.3(d) and (f), and Exhibits 3 and 5.

26. As discussed later, the Board, in its March 2, 2010 Decision and Order, relied upon Union's representations which it paraphrased as follows:

> *"Union also noted the hearing in the EB-2009-0422 proceeding is scheduled for early March, 2010 and Union will proceed with the sale of the St. Clair Line immediately thereafter (assuming that the Board grants DGLP leave to construct the Bickford to Dawn Line and authorizes a regulatory framework that is satisfactory to DGLP)."*
> (emphasis added)

F. Project Development and Service Agreements

27. At the outset of the evidentiary portion of DGLP's LTC and Regulatory Framework approval application, counsel for DGLP filed a "Project Development Agreement" and a "Services Agreement".[26] The "Project Development Agreement" contained provisions that capped DGLP's exposure to the portion of the gain on the sale to be allocated to ratepayers to an amount of $2.5M over and above the NBV of the St. Clair Line.[27]

28. Pursuant to the provisions of Article 3.14 of the Shareholders Agreement of Dawn Gateway Pipeline General Partner Inc. marked as Exhibit C, Appendix B, at page 22, the execution of a "Project Development Agreement" and other agreements, such as the "Services Agreement", based on a duly executed resolution, establish that the project sponsors are committed to the project. In particular, Article 3.14(b) specifies that if a vote on a resolution authorizing the execution of such agreements is passed, then the date of the resolution is referred to as the "Commitment Voting Date".[28]

29. At the hearing on April 6, 2011, counsel for Union filed the resolution dated February 22, 2010, authorizing the execution of the agreements that were filed on March 1, 2010.[29]

[redacted]

[26] EB-2009-0422 Transcript Volume 1, March 1, 2010, pp.2 to 16, and Exhibits K1.7 and K1.8.
[27] EB-2009-0422 Transcript Volume 1, March 1, 2010, pp.15 and 16, and CME Cross-Motion Record, Tab B, Sub-Tab 7.
[28] Exhibit C, Appendix B, p.22.
[29] Exhibit XD1.2.

[redacted] This unusual recital in a resolution that Article 3.14 says evidences the commitment of the project sponsors to the project was never brought to the attention of the Board or anyone else during the hearing of DGLP's LTC and Regulatory Framework Application.

30. The whole tenor of DGLP's presentation to the Board was one of commitment and urgency. DGLP was committed to the project because it had binding market support under the auspices of long-term contracts for 78% of the pipeline's proposed capacity; the pipe had been ordered; and approvals were urgently needed before March 11, 2010, so that construction could proceed for a November 1, 2010 in-service.

31. In the context of this presentation, the Board and other parties would have been astonished had the DGLP witnesses testified to the effect that the partners had not yet voted on whether or not to proceed with the project.

32. The odd language in the heretofore undisclosed resolution suggests that DGLP's partners were attempting to give themselves the ability to resile from the unequivocal commitment to the project they were expressing to the Board to induce it to grant the relief that was being requested on an urgent basis.

33. Union now relies on the unusual and previously undisclosed provisions of this resolution to support its contention that the unequivocal commitment to the project that was being presented to the Board to support requests for expedited and favourable approvals was not unequivocal but conditional.[30]

[30] Transcript Volume 1, April 6, 2011, pp.56 to 59.

G. Representations and Acknowledgements made at the LTC/Regulatory Framework Hearing

34. On March 1, 2010, two (2) witnesses testified to support DGLP's application. Mr. Baker was introduced as a DGLP co-President and a Union Vice-President. Mr. Isherwood was introduced as a Union Gas employee.[31] The witnesses confirmed under oath their support for the representations Union had made previously to the effect that, upon issuance of approvals in the LTC 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. The transcript excerpts quoted in paragraph 40(h) hereunder cannot reasonably be construed otherwise.

35. It is important to remember that when these witnesses testified on March 1, 2010, any uncertainty pertaining to the transaction date that had preceded the Board's November 27, 2009 Decision had disappeared. Prior to the testimony of these witnesses, Union had stated and reiterated that the sale transaction would be completed immediately following by Board approval satisfactory to DGLP of the relief it was seeking before March 11, 2010. That request for relief would be determined at the hearing that commenced on March 1, 2010. There was no longer any uncertainty with respect to the transaction date when the witnesses testified on March 1, 2010. If the Board granted DGLP the approvals it was seeking on or before March 11, 2010, then the sale would be completed immediately thereafter and the ratepayers would be entitled to the funds recorded in the deferral accounts. The witnesses neither disclosed nor relied on any other outstanding conditions to ratepayer entitlement to funds recorded in the deferral accounts. [32]

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[31] EB-2009-0422 Transcript Volume 1, pp.9 and 10.
[32] CME Cross-Motion Record, Exhibit KD1.2, Tab B, Sub-Tab 6.

36. The witnesses for DGLP also confirmed under oath that, for regulatory purposes, the St. Clair Line should be removed from Union's utility Rate Base on the adjustment date that the Board would be determining in its Decision and Order released a day later.

37. These confirmations by DGLP witnesses under oath and the representations from Union that had preceded them could not have been made had DGLP not expressly or impliedly authorized the witnesses to waive the conditions precedent in its Purchase and Sale Agreement with Union, upon which Union now purports to rely.

38. The situation that prevailed was actually more conclusive than estoppel or waiver in that both the vendor and the purchaser were saying the same thing to the Board. Both vendor and purchaser were saying that the sale will be completed immediately following the issuance of regulatory approvals before March 11, 2010, that are satisfactory to DGLP. Normally, when a vendor and purchaser agree on a transaction date, that agreement supersedes any other prior conditions pertaining thereto.

39. During the course of their examination on April 6, 2011, the witnesses conceded that DGLP by its conduct has waived the conditions precedent in the Agreement pertaining to proceedings before the NEB.[33] If some conditions precedent in the Agreement can be waived by conduct, then all of them can be waived in that fashion. If conditions DGLP has waived by its conduct are to be removed from the Agreement by way of amendment, then all conditions waived by conduct should be similarly eliminated from the Agreement. For reasons described later, the Board can and should consider the issues in this case having regard to DGLP's conduct amounting to a waiver or estoppel with respect to the three (3) conditions precedent in Union's Sale Agreement that Union says remain outstanding.

[33] Transcript Volume 1, April 6, 2011, pp.41 to 44.

40. Counsel for Union incorrectly argues that the evidence Mr. Baker gave under oath on March 1, 2010, should be disregarded because it relates only to the transaction date to be used for the gain calculation to be recorded in the deferral account the Board established in its November 27, 2009 Decision.[34] The following facts demonstrate that counsel for Union's submission is incorrect:

(a) The evidentiary portion of DGLP's LTC and Regulatory Framework approval application took place on March 1, 2010. Oral argument concluded by mid-afternoon on March 2, 2010;[35]

(b) The Board's March 2, 2010 Decision in the Leave to Sell proceeding pertaining to its determination of the transaction date and its consequential determination of the portion of the gain to be allocated to ratepayers, as well as the date on which an adjustment would be made to Union's Rate Base to remove the St. Clair Line therefrom was not released until after the evidentiary hearing and oral argument in the DGLP proceeding had concluded;

(c) Accordingly, while the representations made by Union and submissions the other parties had made pertaining to the transaction date to be used in the calculation of the portion of the gain to be allocated to ratepayers were known[36] when the witnesses testified in DGLP's LTC and Regulatory Framework approval proceeding, the Board's response to those specific submissions was not known. Mr. Baker made this very point during his examination-in-chief on March 1, 2010;[37]

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[34] Transcript Volume 1, April 6, 2011, pp.150 and 151.
[35] EB-2009-0422 Transcript Volume 2, March 2, 2010, at p.120 indicating that the hearing concluded at 3:08 p.m.
[36] CME Cross-Motion Record, Exhibit KD1.2, Tab B, Sub-Tabs 3, 4 and 5.
[37] CME Cross-Motion Record, Tab B, Sub-Tab 7, p.15, line 13 to p.16, line 3.

(d) The transcript reveals that the examination by counsel for CME of the witnesses on March 1, 2010, was not conducted for the purpose of leading further evidence with respect to the date to be used for the gain calculation, as counsel for Union now argues.[38] It is evident from the transcript that the examination was conducted for the purposes of determining when ratepayers would become entitled to the amounts to be recorded in the deferral account the Board had established in its November 27, 2009 sale approval Decision having regard to the fact that conditions precedent in Union's Sale Agreement would still be outstanding if the Board granted the approvals DGLP was seeking on or before March 11, 2010;

(e) The focus of counsel for CME's examination of the witnesses was with respect to the timing of and any conditions attaching to ratepayer entitlement of the amount to be recorded in the deferral account. The timing of and any conditions attaching to ratepayer entitlement is the context for the exchange between counsel for CME and Mr. Baker recorded at Transcript Volume 1, page 23, line 19 to page 28, line 21, and not the date to be used in the gain calculation as counsel for Union incorrectly argues;

(f) It is clear from the questions asked that the examination was being conducted in the context of the overall presentation made to the Board, being one of commitment and urgency and the obvious unfulfilled conditions precedent pertaining to regulatory approvals on the U.S. side of the border. The focus of the questions was ratepayer entitlement to amounts to be recorded in the deferral account in the context of statements previously made by Union that the

[38] Transcript Volume 1, April 6, 2011, p.150, lines 9 to 15.

sale would be completed immediately following the grant of approvals satisfactory to DGLP;

(g) The examination focused on conditions precedent pertaining to regulatory approvals on the U.S. side of the border because, in the context of DGLP's overall presentation, based on commitment and urgency, no one had any reason to suspect that the commitment of the partners to the project was anything other than unequivocal. The filing of the Project Development and Services Agreement at the outset of the proceeding was done for the purpose of inducing the Board and everyone else to believe that the partners were unequivocally committed to the project . Nothing was brought to the attention of the Board or anyone else at the hearing to suggest otherwise;

(h) Mr. Baker represented and acknowledged that despite the outstanding matters pertaining to the U.S. component of the project, ratepayers would be entitled to the amount to be recorded in the gain deferral account immediately following the Board's issuance of approvals that were satisfactory to DGLP. The case was presented to the Board on the basis that the only impediment to the ratepayers' entitlement to deferral account balances was the issuance of a Board decision before March 11, 2010, that was satisfactory to DGLP. The exchange between Mr. Baker at Transcript Volume 1, page 23, line 19 and concluding at page 28, line 22, cannot reasonably be construed otherwise. The conclusion of the exchange with Mr. Baker commencing at line 26, page 7 and concluding at line 22, page 28 is as follows:

> ***"MR. THOMPSON: So that regardless of what happens on the US side, for regulatory purposes in Ontario we can treat***

> *this deal as having been done as of March 2010[39], assuming you accept what the Board has ruled on as being reasonable?*
>
> *MR. BAKER: That's correct.*
>
> *MR. THOMPSON: And so if something goes wrong on the US side -- is there any prospect of that?*
>
> *MR. BAKER: Sorry, could you just repeat that? I didn't hear.*
>
> *MR. THOMPSON: If something goes wrong on the US side -- the US issues, based on some information you have provided again in interrogatories, are not going to be resolved until the third quarter of 2010, as I understand it.*
>
> *MR. BAKER: That's correct.*
>
> *MR. THOMPSON: Okay. But regardless of what happens over there, as I understand it, here in Ontario for regulatory purposes we can -- ratepayers can treat the St. Clair line as having been disposed of to Dawn Gateway and they will be entitled to, if you folks approve the -- or if you don't crater the deal on what the Board decides, the amount they're entitled to will go into the deferral account. This is the amount over and above net book value?* (emphasis added)
>
> *MR. BAKER: That's correct."*

(i) The answer "That's correct" to the question that "ratepayers can treat the St. Clair Line as having been disposed of to Dawn Gateway" and "they will be entitled to" the amount that the Board records in the deferral account if the Board grants approval satisfactory to Dawn Gateway is a clear acknowledgement that the triggering event for ratepayers' entitlement to deferral account balances would be the Board's grant of approval satisfactory to DGLP. When that event occurred, ratepayer entitlement to credit balances in the deferral accounts would become absolute. To induce the Board to grant the expedited and favourable approvals DGLP was seeking, the witnesses for DGLP acknowledged that ratepayers would be entitled to the deferral account balances upon the Board's

[39] Reads as "2009" in the Transcript but should read "2010".

grant of approvals satisfactory to DGLP. Upon the issuance of such approvals, any and all risks associated with the Union's Sale Agreement would no longer be a ratepayer risk.

41. The statements Union made to the Board that the sale will be completed immediately following the issuance of regulatory approvals satisfactory to DGLP could only have been made with DGLP's concurrence. The statements meant that DGLP would purchase the St. Clair Line before the project had all of the U.S. regulatory approvals it needed. Having regard to these statements, DGLP had agreed to take the risk associated with these matters. Parties other than Union's ratepayers were at risk for any delays in the completion of the purchase that might ensue after the Board granted approvals satisfactory to DGLP.

42. Union could not have represented to the Board in December 2009 and January 2010 that the sale transaction could be completed immediately following the grant of approvals satisfactory to DGLP without DGLP having waived conditions precedent pertaining to regulatory approvals for the U.S. component of the project.

43. Mr. Baker, the duly authorized co-President of DGLP and also a Vice-President of Union,[40] could not have made the representations and commitments that he made under oath on March 1, 2010, without DGLP having waived those conditions precedent. Moreover, if there were conditions precedent to the ratepayers' entitlement to monies to be recorded in the deferral account in addition to the issuance of Board approvals satisfactory to DGLP, then Mr. Baker was obliged to disclose them to the Board. No outstanding conditions precedent were disclosed. Accordingly, there are no conditions

[40] EB-2009-0422 Transcript Volume 1, March 1, 2010, at p.9.

applicable to ratepayer entitlement to deferral account balances other than the Board's issuance of approvals satisfactory to DGLP and that condition has been satisfied.

44. With respect to ratepayer entitlement to the adjustment to Rate Base that would ensue with the St. Clair Line being treated, for regulatory purposes, as having been sold to DGLP in March 2010, there was a dispute as to when the adjustment would be made which the Board would resolve in its Decision released a day later. Counsel for CME's discussion with Mr. Baker about that issue began at Transcript page 28, line 23, and concluded at Transcript page 31, line 13. Mr. Baker acknowledged that it was the sum of return, and taxes on the NBV of the line, plus OM&A expenses, property taxes, capital taxes and depreciation related to the St. Clair Line that would be eliminated from Cost of Service annually on the adjustment date to be determined by the Board. The conclusion of the discussion was as follows:

> ***"Mr. Thompson: So it is the sum of those numbers, then, that would be coming out of cost of service annually, whenever this adjustment takes place; is that a fair?***
>
> ***Mr. Baker: That's correct."*** [41]

45. To obtain the expedited and favourable regulatory approvals that were being sought, it was represented and acknowledged under oath that ratepayer entitlement to the amount determined by the Board to be recorded in the deferral account and the Rate Base removal adjustment would be absolute once Dawn Gateway had indicated that the Board's LTC and light-handed Regulatory Framework approvals were acceptable.

H. Board's March 2, 2010 FMV, Gain Allocation and Rate Base Adjustment Decision

46. At the end of the day on March 2, 2010, the Board released its Decision and Order pertaining to the portion of the gain to be allocated to ratepayers and matters pertaining to the consequential adjustment to Union's Rate Base. The Board determined that the

[41] CME Cross-Motion Record, Exhibit KD1.2, Tab 6, p.28, line 23 to p.31, line 13.

transaction would be completed in March 2010 and, as a result of that conclusion, found that the deemed transaction date should be a date at the beginning of that month, namely, March 1, 2010. That deemed transaction date was to be used in calculating the gain to be recorded in the deferral account. This determination was not made in the context of any uncertainty about the completion date for the sale. Rather, it was made in the context of Union's representations that the sale would be completed immediately following the issuance of approvals in DGLP's application, the hearing of which had been completed earlier in the day, and that DGLP said it needed approvals before March 11, 2010, in order for the project to proceed. Based on the representations Union had made to induce the Board to act in its favour, which the Board relied upon and accepted, the sale transaction would be completed in March 2010 if approvals satisfactory to DGLP were granted before March 11, 2010. It was in the context of the evidence provided by Union that the Board determined that the purchase and sale transaction would be completed in March 2010, with the result that a deemed transaction date at the beginning of that month, March 1, 2010, was appropriate for use in calculating the gain to be recorded in the deferral account.

47. The deemed transaction date of March 1, 2010, was not simply a notional placeholder. The selection of that date derived from the finding based on Union's representation that the sale would take place immediately following the issuance, on or before March 11, 2010, of approvals satisfactory to DGLP.

48. The Board accepted the representations Union made in its gain calculation submissions that the sale transaction would be completed immediately following the issuance of such approvals. There was no uncertainty about the fact that if such approvals were granted, that they had to be granted early in March in order for the project to proceed.

49. The Board's March 2, 2010 Decision based on Union's evidence achieved the objectives it had established in its November 27, 2009 Decision to eliminate uncertainty with respect to the transaction date and the consequential calculation of the amount to be allocated to ratepayers.

50. In determining that, for regulatory purpose, the sale transaction date would be March 1, 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."*** [42]

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."*** [43]

51. The Board established a further deferral account to capture the removal of the St. Clair Line from Rate Base effective March 1, 2010, and in each of the years remaining in Union's five (5) year Incentive Regulation Mechanism ("IRM") Plan expiring December 31, 2012.[44]

52. Having regard to the further submissions that had been made pertaining to replacement costs, the Board determined the FMV of the St. Clair Line to be $13.17M, a value of

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[42] Board's EB-2008-0411 Decision and Order, March 2, 2011, CME Cross-Motion Record, Exhibit KD1.2, Tab 2, Sub-Tab 8, at para.46.
[43] Board's EB-2008-0411 Decision and Order, March 2, 2011, CME Cross-Motion Record, Exhibit KD1.2, Tab 2, Sub-Tab 8, at para.52.
[44] Board's EB-2008-0411 Decision and Order, March 2, 2011, CME Cross-Motion Record, Exhibit KD1.2, Tab 2, Sub-Tab 8, at para.56.

some $7.97M above its NBV of about $5.2M. The Board allocated $6.4M or 80.32% of the gain to ratepayers.[45]

53. The value of the amounts to December 31, 2012, related to the removal of the St. Clair Line from Rate Base effective March 1, 2010, is about $3.3M.[46]

54. Accordingly, as a result of the Board's March 2, 2010 Decision, the total present value of credits to which ratepayers would become entitled upon DGLP's acceptance of the Board's LTC and Regulatory Framework Decision, was about $9.7M, or slightly less than $10M.

55. As a result of the arrangements made between DGLP and Union reflected in the Development Agreement capping DGLP's exposure to $2.5M, the Board's March 2, 2010 Decision, the recording and eventual recording of a total of about $10M in the St. Clair Line deferral accounts, leads to a cost shift from the utility to Union's non-utility business of about $7.5M. Mr. Baker explained that this result would occur on March 1, 2010, without knowing at that time that the effect of the cost shift would be $7.5M.[47]

56. Accordingly, in a sale completion scenario, Union recovers $7.5M from DGLP, about $5.0M of which constitutes a recovery of the current NBV of the St. Clair Line. About $2.5M of the amounts Union receives from DGLP in a sale completion scenario will be applied to reduce Union's total deferral account exposure to its ratepayers from about $10M to $7.5M.

57. The point to be emphasized is that, even in a sale completion scenario, Union's shareholder suffers $7.5M of harm. However, this harm is "self-inflicted" because it is

[45] Board's EB-2008-0411 Decision and Order, March 2, 2011, CME Cross-Motion Record, Exhibit KD1.2, Tab 2, Sub-Tab 8, at p.14, paras.1 and 2.
[46] Exhibit E1.1.
[47] CME Cross-Motion Record, Exhibit KD1.2, Tab B, Sub-Tab 7, p.15, line 13 to p.16, line 3.

the result of the agreement to cap DGLP's purchase price for the St. Clair Line at $2.5M above its NBV, rather than at a price equal to its FMV, as determined by the Board.

I. Board's March 9, 2010 LTC and Regulatory Framework Decision

58. On March 9, 2010, the Board issued its Decision and Order granting approvals in DGLP's LTC and Regulatory Framework application that were compatible with the approvals DGLP had requested.

J. DGLP's Acceptance of Board's March 9, 2010 LTC and Regulatory Framework Decision

59. During the hearing on April 6, 2011, the witnesses acknowledged that the approvals the Board granted in its March 9, 2010 Decision and Order were acceptable to DGLP.[48] This is corroborated by Union's 2009 Annual Report released on March 17, 2010, some eight (8) days after the Board's Decision.[49] Union could not have reported that the Board had issued approvals satisfactory to DGLP without DGLP having indicated its satisfaction with the approvals the Board granted before March 17, 2010.

60. Upon DGLP's acceptance in March 2010 of the Board's LTC and Regulatory Framework Decision, ratepayers became unconditionally entitled to the amounts recorded in the deferral accounts the Board had established. Upon DGLP's March 2010 acceptance of that Decision, ratepayer entitlement to deferral account balances became absolute. Any and all risks associated with the completion of the Union sale transaction did not affect the entitlement of ratepayers to the deferral account balances.

61. Moreover, upon DGLP's March 2010 acceptance of the Board's March 9, 2010 approvals as satisfactory, DGLP became an OEB regulated utility. As an OEB regulated utility, its contracts with its shippers became subject to OEB supervision in the same way

[48] Transcript Volume 1, April 6, 2011, p.29.
[49] Exhibit KD1.2, Tab 2B, Sub-Tab 10.

that Union's transportation contracts with its shippers are subject to OEB approval and supervision.

K. Union's March 17, 2010 Release of its 2009 Annual Report

62. As noted above, on or about March 17, 2010, Union released its 2009 Annual Report. This report was released at a time when DGLP was discussing with its anchor shippers a delay in the commencement of construction of the Dawn Gateway Pipeline. The closeness of the relationship between DGLP and Union is evident from the March 2010 e-mails pertaining to these discussions which were distributed to several Union officials, including its President.

63. Union confirmed in its 2009 Annual Report that the outstanding conditions precedent pertaining to its sale of the St. Clair Line to DGLP had been satisfied. Had there been any outstanding conditions precedent pertaining to Union's sale of the St. Clair Line that remained outstanding, then Union would have been obliged to report those facts in its Annual Report. We agree that Union's Annual Report does not need to contain complete details on the "status" of the Dawn Gateway Pipeline.[50] It does however need to contain accurate statements by Union pertaining to the status of Union's contract with DGLP. The Annual Report discloses no outstanding conditions with respect to that agreement.

64. The position that Union adopted for the first time in a letter to the Board dated July 23, 2010, that there were conditions precedent outstanding in its sale agreement with DGLP is incompatible with the facts reported in its 2009 Annual Report released on March 17, 2010. The Annual Report discredits the assertions that any outstanding conditions

[50] Transcript Volume 1, April 6, 2011, pp.64, lines 12 and 13.

precedent in Union's Sale Agreement had not been waived by DGLP. Any contention otherwise lacks credibility and is without merit.

L. Union's Accounting Actions

65. Testimony provided on April 6, 2011, indicates that Union has accounted for the transactions on the premise expressed in the Annual Report, namely, that there are no outstanding conditions precedent pertaining to the Agreement of Purchase and Sale.[51]

M. Anchor Contract Amendments

(i) DGLP's Notice to Board and Interested Parties

66. On April 19, 2010, DGLP reported to the Board and interested parties that it had agreed with its committed long-term shippers to delay construction of the Dawn Gateway Pipeline. DGLP's letter says nothing about having replaced the long-term anchor contracts (now subject to OEB supervision since DGLP was an OEB regulated utility) with other agreements. DGLP's letter says nothing about a plan to refrain from completing the purchase of the St. Clair Line as had been represented to the Board. The letter simply reports the agreed upon construction delay and attributes the cause of the delay to "evolving market dynamics". With respect to evolving market dynamics, one needs to recall that counsel for DGLP informed the Board during argument on March 1, 2010, that significant volatility in the spreads between Michigan and Dawn was not unprecedented. That volatility would be well known to sophisticated shippers, including Union, that had made long-term commitments to DGLP.[52]

[51] Transcript Volume 1, April 6, 2011, pp.59 to 63, and p.86.
[52] See para.8 of this Argument.

(ii) Union's Withholding of Credit Deferral Account Balances from Ratepayers

67. Curiously, of the two (2) OEB regulated utilities, it was not the purchaser (DGLP) but the seller (Union) that informed the Board and interested parties that the sale of the St. Clair Line would not be completed as previously represented, namely, immediately upon the issuance of Board approvals satisfactory to DGLP. In the pre-filed evidence it delivered on April 22, 2010, Union reported that DGLP had not proceeded with the purchase of the St. Clair Line. As a result, Union proposed to refrain from clearing the balances in the St. Clair Line deferral accounts until DGLP actually completed its purchase, failing which, Union would apply to have the deferral accounts amounts attributed back to Union. This proposal was incompatible with the representations and commitments previously made by both Union and DGLP to the effect that the sale would be immediately completed upon the Board's issuance of approvals satisfactory to DGLP and that ratepayers were entitled to the deferral account balances upon the issuance of such approvals.

68. Had DGLP and Union completed the purchase and sale when they told the Board they would, clearance of the amounts recorded in the deferral account would not be "decoupled" from the completion of the sale. Union has brought upon itself the "decoupling" of which it now complains by failing to complete the transaction when both DGLP and Union told the Board it would be completed. The "decoupling" about which Union complains is "self-inflicted".

69. In the context of all of the representations made previously to induce the Board to act in favour of DGLP and itself, Union's actions, as a seller of a utility asset at a favourable price, in failing to press the purchaser to complete the sale in accordance with the representations that had been made to the Board and upon which the Board had relied,

are incompatible with the obligations of an OEB regulated utility to balance the interests of its ratepayers and its owner. An arm's length seller of a utility asset at a favourable price in which its ratepayers had a vested interest would press for completion of the sale in accordance with representations made to and relied upon by the regulatory tribunal approving the sale rather than become an advocate for the purchaser's failure to complete the transaction.

70. The adoption of the position that ratepayer entitlement to deferral account balances no longer depended on DGLP's acceptance of regulatory approvals the Board granted on March 9, 2010, but rather depended upon an actual sale of the St. Clair Line to DGLP would produce a $7.5M benefit to Union's owner if a sale did not take place compared to the sale completion scenario.[53] Moreover, even if a sale took place later, the position that the timing of ratepayer entitlement to deferral account balances was no longer dependent upon the issuance of Board approvals acceptable to DGLP, but upon an actual sale of the St. Clair Line would produce a benefit to Union's owner by deferring to a later date the cash impact of clearing the deferral accounts to ratepayers.

71. Union's withholding of deferral account balances of ratepayers benefits its owner and harms its ratepayers by depriving them of immediate rate reductions. The benefit to Union's owner is either the deferral of or the avoidance of an immediate cost shift of $7.5M from the utility to Union's non-utility business.

72. Union's actions in refusing to insist that DGLP complete its purchase, as well as becoming the advocate for DGLP's failure to complete its purchase of the St. Clair Line immediately following the Board's issuance of approvals satisfactory to DGLP, along with its proposal to change the condition of ratepayer entitlement to deferral account

[53] See paras.54 to 57 of this Argument.

balances from the Board's issuance of approvals satisfactory to DGLP to an actual purchase of the St. Clair Line by DGLP are actions that prefer the interests of its owner to the interests of its utility ratepayers.

(iii) Circumstances Leading to the Replacement of the Anchor Contracts

73. The probing by parties opposite in interest to Union of Union's April 22, 2010 evidence; the further evidence it adduced to support an adjournment motion heard by the Board on December 3, 2010; and the additional evidence Union adduced to support the requests for declaratory relief it now seeks reveal considerably more detail about the actions DGLP and Union took following the release of the Board's March 9, 2010 Decision granting regulatory approvals satisfactory to DGLP. The evidence[54] now reveals the following details:

(a) One phone call from an unnamed shipper to Mr. Bering on or about March 10, 2010, in which the shipper expressed concern about the point in time market circumstances apparently surprised the representative of the DTE and Spectra organizations. This assertion is in and of itself surprising since DTE and Spectra are two (2) of the largest organizations involved in the North American natural gas industry. It is difficult to accept that these organizations would be unaware, in March 2010, of the implications of current market dynamics;

(b) As already noted, that market dynamics could be volatile was part of the testimony and argument presented to the Board ten (10) days earlier on March 1, 2010, when the DGLP witnesses were supporting DGLP's application for expedited regulatory approvals for a pipeline project that was supported by long-term anchor contracts with sophisticated market participants, and project sponsor

[54] See Exhibit E2.4. The documents referenced therein and Transcript Volume 1, April 6, 2011, at pp.68 to 82.

commitments evidenced by the ordering of pipe and the request for favourable regulatory approvals on an urgent basis so that the project could proceed for a November 2010 in-service date;

(c) Nevertheless, one phone call a day or two after the Board rendered its March 9, 2010 Decision prompted senior officials of DGLP, also then holding positions in Union and DTE, to initiate follow-up phone calls with that shipper and another and, within the duration of a morning discussion on March 12, 2010, to devise and promote a plan to replace the [redacted] of long-term commitments supporting the project with what amounted to a proposed four (4) shipper option agreement (excluding Union) to allow the shippers to call for the construction of the pipeline in November 2010 or November 2011;

(d) The interests of Union's ratepayers were neither represented, nor considered when this plan was devised;[55]

(e) DGLP's asking price for this shipper option arrangement was [redacted] compared to the amount of about [redacted] of commitments that the four (4) long-term shippers (excluding Union) had to DGLP under the auspices of their long-term Precedent Agreements;

(f) Under the plan, Union's long-term contract would also be replaced but, unlike the other shippers, Union would not have an option to call for the construction of the pipeline, nor would Union have an opportunity to participate in a shippers' meeting at which each shipper would have the option of requesting that the pipeline be constructed for a November 2010 in-service date, in which case, DGLP would proceed with construction;

[55] Transcript Volume 1, April 6, 2011, pp.95 to 98.

(g) Instructions were immediately given to draft agreements to replace the long-term anchor contracts and to circulate those agreements to the five (5) anchor shippers in advance of a meeting to be held on March 30, 2010, with the four (4) shippers other than Union;

(h) In addition to agreeing to be excluded from the meeting, Union countenanced the proposal that it would not be entitled to the option being provided to each of the other four (4) shippers to elect to proceed with the pipeline for a November 2010 in-service date. Union did not insist on being treated in the same manner as the other committed shippers, even though it was the largest committed shipper on the pipeline and the market it represented and served both needed and would benefit from construction of the pipeline. Union's agreement to this feature of the plan was incompatible with its obligations to the market it represents and serves, being a market that, according to Union, will materially benefit from enhanced linkage between Michigan and Dawn storage. The Board had described these benefits in its EB-2008-0411 Decision and reiterated them in its March 9, EB-2009-0422 Decision as follows:

> ***"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."*** [56]

(i) Not surprisingly, three (3) of the four (4) committed shippers (other than Union) agreed to replace their long-term Precedent Agreements with agreements giving

[56] Kitchen Affidavit, Exhibit C, para.60.

them an option to call in November 2010 or November 2011 for construction of the Dawn Gateway Pipeline for an in-service date one (1) year later. The volume covered by what were effectively option agreements were equivalent to the total volumes that the four (4) shippers (other than Union) had previously contracted and for the same terms previously contracted. The total price the three (3) shippers agreed to pay representing DGLP's costs (but not the costs to acquire the St. Clair Line) was [redacted] compared to the [redacted][57] of obligations the four (4) shippers faced under their anchor contracts. It is not surprising that the shippers agreed to pay [redacted] to avoid [redacted] of obligations;

(j) Union's long-term contract, with [redacted] of obligations to DGLP, was replaced with another [redacted] year agreement that would only come into effect if the three (3) other shippers called for construction of the pipeline;

(k) In the context of representations made to the Board pertaining to the need for the Dawn Gateway Pipeline and the benefits it would bring to Ontario, DGLP's action in initiating these arrangements were peculiar. Without any consultation or advance notice to its regulator, it responded to a point in time situation of volatility in the spreads between Michigan and Dawn, to effectively cancel some [redacted] of long-term commitments with sophisticated shippers. It effectively abandoned its commitment to the Ontario Energy Board to enhance the linkage between Michigan and Dawn storage to produce material benefits for Ontario and, for [redacted], empowered three (3) sophisticated marketers to determine when and if the Dawn Gateway Pipeline will be constructed;

[57] This calculation derives from the contracts at Tab B, Sub-Tabs 2, 3, 4 and 5 of Exhibit X1.1.

(l) DGLP supposedly made its spur of the moment decision to relinquish the long-term commitments it had from sophisticated shippers, including Union, because of enhanced non-renewal risk and a concern for on-going business relationships with its committed shippers. The Board should be reluctant to accept these reasons as justification for the actions DGLP and Union took. During the course of the EB-2009-0422 proceeding, DGLP's witnesses testified that the project sponsors had assumed all risks associated with contract non-renewal.[58] Moreover, the changing market dynamics suggest an enhanced prospect of shorter-term, rather than long-term commitments to the pipeline, given the increases in short-term spreads as compared to long-term spreads. The prospect of the pipeline being unable to find sufficient shippers to support it upon the expiry of the anchor contracts seems remote in the context of the benefits that the project was touted to provide by enhancing the linkage between gas supply and storage in Michigan and Dawn.

74. The agreements implementing these arrangements were executed in early April and within weeks of the initial collaboration between DGLP and Union to facilitate these plans. Union did nothing to insist that its Agreement of Purchase and Sale with DGLP be completed in accordance with the representations made to the Board and for the purpose of protecting the vested interests of its ratepayers in the sale proceeds. Instead and when the ink was barely dry on the new agreements with DGLP, Union tabled its evidence on April 22, 2010, that included the proposal to change the condition for ratepayer entitlement to deferral account balances from the Board's issuance of approvals satisfactory to DGLP to an actual sale of the St. Clair Line to DGLP. The proposal included Union's contingency claim to deprive ratepayers of the amounts

[58] See Argument of counsel for DGLP, EB-2009-0422, Transcript Volume 2, at pp. 5 and 6.

recorded in the deferral accounts in the event that a sale did not take place. Having regard to the closeness of the relationship between DGLP and the coincident timing of DGLP's April 19, 2010 letter to the Board and Union's April 22, 2010 filing of evidence, the inference is inescapable that all of this was a collaborative effort.

75. The consequence of the plan devised by DGLP with Union's support and implemented without any prior consultation with their regulator or other interested parties was to replace the anchor contracts underpinning the Dawn Gateway Pipeline with a three (3) shipper option to call for construction of the pipeline at a later date. All of this was presented by Union to the Board and interested parties on April 22, 2010, as a fait accompli and to support a contingency claim to deprive ratepayers of the amounts recorded in the deferral accounts.

(iv) Options Available to Union and DGLP

76. The options available to DGLP and Union, two (2) OEB regulated utilities obliged to act in a manner that does not prefer shareholder interests over the interests of utility ratepayers, included the following:

(a) One option was to adhere to representations and commitments that had been made to the Board to induce it to grant the expedited and favourable regulatory approvals DGLP and Union had requested; complete the purchase and sale of the St. Clair Line, build the Dawn Gateway Pipeline; and provide service to the committed shippers in accordance with their long-term anchor contracts. As noted, this course of action was supposedly the course of action Union preferred. It was apparently not pursued by DGLP because of enhanced non-renewal risk and concern over business relationships with the committed long-term shippers other than Union. We reiterate that the Board should be reluctant to accept

these reasons as justification for the collaborative actions taken by DGLP and Union to cancel the long-term commitments and replace them with agreements that effectively confer on three (3) sophisticated marketers an option to call for construction of the Dawn Gateway Pipeline. The approvals were granted on the basis that the shippers that made long-tem commitments were sophisticated market participants and, as already noted, the approvals DGLP requested and the Board granted in its favour were based on representations that the construction of the pipeline should be approved because it assumed all renewal risk. Moreover, as already noted, the prospect that the pipeline would be unable to find sufficient shippers to support it upon the expiry of the anchor contracts seems implausible in the context of the benefits that Union continues to insist that the project will provide;

(b) A second option was for DGLP and Union to adhere to the representations and commitments made to the Board pertaining to the completion of the purchase and sale of the St. Clair Line and to include the ratepayers' vested interests in that transaction in the discussions with long-term shippers wishing to either eliminate or modify their commitments to DGLP. This option would respect the commitments that had been made to the Board to induce it to act in DGLP's favour, and not alter the ratepayers' entitlement to amounts recorded in the deferral accounts. Committed shippers (including Union) would be obliged to compensate DGLP the $7.5M capped purchase price that DGP would pay to acquire the St. Clair Line.

(c) A third option was for DGLP and Union to seek directions from their regulator on notice to other interested parties. At the very least, this is the way stand-alone arm's length OEB regulated utilities would act when faced with a situation that

they believed justified them from continuing to act in accordance with representations and acknowledgements that had previously been made to the Board to obtain expedited regulatory approvals. Under this option, the anchor contracts would not have been amended without prior Board approval. A postponement of the November 2010 in-service date in the anchor contracts would have been necessary to pursue this course of action. Such a postponement would undoubtedly have been agreed to by anchor shippers since they were concerned about their fixed charge exposure commencing in November 2010 because of the then current market dynamics.

77. Instead of pursuing any of these options, DGLP and Union collaborated to produce a result that relieved DGLP and Union of their long-term obligations to one another, and supported a contingency claim by Union to deprive its ratepayers of their entitlement to the balances recorded in the deferral accounts.

78. The option that DGLP and Union elected to pursue, without any prior notice to the Board or interested parties, and without any representation from or consideration of ratepayer interests was one that preferred the interests of Union's owner over the interests of its ratepayers.

79. The plan DGLP and Union developed may have other benefits for DTE, Spectra and/or the sophisticated shippers, including Union. A delay in enhancing the linkage between the large storage areas in Michigan and Dawn could affect current prices for commodity and unregulated storage services in each area. The extent to which this outcome of the arrangements made by DGLP and Union benefits DTE, Spectra and/or the DGLP shippers, including Union, is unknown.

80. Converting the anchor contracts of the DGLP shippers to a (3) shipper option probably prevents the pipeline projects that were in competition with the Dawn Gateway Pipeline from being resurrected. The extent to which the sophisticated marketers now holding the option to call for construction of the Dawn Gateway Pipeline, DTE and/or Spectra through its interests and Union's unregulated storage business or otherwise, might benefit from this outcome of the arrangements are unknown.

81. Of all of the options available, the course DGLP and Union collaborated to adopt was incompatible with Union's obligations as an OEB regulated utility to refrain from preferring the interests of its owner to the interests of its ratepayers. Union's actions in refraining from asserting its rights under its contracts with DGLP and, instead, supporting DGLP are in breach of its obligations to ratepayers and should prompt the Board to refrain from changing the condition of ratepayer entitlement to balances in the deferral accounts from the Board's issuance of approvals satisfactory to DGLP to the actual completion date of the sale of the St. Clair Line to DGLP or its cancellation.

82. Despite the leverage Union held over DGLP under the Union Sale Agreement and the leverage it held over DGLP and other committed shippers under the Union shipper contract, Union did nothing to insist upon the completion of the purchase of the St. Clair Line, or in the alternative, to obtain an indemnity for some or all of its exposure to ratepayers arising from the combined effect of the Board's Decision approving the sale and issuing approvals satisfactory to DGLP. Having regard to the leverage that Union held over DGLP and DGLP held over committed shippers and the [redacted] binding commitments made by committed shippers, there was more than sufficient leverage for DGLP to obtain indemnity coverage in an amount of $7.5M, being the amount that Union would realize from DGLP had the sale proceeded as represented to the Board.

(v) Emergence of Union's Reliance on Conditions Precedent Not Previously Reported as Outstanding

83. As already noted, the notion that three (3) conditions precedent in Union's sale contract remained outstanding and justified DGLP's failure to complete the purchase of the St. Clair Line as represented to the Board only emerged in July 2010 after a Union witness had confirmed at a Technical Conference held on July 9, 2010, the correctness of the statements contained in the March 17, 2010 Annual Report indicating that no conditions precedent remained outstanding.[59]

84. The evidence that DGLP, by its conduct, had either waived, or is estopped from relying on any outstanding conditions precedent in Union's Sale Agreement is overwhelming and Union's failure to insist that DGLP comply with its obligations and complete the purchase is unjustified. Moreover, as already noted, it is highly unlikely that an arm's length seller in Union's position would refrain from pressing the purchaser to complete the transaction and most certainly would not become the advocate for the purchaser's failure to complete the transaction in accordance with the representations that have been made by both the vendor and the purchaser to their common regulator.

N. Separate Hearing Agreement

85. A Settlement Agreement was reached in July 2010 specifying that a fixed date for hearing would be scheduled later that year to resolve matters pertaining to Union's proposal to withhold credit balances in the deferral account until such time as Union actually completed the sale of the St. Clair Line to DGLP. In accordance with the agreement, the Board fixed December 6 and 7, 2010, as the date for the hearing.

[59] Union's July 23, 2010 letter to the Board, CME Cross-Motion Record, Tab B, Sub-Tab 17.

O. Union's Adjournment Motion and its Outcome

86. Union's Motion to Adjourn the fixed hearing date and CME's Cross-Motion seeking an order that ratepayers are entitled to the credit balances in the deferral accounts were heard by the Board on December 3, 2010. Written submissions supplemented by oral argument were presented to the Board. In an Oral Decision released at the conclusion of oral argument, the Board stated as follows:

> *"The central issue before the Board in this matter is the extent to which ratepayer entitlement to disposition of accounts 179-121 and 179-122 is dependent on the completion of the transaction between Union Gas and DGLP for the sale of the Dawn Gateway Pipeline.*
>
> *It is Mr. Thompson's core submission that ratepayer entitlement to the amounts in these deferral accounts has already ripened, and that it is not dependent in any degree on further developments in the transaction.*
>
> *Mr. Smith, on behalf of Union Gas, argues that recovery by ratepayers is conditional upon completion of the sale of the pipeline.*
>
> *It is the Board's view that Mr. Thompson has made a compelling argument.*
>
> *However, for the reasons indicated below, the Board will grant Union's motion for an adjournment, acknowledging that it faces a significant burden going forward."* [60]

P. DGLP's November 2010 Open Season

87. It appears that Union relies on the fact that DGLP conducted a further Open Season in November 2010 as evidence of good faith.[61] We question whether the November 2010 Open Season constitutes such evidence.

88. The reality is that the three (3) shippers holding the option to call, in November 2010, for construction of the pipeline for a November 2011 in-service date did not exercise that right. Nevertheless, they still hold a right to call in November 2011 for construction of the

[60] Transcript Volume 1, December 3, 2010, at pp.68 to 70.
[61] Transcript Volume 1, April 6, 2011, at pp.154 and 155.

pipeline for a November 2012 in-service date. There is no reason for these parties to bid in an Open Season while they hold such an option. Similarly, Union's role as a shipper on the Dawn Gateway Pipeline is now tied to an exercise of option rights held by the three (3) shippers who paid [redacted] to acquire them. There is no reason for Union to bid into an Open Season while these contracts are still operable.

89. The Open Season DGLP conducted in November 2010 was for the 80,000 DTH of capacity not covered by the option contracts of the three (3) shippers (other than Union) and by Union's contract linked thereto. The bids Union received totalled [redacted].[62] The duration of the bids was for a period beyond November 2012. [redacted]

90. The bids received demonstrate that the pipeline does have additional market support. However, until the option DGLP has granted to three (3) shippers to call for construction is either exercised or expires, it makes little sense for DGLP to be conducting Open Seasons.

91. In short, in the absence of a call by the option shippers in November 2010 for construction of the pipeline for a November 2011 in-service date, the November 2010 Open Season conducted by DGLP was, for practical purposes, of little, if any, value. The holding of the November 2010 Open Season does not constitute any evidence of good faith as counsel for Union appears to argue.

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[62] Kitchen Affidavit, Exhibit F.

Q. Union's Request for a Declaratory Order

92. There was little, if anything, new in the evidence Union filed in February 2011 to support its request for declaratory order that the deferral account balances not be disposed of until the sale of the St. Clair Line has closed or the project is cancelled. The evidence did address the results of the November 2010 Open Season. However, as noted above, in view of the fact that the option shippers declined to call for construction of the Dawn Gateway Pipeline for a November 2011 in-service date, the outcome of that Open Season was of little or no value.

93. The arguments Union makes to support the declaratory order it seeks are not substantively different from the arguments it made in December and in the absence of any new or better evidence and having regard to the substantially unchanged nature of Union's arguments and the absence of any new or better evidence, it is submitted that Union has failed to discharge the heavy onus the Board imposed when it rendered its December 3, 2010, on Union's Adjournment Motion.

III. ISSUES

94. In Procedural Order No. 4, the Board determined the issues to be considered as follows:

1. Is the disposition of deferral accounts 179-121 and 179-122 dependent on the completion of the transaction between Union Gas Limited and Dawn Gateway Limited Partnership?
2. If the answer to the first issue is yes, what if any action is required by the Board at this time?
3. If the answer the first issue is no,
    a. As of what effective date should deferral accounts 179-121 and 179-122 be disposed?
    b. What are the amounts in the accounts as of that date?
    c. What is an appropriate methodology to apportion the amounts across customer rate classes?
    d. Does the St. Clair Transmission Line remain in Union Gas Limited's rate base?

95. An awareness of all of the facts in this case is essential to a determination of the questions the Board has listed.

96. Principles that the Board should apply to the facts when determining these questions include those described below.

IV. GUIDING PRINCIPLES

A. Union's Utility Company Obligations

(i) No Preference of Owner Over Ratepayers

97. The principle that a utility company regulated by the Board must balance the interests of its shareholders against those of its ratepayers has been expressed by the Ontario Court of Appeal as follows:

> *" The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. 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."* (emphasis added)

Reference: ***Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284.**

98. The obligation of the utility company to act in this manner is a corporate obligation.

99. Where the utility corporation has not acted in accordance with these obligations, it is no answer for corporate representatives to say that the actions they took, contrary to the interests of ratepayers, were justified because they were taken while acting for a non-utility component of the corporation's business.[63] Where there is a conflict of interest

[63] Transcript Volume 1, April 6, 2011, p.79.

between a OEB utility company and its ratepayers, the interests of ratepayers must be objectively and fairly represented and considered.

100. Ratepayer interests would never be adequately protected if those representing non-utility lines of business could act contrary to those interests in the absence of an objective and fair representation of those ratepayer interests.

(ii) OEB Utility Disclosure Obligations

101. A lack of timely disclosure by a utility the Board regulates of material facts upon which the utility subsequently relies in an attempt to benefit its owner at the expense of its ratepayers constitutes a course of conduct that falls below the standard expected of such utilities. The Board has described the disclosure obligations of the utilities it regulates as follows:

> *"A public utility in Ontario with a monopoly franchise is not a garden variety corporation. It has special responsibilities which form part of what the courts have described as the "regulatory compact". One aspect of that regulatory compact is an obligation to disclose material facts on a timely basis. As stated recently by Mr. Justice Lederman in the case of Toronto Hydro-Electric System Limited v. Ontario Energy Board [2008] OJ No 3904(QL), para 78.*
>
> > *'At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact:, it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.'*
>
> *Failure to disclose has at least two unfortunate consequences. First, it can only result in less than optimum Board decisions. Second, it adds to the time and cost of proceedings. Neither of these are in the public interest.*

> ***A publicly regulated corporation is under a general duty to disclose all relevant information relating to Board proceedings it is engaged in unless the information is privileged or not under its control. In so doing, a utility should err on the side of inclusion. Furthermore, the utility bears the burden of establishing that there is no reasonable possibility that withholding the information would impair a fair outcome in the proceeding."***

102. Utilities cannot circumvent representations and commitments they make to the Board to obtain relief in their favour by subsequently relying on circumstances that they failed to disclose to the Board at the time the requests for favourable regulatory approval were being considered.

B. Binding Effect of Representations made to Induce a Third Party to Respond in favour of the Representor – Promissory Estoppel

103. It is well settled that representations made to induce a third party to respond in favour of the representors are binding on the representor.

104. In *Snell's Equity,* Twenty-Ninth Edition, 1990, at page 571, the principle is expressed as follows:

> ***"Where by his words or conduct one party to a transaction freely makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise), and, before it is withdrawn, the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it. It is essential that the representor knows that the other party will act on his statement. Yet the conduct of the other party need not derive its origin only from the encouragement or representation of the first: the question is whether it was influenced by such encouragement or representation."***

C. Waiver/Estoppel by Conduct

105. It is well settled that parties, by their conduct, can waive contractual conditions precedent for their benefit.

V. POINTS OF ARGUMENT

A. Requiring Adherence to Binding Representations and Acknowledgements made by Union and DGLP

106. The Board should never countenance actions taken by utilities it regulates that are materially incompatible with representations and acknowledgements previously made by those utilities to the Board to induce the Board to issue expedited and favourable regulatory approvals requested by those utilities. Prior Board approval to depart from such representations and acknowledgements should be regarded as an absolute pre-requisite.

107. In this case, the combined relief the Board granted to Union at the culmination of the EB-2008-0411 proceeding and to DGLP in the EB-2009-0422 proceeding was induced by representations made by both Union and DGLP that DGLP's purchase of the St. Clair Line would be completed immediately following the Board's issuance before March 11, 2010 of regulatory approvals satisfactory to DGLP. These representations were made to induce the Board to grant the favourable regulatory approvals that issued to Union on March 2, 2010, and to DGLP on March 9, 2010. The representations and acknowledgements are binding on Union and DGLP. Moreover, it was both represented and acknowledged that ratepayers would be entitled to the balances to be recorded in the deferral accounts the Board established once the Board issued regulatory approvals satisfactory to DGLP. Those representations and acknowledgements were also made to induce the Board to grant the approvals DGLP was seeking. They are equally binding and the Board should require adherence to them.

108. The acknowledged condition upon which ratepayer entitlement to the deferral account balances depended has been satisfied. The Board granted approvals satisfactory to DGLP. The balances in the deferral accounts should be cleared to ratepayers.

B. What Parties acting at Arm's Length Would Do

109. A consideration of what two arm's length OEB regulated utilities contractually bound to one another would do in the circumstances facing DGLP and Union reinforces the conclusion that ratepayer entitlement to the balances recorded in the deferral account has ripened with the result that the accounts should be cleared to ratepayers.

110. The questions that we urge the Board to consider to reach this conclusion are set out below:

(i) What would an arm's length OEB utility company seller in Union's position do when DGLP refused to complete the purchase immediately following the Board's issuance on March 9, 2011, of approvals satisfactory to DGLP?

111. An arm's length seller, in Union's position, would undoubtedly insist that the purchaser complete the transaction. If the purchaser refused, then an arm's length seller, in Union's position, would either take action to bring the purchaser before the OEB, as the regulator of both the vendor and the purchaser, to seek sanctions that would prompt DGLP to complete the transaction. Alternatively, an arm's length seller would sue DGLP for specific performance.

112. Based on representations DGLP made to Union and to the Board that the purchase would be completed immediately following the Board's issuance by March 11, 2011, of regulatory approvals satisfactory to DGLP, an arm's length vendor would insist that there was either an express agreement to complete the transaction immediately following the occurrence of that event, or treat the purchaser's conduct as a waiver of any conditions precedent under the Purchase and Sale Agreement that either had not or could be satisfied prior to or immediately following the Board's issuance of regulatory approvals satisfactory to DGLP.

113. An arm's length seller in Union's position would never refrain from insisting upon completion of the sale as Union did in this case. Moreover, an arm's length seller in Union's position would certainly not become an advocate for the purchaser's failure to complete the transaction as Union did. Union did not act as an arm's length seller would act.

(ii) What would an arm's length utility company shipper contractually entitled to and wanting service on an OEB regulated pipeline do?

114. An arm's length shipper with a long-term binding Precedent Agreement on DGLP's proposed pipeline wanting service thereon would never agree to amend its contract for no consideration as Union did in this case.

115. An arm's length shipper wanting service on a particular in-service date and operating under the auspices of a binding long-term Precedent Agreement would, at the very least, require the pipeline's regulator to adjudicate on whether the pipeline company should be permitted to make any changes to the long-term anchor contracts that would undermine the pipeline company's obligation to complete the pipeline project the regulator had approved.

116. For the purposes of discussing the possibility of revised arrangements with the pipeline company, an arm's length shipper would never agree, as Union did in this case, to be treated any differently than each of the other shippers. Union refused to insist on the right, that each of the other shippers were granted, to call for construction of the pipeline for a November 2010 in-service date. Had Union acted as an arm's length shipper would act, it would have obtained this right and exercised it since the market it represents and serves needs and will benefit from enhanced connection between Michigan and Dawn storage areas. If Union had insisted on being accorded the same rights that DGLP accorded to other shippers, it could have forced DGLP to build the

pipeline and other shippers would remain bound to DGLP under the auspices of the long-term commitments they have made.

117. At the very least, an arm's length shipper in Union's position, being a utility corporation obliged to ratepayers who had a vested interest in the deferral accounts the Board had established, would never have agreed to amending its shipping arrangements with DGLP without insisting on coverage for the $7.5M capped purchase price DGLP was obliged to pay to Union. An arm's length shipper in Union's position would have combined its leverage under its shipper and purchase and sale contracts with DGLP and insisted that DGLP either complete the transaction or provide full compensation for the amount it would have paid to Union had the transaction been completed.

118. An arm's length OEB utility company in Union's position would recognize its obligation to its ratepayers and would never have acted in the way Union acted, in this case, by ignoring the vested interests of its ratepayers. Union disregarded the interests of its ratepayers and collaborated in the creation of an arrangement upon which Union then immediately relied in an attempt to benefit its owner by delaying the clearance to ratepayers of balances recorded in the deferral accounts the Board had established and, if the sale did not take place, by enabling Union's non-utility business to avoid a $7.5M burden that Union's owner would bear in a sale completion scenario.

119. Union's actions were entirely incompatible with the way an arm's length OEB regulated utility would act and in breach of its obligations to refrain from taking action that benefits its owner at the expense of its ratepayers.

120. The Board would be countenancing Union's breach of its obligations to its ratepayers if it were to grant the declaratory order Union requests.

(iii) What would an arm's length OEB regulated pipeline in DGLP's position do with respect to its obligations under the Agreement of Purchase and Sale?

121. An arm's length OEB pipeline company would either adhere to the commitments it had made to complete the purchase of the St. Clair Line immediately following the Board's issuance in March 2010 of regulatory approvals acceptable to DGLP, or would have come before the Board with a request to vary that commitment. An arm's length OEB regulated pipeline would have not proceeded unilaterally in collaboration with Union to refrain from completing a transaction in contravention of representations it had made to the Board to obtain expedited and favourable regulatory approvals it was seeking on the basis of those representations.

(iv) What would an arm's length OEB regulated pipeline in DGLP's position do in response to some shippers seeking amendments to their anchor contracts?

122. An arm's length OEB regulated pipeline would never have taken the initiative to promote the replacement of [redacted] of long-term contractual commitments to its project with an option agreement because one shipper had expressed concern about changing market dynamics, which is what DGLP did in this case. At the very least, an arm's length OEB regulated shipper would ask its regulator to adjudicate whether long-term shippers committed to the project should be permitted to withdraw the commitments that had been made and upon which the Board had relied to support its approval for construction of the pipeline and its operation under a light-handed regulatory regime.

123. It is questionable whether the Ontario Energy Board would allow sophisticated shippers, familiar with the volatility of the spreads between Michigan and Dawn, to convert their long-term commitments to the Dawn Gateway Pipeline to an option arrangement having regard to the evidence adduced by the pipeline and accepted by the Board that an enlarged link between storage areas in Michigan and Dawn was needed to bring material benefits to the Ontario public interest.

124. An arm's length OEB pipeline company would never agree to amendments to its contracts with anchor shippers without insisting on terms that would enable it to discharge the representations and commitments it had made to the Board in which Ontario utility ratepayers had a vested interest.

(v) Summary

125. Having regard to:

(a) The closeness of the relationship between Union and DGLP;

(b) Their obligations as utility companies regulated by the OEB to refrain from preferring the interests of their owner(s) to the interests of utility ratepayers; and

(c) Their actions in failing to act as arm's length entities would act and, instead, collaborating to produce a situation that benefited Union's owner at the expense of its ratepayers

the Board should refuse Union's request for a declaratory order and order that the credit balances in the deferral accounts be cleared to ratepayers because the condition to ratepayer entitlement, namely the issuance by the Board of regulatory approvals satisfactory to DGLP, has been satisfied.

C. CME's Response to Union's Arguments

(i) Compatibility with the EB-2008-0411 Decision Rationale

126. Union argues that the declaratory order it seeks should be granted because it is compatible with the EB-2008-0411 Decision rationale. We disagree.

127. When considering this argument, it is important to remember that there are two (2) stages to the Board's EB-2008-0411 Decision. The first stage concluded with the Board's Decision and Order dated November 27, 2009.

128. The harm upon which the November 27, 2009 Decision was based was the harm being caused by Union's non-arm's length agreement to sell to DGLP a utility asset at a price equal to its NBV which was materially less than its FMV. The proposed sale was part of a project supported by five (5) long-term anchor contracts calling for the payment of a total of [redacted], regardless of the extent to which the shippers used the proposed pipeline.

129. The November 27, 2009 Decision remedied that harm by establishing a deferral account in which to record the gain that the Board would subsequently determine on the basis of further submissions to be provided by Union and other parties with respect to the date on which the St. Clair Line would be sold to DGLP. The method the Board adopted to determine the amount to be credited to the deferral account it had established depended upon its determination of the date at which the sale of the St. Clair Line would occur. The method the Board established to bring the EB-2008-0411 proceeding to an end required Union and others to make submissions on the sale transaction date. The Board clearly was proceeding in a manner that would enable it to make findings that eliminated the uncertainty with respect to the purchase and sale transaction date and the consequential amount to be recorded in the deferral account. The Board proceeded in this manner so as to provide certainty to the parties.

130. The final stage of the Board's EB-2008-0411 proceeding concluded with its Decision and Order dated March 2, 2010. In that proceeding, the Board determined that the transaction date to be used in calculating the gain to be recorded in the deferral account was March 1, 2010. This determination was not made in the context of any uncertainty about the completion date for the sale. Rather, it was a finding based on Union's representations, supported by DGLP, that the sale would be completed immediately following the Board's issuance on or before March 11, 2010, of approvals satisfactory for

DGLP. Based on the representations Union and DGLP had made to induce the Board to act in their favour, which the Board relied upon and accepted, the sale transaction would be completed in March 2010. This was the factual context that prompted the Board to conclude that the sale would be completed in March and that a deemed transaction date, at the beginning of that month, of March 1, 2010, should be used to calculate the gain to be recorded in the deferral account and for subsequent adjustments to remove Rate Base carrying costs from Union's 2010, 2011 and 2012 rates.

131. The extent to which Union's request for a declaratory order is or is not compatible with the EB-2008-0411 Decision rationale must be evaluated by comparing it to the outcome at the conclusion of that proceeding and the related DGLP proceeding in March 2010.

132. By March 2010, the Board had made a determination that the purchase and sale transaction would be completed in that month because it would be known in that month whether the approvals the Board granted in response to DGLP's application were satisfactory to DGLP. The Board's finding that the transaction would be completed in March 2010 was based on its acceptance of evidence from Union and DGLP. As a result of that finding and the consequential finding that a deemed date of March 1, 2010 would be used to calculate the amounts recorded in the deferral accounts, the EB-2008-0411 proceeding concluded with amounts recorded and to be recorded in deferral accounts for the benefit of ratepayers having a net present value of approximately $10M. Moreover, in the proceeding before the Board in March 2010, it was acknowledged that ratepayers would be entitled to the balances in these deferral accounts upon the issuance of a Board Order on or before March 11, 2010, granting approvals favourable to DGLP.

133. In the result, the EB-2008-0411 Decision rationale produced approximately $10M of benefits to which ratepayers were entitled upon the issuance of a Board Order before March 11, 2010, acceptable to DGLP. Underpinning that relief was a project supported by five (5) long-term anchor contracts producing fixed payments for DGLP, regardless of pipeline use in a total amount of [redacted]. The timing of ratepayer entitlement was expressed in the EB-2008-0411 Decision as the date of the sale transaction that was ultimately determined by the Board to be March 2010. The timing of ratepayer entitlement to these balances was confirmed in the DGLP proceeding when the witnesses acknowledged that ratepayers would be entitled to the balances immediately following the issuance by the Board of approvals satisfactory to DGLP.

134. The declaratory order Union seeks is entirely incompatible with the rationale producing the final March 2, 2010 EB-2008-0411 Decision and the related March 9, 2010 EB-2009-0422 Decision granting approvals satisfactory to DGLP. The factual underpinnings for Union's declaratory order request are the arrangements that were made subsequent to the issuance of the Board's March 2 and March 9, 2010 Decisions and Orders. These facts do not represent the "status quo" as of the March 2 and March 9, 2010 Decisions. These facts are the result of actions taken by DGLP and Union subsequent to the Decisions.

135. Union's proposal does not respect the Board's determination of a March 2010 transaction date, nor its determination of ratepayer entitlement as of the transaction date which the witnesses for DGLP acknowledged when they testified on March 1, 2011. Union's proposal is entirely incompatible with the rationale for and the outcome of the Board's EB-2008-0411 proceeding and the related EB-2009-0422 proceeding.

136. The Board's finding of a transaction date in March, its determination that ratepayers were entitled to funds recorded in the deferral accounts effective March 1, 2010; and the confirming acknowledgements by DGLP's witness that ratepayers would be entitled to deferral account balances when the Board issued approvals satisfactory to DGLP were based on the evidence of Union and DGLP that the sale would take place immediately following such approvals. This is why the issuance of approvals is the only condition to be satisfied in order for ratepayers to be entitled to the deferral account balances.

137. Risks associated with the sale, including its actual sale, ceased to be Union ratepayer risk once the Board issued its March 9, 2010 Decision that was satisfactory to DGLP.

138. The declaratory order Union seeks is not compatible with the combined effect of the EB-2008-0411 and EB-2009-0422 proceedings. The relief Union seeks, if granted, will effectively reverse the combined effect of the Decisions the Board rendered in March 2010, and countenance Union's actions in breach of the obligations it owed to its ratepayers.

(ii) Harm

139. Union argues that the declaratory order it seeks causes no harm to ratepayers. We disagree.

140. When considering the issue of harm, it is important to establish the factual base from which a consideration of harm is to be considered in the context of Union's request for declaratory relief. We submit that the factual base or the "status quo" for the purposes of evaluating Union's request for declaratory relief consists of the conditions that existed when the Board rendered its Decisions in March 2010. At that time, DGLP's proposed pipeline was supported by five (5) long-term anchor contracts. DGLP and Union had represented to the Board that the purchase of the St. Clair Line would be completed

immediately following the Board's issuance on or before March 11, 2010, of approvals satisfactory to DGLP. Based on these representations, the Board had found a sale transaction date in the month of March 2010 and deemed March 1, 2010 to be the date to be used for calculating amounts to be credited to deferral accounts.

141. The Board had determined in its November 27, 2009 Decision and Order that ratepayers would be entitled to deferral account balances on the transaction sale date it would subsequently determine. In its March 2, 2010 Decision and Order, the Board determined that the transaction sale date would be a date in March 2010. Witnesses appearing for DGLP on March 1, 2010, confirmed ratepayer entitlement on the sale transaction once the Board issued a Decision on or before March 11, 2010, granting approvals acceptable to DGLP. This is the "status quo" against which the assertions of harm is to be evaluated.

142. The "no sale – no harm" concept does not apply, in this case. Union's ratepayers are being harmed because Union inappropriately relies on the failure of DGLP to complete the sale to refrain from adhering to the conditions of ratepayer entitlement to deferral account balances that were acknowledged to be applicable. The "no sale – no harm" concept may apply in an arm's length transaction. However, it does not apply in this non-arm's length case where the absence of a sale is the outcome of actions taken by Union in collaboration with DGLP that are not compliant with Union's obligations to its ratepayers. Moreover, the actions Union and DGLP have taken are incompatible with actions that arm's length participants in their shoes would take. Union's ratepayers are harmed because Union has done nothing to force DGLP to complete the purchase of the St. Clair Line or to pay the $7.5M that it would pay if the sale were to be completed. As already noted, Union had more than sufficient leverage under the auspices of its two (2) contracts with DGLP to achieve that outcome. The harm ratepayers are experiencing is

attributable to Union's failure to exercise its leverage or, in the alternative, returned to the Board for guidance rather than collaborating with DGLP to design and implement a plan that was incompatible with its obligations of an OEB regulated utility company to its ratepayers.

143. In terms of harm to Union's shareholder, even with a sale, Union's shareholder suffers harm because of DGLP's capped arrangements with Union whereby all Union will receive from DGLP for the sale of the St. Clair Line is $7.5M, and not the FMV for the St. Clair Line determined by the Board. About $2.5M of this amount will be attributable to balances recorded in the deferral accounts. Accordingly, the harm to Union's shareholder in a sale completion scenario is $7.5M. However, this is self-inflicted harm because DGLP is not paying the FMV for the St. Clair Line determined by the Board.

144. Clearance of the deferral accounts does not cause this aspect of harm to Union's shareholder. The harm Union's shareholder suffers as a result of the clearance of the deferral accounts and the absence of sale is harm it inflicts on itself because it has done nothing to exercise its leverage over DGLP to either force a sale or obtain an indemnity for the $7.5M of sale proceeds it would receive if the transaction were to be completed.

145. Union's declaratory order proposal is not neutral. It deprives ratepayers of the deferral account balances to which they are entitled. Moreover, in the 'no sale' scenario, Union's proposal for a declaratory order will benefit Union's shareholder by facilitating the shareholder's avoidance of the $7.5M of harm that ensues in a sale scenario.

146. .Considerations of harm do not justify the declaratory order that Union seeks.

(iii) Waiver

147. As already noted, counsel for Union is incorrect when he assets that a written waiver of conditions precedent in the Agreement of Purchase and Sale is required. The

Agreement does not preclude waivers by conduct and DGLP has clearly waived the conditions precedent that Union says remain outstanding. Having regard to the overwhelming evidence of waiver, Union's failure to insist that DGLP complete the purchase transaction immediately following the issuance of approvals satisfactory to DGLP, its assumption of the role as an advocate for the purchaser's failure to complete the transaction constitute conduct incompatible with Union's obligations to protect the interests of its ratepayers.

(iv) Practice, Precedent and Investment Climate

148. The main thrust of Union's argument that clearing the deferral account balances to ratepayers before a sale of the St. Clair Line actually takes place would create an unfavourable precedent is that "decoupling" ratepayer entitlement to proceeds of sale a utility asset and the actual sale of that asset is unprecedented and a disincentive to investment.

149. We concede that in arm's length sales transactions, ratepayers would not normally be entitled to a share of the proceeds of a sale of a utility asset before the sale is completed.

150. However, this case does not involve an arm's length transaction. It involves a non-arm's length transaction where the non-arm's length parties have collaborated to postpone the sale that they told the Board would be completed immediately following the Board's issuance of approvals satisfactory to DGLP. The sale that the parties have agreed upon is still not taking place at the FMV of the asset determined by the Board. Even if the sale takes place, there is about $7.5M recorded in the deferral accounts that is payable to ratepayers and not covered by the proceeds of the sale that Union will receive from the purchaser. Moreover, the failure of Union to recover the $7.5M of proceeds from the

sale of the asset is attributable to its own inaction and its failure to act in the interests of its ratepayers.

151. The "decoupling" of the clearance of deferral account balances and the actual completion of the sale in this case has only occurred because the non-arm's length parties have failed to abide by the representations they both made to the Board to obtain favourable regulatory relief that they were then seeking. The "decoupling" that has occurred in this case is of no precedent effect because it is "decoupling" that the non-arm's length parties have inflicted upon themselves.

152. Requiring utilities to adhere to the representations they make to obtain regulatory approvals in their favour is sound precedent. Clearing the deferral account balances to ratepayers in this unique non-arm's length case is entirely consistent with the principle that those who make representations to induce third parties to act on them are bound by the representations.

153. In contrast, failing to clear the deferral accounts balances would be incompatible with the principle that utilities are obliged to act in a manner that balances the interests of their shareholders and ratepayers. Failure to clear the balances would countenance Union's breach of the obligations it owed to its utility ratepayers.

154. The fact that Union continues to use the St. Clair Line is irrelevant to the issue of the ratepayers entitlement to deferral account balances. Had Union and DGLP completed the sale and purchase of the St. Clair Line immediately following the Board's issuance of approvals satisfactory to DGLP, as they told the Board they would, Union would, nevertheless, be continuing to use the asset. Ratepayer entitlement to the balances in the deferral account is not contingent on Union Gas Limited ceasing to use the asset,

but on the issuance by the Board of regulatory approvals satisfactory to DGLP. That event has occurred and the deferral accounts balances should be cleared.

VI. CONCLUSIONS

155. For all of these reasons, we respectfully submit that the entitlement of ratepayers to the deferral account balances is ripe and absolute. The declaratory order Union seeks should be denied and the deferral accounts should be cleared.

156. We submit that the answer to the first question the Board has listed for determination in Procedural Order No. 4 is 'NO'.

157. If deferral account balances are cleared to ratepayers, now, as we submit they should be, and the sale of the St. Clair Line to DGLP does not eventually take place, then Union is free, if so advised, to seek to return the St. Clair Line to its regulated utility Rate Base, subject to demonstrating, at that time, that the asset is needed. If a demonstration of need is made to the Board's satisfaction, then the return of the asset to Rate Base should be at its FMV, which could be considerably lower than its NBV, at that time. This contingency is attributable because of the arrangements that DGLP and Union made to effectively undermine the long-term anchor shipper commitments that DGLP had procured to support the Dawn Gateway Pipeline.

158. With respect to the third question in Procedural Order No. 4, we submit that the balances in the deferral accounts should be cleared in the 2010 Deferral Account Clearance proceeding that Union will be initiating shortly. The allocation methodology Union proposes should be applied and the St. Clair Transmission Line should remain excluded from Rate Base.

159. If the Board disagrees and refrains from ordering the clearance of the deferral account balances, at this time, then we submit that no action is required by the Board, at this

time, other than to reserve the rights of all parties in the event the sale of the St. Clair Line does not proceed.

160. As already noted, there is about $7.5M of benefits in the deferral accounts payable to ratepayers that are not linked to the proceeds of the sale transaction. We believe that it is arguable that this amount should be cleared to ratepayers in any event and would wish to reserve our rights to make that argument at a later date.

VII. COSTS

161. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of April, 2011.

Peter C.P. Thompson, Q.C.
Counsel for CME

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