EB-2010-0039

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order of 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 REPLY ARGUMENT OF UNION GAS LIMITED

A. OVERVIEW

1. This is Union's Reply Argument, which should be read in conjunction with Union's Argument in Chief. This Reply Argument responds to the submissions of the Consumers Council of Canada ("CCC"), the Federation of Rental-Housing Providers of Ontario ("FRPO") and Canadian Manufacturers and Exporters ("CME").

2. Union remains of the view, as outlined in its Argument in Chief, that it should not be required to dispose of the amounts in deferral accounts 179-121 and 179-122 (the "Deferral Accounts") until the Dawn Gateway project has closed or been cancelled. Unlike the arguments of the intervenors listed above, Union's submission is supported by the evidence in this proceeding, and not merely by hypotheses and speculation that fly in the face of the evidentiary record. Union is supported in its submission by Board staff.

3. This proceeding comes down to the question of the purpose for which the Deferral Accounts were created. Discussions about actions taken by the parties subsequent to the decision to create those accounts are largely irrelevant and distract from the real issue at hand: were the Deferral Accounts intended by the Board to benefit ratepayers, regardless of whether

the St. Clair Line transaction took place, or were they specifically tied to that transaction and intended to compensate ratepayers for harm arising therefrom?

4. The answer to this question is straightforward. All parties to this proceeding agree that the underlying rationale for the creation of the Deferral Accounts was to protect ratepayers from what the Board characterized as harm that would arise if the sale of the St. Clair Line took place as proposed. CME characterizes this purpose in its submissions as follows:

> The Board found that the sale of the St. Clair Line should take place at FMV [Fair Market Value] rather than NBV [Net Book Value] to prevent harm to ratepayers. 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 NBV and FMV was allocated to utility ratepayers. [Emphasis added.][1]

5. However, while Union and Board staff maintain that the Deferral Accounts should not be disposed of except in accordance with that purpose, CME, CCC and FRPO argue that, because of Union and/or DGLP's alleged conduct subsequent to the Board's Decision, the Board should reinterpret the purpose of the Deferral Accounts and dispose of them to ratepayers, notwithstanding the obvious fact that the sale of the St. Clair Line has not taken place.

6. For the reasons outlined below, Union disagrees with both the premise of that argument (the alleged conduct) and the appropriateness of the proposed remedy.

B. FACTS

The Parties: DGLP, DTE and Union

7. Dawn Gateway LP ("DGLP"), a limited partnership formed pursuant to the laws of Ontario, was formed in 2008 by Spectra Energy Transmission ("Spectra") and DTE Energy ("DTE") for the purpose of developing a new gas transmission line. Each of Spectra and DTE, through their respective affiliates, owns 50 percent of DGLP.[2]

8. Union is a subsidiary of Spectra Energy.

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[1] Argument of Canadian Manufacturers &Exporters ("CME Argument"), EB-2010-0039, April 20, 2011, para. 17, (emphasis added).

[2] Pre-Filed Evidence of Union Gas Limited ("Union Evidence"), EB-2010-0039, Exhibit C, p. 5.

9. DTE is an entity unrelated to and independent of Union.

The Proposed Dawn Gateway Pipeline

10. **The Pipeline**. The Dawn Gateway Pipeline is a proposed 34 km gas transmission line between Belle River Mills Compression Station in Michigan (owned by Michigan Consolidated Gas Company) and the Dawn Compressor Station in Ontario (owned by Union). The proposed pipeline would create 360,000 Dth/d (379,876 GJ/d, 10,198 10^3m^3/d) of capacity.[3]

11. Dawn Gateway, if built, would be an "at risk" pipeline. Among the risks DGLP would assume is renewal risk. This is significant. Ultimately, the financial success of the project will depend on the ability of DGLP to persuade existing Shippers to renew their contracts on expiry; if they do not, or other shippers are not found, the pipeline will lose money.[4]

12. **The Precedent Agreements**. In September/October 2008, DTE, on behalf of DGLP, held a non-binding open season to determine the level of interest in the services to be provided by Dawn Gateway. Based on the bids then received, DTE and Spectra determined that there was sufficient interest in the proposed service to justify proceeding with the Dawn Gateway pipeline project.[5]

13. Subsequently, five shippers entered into Precedent Agreements to subscribe for a total of 280,000 Dth/d (295,459 GJ/d, 7,932 103m3/d) of firm transportation service on the Dawn Gateway Pipeline. Any non-contracted capacity would be made available to shippers through future open seasons or through direct negotiation.[6]

14. Each of the Precedent Agreements contains conditions precedent in favour of *each* of Spectra and DTE including conditions that sufficient firm capacity subscription must exist at acceptable rates, as determined by them in their sole discretion and that all necessary Canadian and US regulatory approvals have been received.[7]

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[3] Union Evidence, Exhibit C, p. 5.

[4] Transcript, EB-2010-0039, April 6, 2011, pp. 138-139.

[5] Union Evidence, Exhibit C, p. 6.

[6] Union Evidence, Exhibit C, p. 6.

[7] Precedent Agreement, Brief of Confidential Documents of Union Gas Limited ("Union Confidential Documents"), EB-2010-0039, Tab 2, p. 3, Article 3(a) and (c).

15. **The Development Schedule.** Development of the Dawn Gateway pipeline is governed by a number of agreements between the parties, most importantly the Limited Partnership Agreement.

16. Pursuant to Article 3.14 of the Limited Partnership Agreement, development is conditional on the successful passage of a vote of the DGLP Board of Managers (which is comprised of representatives of the partners) to proceed with the project.[8] This vote has not taken place.[9] Nevertheless, DGLP has taken steps to advance the project, consistent with its stated goal of ultimately bringing the pipeline in-service. These steps have been taken pursuant to resolutions passed by the Board of Managers dated February 22, 2010, which authorized DGLP to enter into the various "Project Agreements" necessary for the project to move forward.[10]

Proposed Sale of the St. Clair Transmission Line

17. **The Purchase and Sale Agreement**. In May, 2009, Union entered into a Purchase and Sale Agreement ("PSA") with DGLP regarding the sale of the St. Clair transmission line. Pursuant to the Agreement, Union agreed to sell the St. Clair Line to DGLP, who would integrate it into the proposed Dawn Gateway pipeline.[11]

18. The PSA includes a number of conditions precedent in favour of DGLP, which are for the exclusive benefit of DGLP, and which may only be waived by DGLP. These conditions, which are set out in Article 3.1, include:

(a) a vote of the DGLP partners in favour of proceeding with the Pipeline System (as defined);

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

(c) regulatory approvals for the operation of the Pipeline System, including from the Michigan authority.[12]

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[8] Limited Partnership Agreement, Union Evidence, Exhibit C, Appendix B, p. 25, Article 3.14(b).
[9] Transcript, EB-2010-0039, April 6, 2011, p. 47.
[10] Exhibit XD 1.2
[11] Union Evidence, Exhibit C, p. 8.
[12] Purchase and Sale Agreement, Union Confidential Documents, Tab 1, pp. 10-12, Article 3.1.

19. Article 4 of the PSA relates to Closing. It provides that Closing will occur if, and only if, Union has received notice from DGLP that the conditions precedent in Art. 3.1 have been satisfied, complied with, or waived. Specifically, the PSA provides that:

[redacted]

20. The notice contemplated by Article 4.1 is written notice. In this respect, Art. 9.1 of the PSA provides:

[redacted]

21. Union has never received written notice of DGLP's satisfaction, compliance or waiver of the conditions precedent set out in para. 18, above. Nor have the conditions precedent been waived by the Closing (as defined under the PSA), as the Closing has not occurred.[15]

22. As a practical matter, Mr. Isherwood and Mr. Capps suggested that the PSA should be amended to remove references to the NEB approval conditions now that approval under a different regulatory regime has been obtained.[16] However, absent such an amendment, the combined effect of the conditions precedent, the closing provision, and the written notice requirement is that DGLP has the benefit of the conditions until they are fulfilled or waived in writing.

The EB-2008-0411 Proceeding

23. **Application for Approval of Proposed Sale.** On December 23, 2008, Union brought an application for approval of its proposed sale of the St. Clair Line to DGLP.

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[13] Purchase and Sale Agreement, Union Confidential Documents, Tab 1, p. 13, Article 4.1 (emphasis added).

[14] Purchase and Sale Agreement, Union Confidential Documents, Tab 1, p. 23, Article 9.1.

[15] Union Evidence, Exhibit C, p. 8.

[16] Transcript, EB-2010-0039, April 6, 2011, pp. 43-44.

24. As part of its consideration of Union's application, the Board considered whether the sale of the St. Clair Line to DGLP would result in harm to ratepayers and, if so, whether that harm could be remedied. CME was among the parties that argued that the proposed sale would harm ratepayers. The Board captured CME's position as follows, "CME argued that the harm arises from the fact that ratepayers will derive no benefit from the future revenues earned on the line."[17]

25. **Board's November 27, 2009 Decision**. On November 27, 2009, the Board released its Decision granting Union leave to sell the St. Clair Line to DGLP. The Board agreed with CME and others and concluded that the sale of the St. Clair Line would cause harm to ratepayers as follows:

> The Board concludes that the transaction does result in harm to ratepayers. The harm is the inability of ratepayers to recoup the cumulative past subsidy since 2003 through future revenues. The harm arises because Union intends to do outside the utility what it originally intended to do within the utility. The asset is not being sold to be used for an entirely different purpose; it is being sold to a utility and will continue to be used for utility service – the very service it was originally expected to provide.[18]

26. Nonetheless, the Board granted Union's application, on the condition that Union allocate to the ratepayers on the sale of the St. Clair Line the amount of the cumulative under-recovery of the Line from 2003 until the time of the transaction, to be placed in a deferral account:

> The Board further concludes that in order to mitigate the harm of the transaction, ratepayers should be allocated an amount equivalent to the cumulative under-recovery of the asset since 2003 from the proceeds of a sale based on fair market value as determined by replacement cost.
>
> The Board will approve the transaction conditional on the ratepayers being allocated a portion of the deemed net gain equivalent to the cumulative under-recovery as of the date of the transaction. The Board directs Union to file the necessary evidence to substantiate the cumulative under-recovery of the assets since 2003… The Board will then fix the amount to be allocated to ratepayers to compensate for the harm arising from the transaction. This amount will only vary depending upon the timing of the

[17] Decision and Order ("November 27, 2009 Decision"), EB-2008-0411, Key Documents Brief of Union Gas Limited ("Union Key Documents"), Tab 1, para. 81.

[18] November 27, 2009 Decision, Union Key Documents, Tab 1, para. 92.

> actual transaction. The determination of the relevant amount will be made as part of this proceeding so as to provide certainty to the parties. A deferral account will be established to capture the amount of the allocation as of the date of the transaction. Rates can be adjusted at a subsequent rates proceeding. [Emphasis added.][19]

27. As noted above, there is no disagreement between the parties to this proceeding about the purpose for which the Board directed that the Deferral Accounts be created. As CME admits in its argument, 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 fair market value would harm ratepayers unless a portion of the difference between net book value and fair market value was allocated to utility ratepayers.[20]

28. The Board's ultimate order in the proceeding also recognized the fact that the sale of the St. Clair Line was only a potential future event. The Board granted leave to sell through 2013, indicating that:

> If the transaction has not been completed by that date, a new application for leave to sell will be required in order for the transaction to proceed.[21]

29. **Subsequent Proceedings for the Purpose of Calculating Cumulative Under-Recovery and Creating Deferral Accounts**. In accordance with the Board's November 27, 2009 Decision, Union filed its calculation of the cumulative under-recovery of the St. Clair Line from 2003 until the proposed closing date of the transaction. For the purposes of this calculation, Union "estimated" a proposed transaction date of March 1, 2010.[22]

30. In its filing, Union specifically stated that it was requesting "that the Board approve the establishment of a deferral account by Union if the sale of the St. Clair Line to DGLP proceeds.

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[19] November 27, 2009 Decision, Union Key Documents, Tab 1, paras. 121-122.

[20] CME Argument, para. 17.

[21] November 27, 2009 Decision, Union Key Documents, Tab 1, p. 37.

[22] This is repeatedly stated throughout Union's submissions at this stage of the proceeding. See, e.g., Union's Calculation of Under-Recovery, EB-2008-0411, December 23, 2009, Cross Motion Record of Canadian Manufacturers & Exporters ("CME Cross Motion Record"), Tab 3, p. 3; Union's Reply Submission, EB-2008-0411, January 15, 2010, CME Cross Motion Record, Tab 4, p. 1.

If the sale does not proceed, Union will not require a deferral account as there would be no refund of the cumulative under-recovery to customers."[23]

31. Following Union's filing, other parties (including CME) made submissions as to the appropriateness of Union's calculation. These submissions dealt with how the cumulative under-recovery should be calculated, what amounts should be included in the calculation, and what the deemed transaction date for the purposes of the calculation should be.[24]

32. Following these submissions, the Board issued a Decision on March 2, 2010. In its Decision, the Board determined that the amount that should be allocated to ratepayers from the sale of the St. Clair Line should be $6.402 million, based on a deemed transaction date of March 1, 2010. The Board ordered that the $6.402 million should be placed into a deferral account.[25]

33. Recognizing that there would be an additional impact on ratepayers for the period between the deemed transaction date of March 1, 2010, and the actual transaction date at some point in the future, the Board also ordered that Union create another deferral account to capture the effect of removing the St. Clair Transmission Line from rates effective March 1, 2010.[26]

34. **Representations Made in Concurrent Proceedings Relating to DGLP's Leave to Construct and Regulatory Framework Application**. At the same time that the Board was considering the submissions of the parties with respect to the amount of the cumulative under-recovery of the St. Clair Line that should be allocated to ratepayers in the EB-2008-0411 proceeding, the Board was hearing the evidence in the EB-2009-0422 proceeding relating to DGLP's application for leave to construct the Dawn Gateway pipeline and for an alternative regulatory framework. It is the evidence given by DGLP in the EB-2009-0422 proceeding that CME and the other intervenors rely on as fundamentally altering the nature and purpose of the deferral accounts created in the EB-2008-0411 proceeding. It is this evidence on which CME and the other intervenors base their argument that ratepayers should be entitled to the amounts in

[23] Calculation of Under-Recovery of Union Gas, EB-2008-0411, December 23, 2009, CME Cross Motion Record, Tab 3, p. 2.

[24] Submission of Canadian Manufacturers & Exporters, EB-2008-0411, January 4, 2010, CME Cross Motion Record, Tab 4.

[25] Decision and Order ("March 2, 2010 Decision"), EB-2008-0411, Union Key Documents, Tab 2, paras. 46, 49, 56.

[26] March 2, 2010 Decision, Union Key Documents, Tab 2, para. 56.

the deferral accounts, notwithstanding the fact that the sale of the St. Clair Line has not taken place.

35. In the course of the EB-2009-0422 proceeding, CME cross-examined DGLP's witness panel about the date on which the sale of the St. Clair Line from Union to DGLP was expected to take place. Contrary to CME's submission in this proceeding that "[i]t 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",[27] the transcript clearly reveals that the discussion about the transaction date was introduced by counsel in the context of the amount to which ratepayers would be entitled, not whether they would be unconditionally entitled to that amount after a particular date:

> MR THOMPSON: … In the debate that is going on about how much ratepayers should get, Union, as I understand it, is taking the position this transaction, the purchase transaction is going to be completed in March of 2010. Is that correct?
>
> MR. BAKER: That's fair.
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> * * *
>
> MR THOMPSON: All right. Well, let's just explore that a little bit.
> Let's just take the ratepayer harm issue. Your proposal is 4 million, I think I am as high as eight. A major component of the differential is whether the St. Clair toll is on or out of the subsidy calculation. Would you agree with that?
>
> MR. BAKER: That's my understanding, yes. [Emphasis added.][28]

36. It would appear that CME is well aware of this context. CME's initial argument asserted that "There is no reference in the questions put to Mr. Baker to submissions that had been made pertaining to the calculation of the gain to be allocated to ratepayers".[29] In its "corrected" argument, this sentence has been deleted. The inescapable conclusion is that CME now acknowledges that the questions put to Mr. Baker were posed in the context of a discussion about

[27] CME Argument, p. 15.

[28] Transcript, Vol. 1, EB-2009-0422, March 1, 2010, CME Cross Motion Record, Tab 6, pp. 23, 25 (emphasis added).

[29] CME Argument, p. 15.

the calculation of the amount to which ratepayers would be entitled, and not in the context of asking Mr. Baker to confirm that ratepayers could become unconditionally entitled to the amounts in the deferral accounts, even if the transaction never proceeded. Nevertheless, and despite this acknowledgment, CME continues to advance a strained, unsubstantiated interpretation of Mr. Baker's evidence throughout its argument.

The EB-2009-0422 Proceeding

37. **Application and Decision**. On December 23, 2009, DGLP brought an application for leave to construct the Dawn Gateway Pipeline, and an alternative regulatory framework (EB-2009-0422).

38. DGLP's application was supported, among other things, by its evidence regarding the commitment of the five Shippers with whom it had entered into Precedent Agreements, and its evidence regarding the likelihood that the project would go forward.[30]

39. DGLP's evidence was given in good faith, based on the facts known at the time. As discussed further below, prior to March 9, 2010, DGLP had received no indication from any of the Shippers that they did not wish to proceed with the project. As far as DGLP was concerned, the project was a "go".[31] Union felt the same way, as evidenced by its own Annual Report.[32]

40. That is not to suggest, as CME does, that DGLP had waived its legal right not to proceed with the project. Nor is it correct to assert, as CME does, that DGLP acknowledged in this proceeding that it had waived its rights. In fact, the evidence is to the contrary; Mr. Isherwood and Mr. Capps both disagreed with the suggestion that DGLP had waived the conditions precedent.[33]

41. On March 9, 2010, the Board issued its Decision granting DGLP leave to construct and approving a complaint-based regulatory framework for DGLP.[34]

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[30] Application of Dawn Gateway Limited Partnership, EB-2009-0422, December 23, 2009, CME Cross Motion Record, Tab 2, p. 6.

[31] Transcript, EB-2010-0039, April 6, 2011, p. 11

[32] Union Gas 2009 Annual Report, CME Cross Motion Record, Tab 10, pp. 9-10.

[33] Transcript, EB-2010-0039, April 6, 2011, pp. 45-47.

[34] Decision and Order ("March 9, 2010 Decision"), EB-2009-0422, Union Key Documents, Tab 4.

42. **Shippers' Actions in March, 2010**. Following the Board's March 9, 2010 Decision, DGLP received a telephone call from one of its Shippers indicating that, due to changes in market dynamics, the Shipper was looking to postpone its commitment to the Dawn Gateway Pipeline.[35]

43. The changing market conditions had caused a rapid and significant decline in the long-term value of the Dawn Gateway Pipeline, as measured by the spread or difference between the natural gas price in Michigan versus the price at Dawn.[36]

44. Following receipt of this telephone call, DGLP followed up with the other anchor Shippers on the project to determine whether this sense of change in market dynamics was universal. DGLP learned that all of the Shippers consulted (all those except Union) desired to delay the project until market conditions changed.[37]

45. The Shippers are all highly sophisticated players in the natural gas market. It is precisely for this reason that their reservations about the Dawn Gateway project held significant weight for DGLP in assessing the viability of the project at the proposed time.

46. On March 30, 2010, DGLP held a meeting with its anchor Shippers, except Union. Union was excluded from that meeting because of its relationship with Spectra (one of the DGLP partners). It was communicated to the remainder of the Shippers that Union would proceed in the direction that the other Shippers decided.[38]

47. At the March 30 meeting, DGLP advised the Shippers that it was prepared to advance the pipeline project for November 2010 in-service unless a unanimous decision to delay the project was reached by all four anchor Shippers present at the meeting.[39] Although it was not obligated to do so, DGLP was prepared to advance the project for November 2010 in-service if any one of the four anchor Shippers wanted service.[40]

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[35] Transcript, EB-2010-0039, April 6, 2011, p. 11
[36] Union Evidence, Exhibit C, p. 9.
[37] Transcript, EB-2010-0039, April 6, 2011, pp. 11-12.
[38] Transcript, EB-2010-0039, April 6, 2011, pp. 11-12
[39] Union Evidence, Exhibit E2.3.
[40] Union Evidence, Exhibit E2.3.

48. At the March 30 meeting, DGLP offered the four anchor Shippers present the option of delaying the pipeline project, on the condition that all four Shippers unanimously agreed to reimburse DGLP for its third party project costs to date and to decide how to allocate the reimbursement among the Shippers.[41]

49. Without DGLP present, the four anchor Shippers met and agreed on how the DGLP costs and capacity would be allocated between them. Three Shippers agreed to allow one Shipper to terminate its Precedent Agreement, and to pay the costs incurred by DGLP.[42]

50. For its part, Union was not one of the Shippers that approached DGLP requesting a delay in the construction of the pipeline. However, having regard to its own longstanding business relationships with the other Shippers (through purchasing natural gas for system sales customers and selling regulated services), Union indicated that it would accept the outcome of the negotiations with the other Shippers.[43] Union was not cross-examined on this evidence.

51. **Amended Precedent Agreements**. As a result of the March 30, 2010 meeting, DGLP signed Amended Precedent Agreements with four of the original five anchor Shippers (including Union). One Shipper terminated its Precedent Agreement with DGLP.[44]

52. Under the Amended Precedent Agreements signed by the Shippers other than Union, they have the right to call for construction of the Dawn Gateway pipeline for in-service in 2011 or 2012. Significantly, and contrary to CME's argument at para. 73(f) and elsewhere,[45] the call right must be exercised by <u>all</u> of the shippers. No one Shipper can demand service. As the Agreements state:

[redacted]

[41] Letter from Dawn Gateway dated March 26, 2010, Union Confidential Documents, Tab 3.
[42] Union Evidence, Exhibit B3.17.
[43] Union Evidence, Exhibit C, p. 10.
[44] Union Evidence, Exhibit C, p. 9; Transcript, EB-2010-0039, April 6, 2011, p. 36
[45] CME Argument, p. 29.

[redacted]

53. If the Shippers do not unanimously call for service by November 2012, the Agreements terminate.

54. The ability to call for construction of the pipeline was extended to the anchor Shippers other than Union in the context of the March 30, 2010 meeting with DGLP for the purpose of ensuring that all anchor Shippers would be subject to the same agreement (rather than some being subject to the original Precedent Agreements and others to the amended version). In other words, DGLP offered the amendment to the Precedent Agreement on the condition that all anchor Shippers agreed to it.

55. **April 19, 2010 Letter to the Board**. By letter dated April 19, 2010, DGLP advised the Board that the Shippers had requested a delay in construction due to evolving market dynamics, and that, as a result, construction would not be proceeding as originally scheduled.[47]

2009 Deferral Account Proceeding

56. By application dated April 22, 2010, Union commenced this proceeding (EB-2010-0039) relating to 2009 earnings sharing and the disposition of deferral account and other balances. In the proceeding, Union raised the issue of the balances in the Deferral Accounts.[48]

57. Given that DGLP had not committed to proceeding with the purchase of the St. Clair Line, Union proposed not to dispose of the balances in the Deferral Accounts. Instead, Union proposed to record in Account 179-121 the $6.402 million amount to be allocated to the ratepayers at the time of the sale, and to record in Account 179-122 for disposition in the future the amount attributable to the St. Clair Line that is included in Union's rates. Union proposed to continue to track the ratepayer credit in Account 179-122 based on a sale date later than March 1, 2010 and to use the Board's methodology as outlined in its EB-2008-0411 Decision to calculate the ratepayer credit.[49]

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[46] Agreement and Amendment to Precedent Agreement, Union Evidence, Exhibit E2.4, Agreements #1-5, Attachment 2, p. 2, Article 4 (emphasis added).

[47] Letter from Dawn Gateway Limited Partnership dated April 19, 2010, EB-2009-0422, Union Key Documents, Tab 5.

[48] Union Evidence, Exhibit A, CME Cross Motion Record, Tab 13, pp. 21-24.

[49] Union Evidence, Exhibit A, CME Cross Motion Record, Tab 13, pp. 21-24.

58. Pursuant to Procedural Order No. 1, on July 26 and 27, Union and intervenors participated in a Settlement Conference. This conference resulted in a comprehensive settlement of all issues including those relating to the disposal of the balances in the Deferral Accounts. On that issue, the parties agreed to defer the determination of disposal of those balances until after November 1, 2010 — the deadline by which DGLP and its shippers intended to determine whether the Dawn Gateway Pipeline would proceed for in-service in November 2011.[50]

59. At the time of the settlement, Union believed that postponing the determination of whether the Deferral Accounts should be disposed was a reasonable compromise. It was Union's belief that, after November 1, 2010, it would have information as to whether DGLP and its Shippers intended to proceed with construction of the Dawn Gateway Pipeline, and therefore, whether the purchase of the St. Clair Line would proceed for in-service in 2011.[51]

60. On September 3, 2010, the Board ordered that a two day oral hearing be scheduled for December 6 and 7, 2010, to address the balances in the Deferral Accounts.

61. By Notice of Motion dated November 19, 2010, Union sought to adjourn the hearing respecting the dispensation of the deferral accounts. CME brought a cross-motion for summary judgment on the disposition of the deferral accounts.

62. By Decision dated December 3, 2010, the Board granted Union's motion and dismissed CME's cross-motion for judgment.[52] The Board indicated in its Decision that Union would face a high hurdle if it sought a further adjournment.[53] For this reason, and consistent with the Settlement Agreement, Union now seeks declaratory relief on the ultimate merits of its position.

Current Status of the Dawn Gateway Project

63. **2010 Open Season**. Subsequent to reaching an agreement with Shippers to defer the construction of the Dawn Gateway pipeline, DGLP continued to monitor the market conditions and consult with Shippers to establish their interest in advancing the project for 2011 service.

[50] Settlement Agreement, EB-2010-0039, July 30, 2010, pp. 7-8.
[51] Settlement Agreement, EB-2010-0039, July 30, 2010, p. 7.
[52] Transcript, EB-2010-0039, December 3, 2010, pp. 68-70.
[53] Transcript, EB-2010-0039, December 3, 2010, p. 68.

Discussions and negotiations continued with the Shippers as well as other potential shippers throughout 2010.[54]

64. As set out above, under the Amended Precedent Agreements, the Shippers were to provide notice if they wanted transportation service in 2011. The Shippers did not provide notice for service to DGLP and subsequently they paid to it the third party project costs as agreed to in the Amended Precedent Agreements.[55]

65. In addition to negotiating with existing Shippers, DGLP conducted a binding open season to solicit additional market interest in service on the Dawn Gateway pipeline. The open season was conducted between November 15 and December 7, 2010 and offered the uncommitted 80,000 Dth/d for a term of 7 years (280,000 Dth/d of the 360,000Dth/day has already been committed to by the existing Shippers). The open season did not result in enough market support combined with existing Shipper requests to proceed.[56]

66. The North American natural gas supply market continues to remain volatile with Shippers remaining reluctant to commit to firm long term contracts. This market uncertainty is reflected in the increasing difference between the short-term and long-term spreads. Prior to April 2010 the longer term and shorter term spreads traded at similar values. Since April 2010 the longer term spreads started to trade at a discount to shorter term spreads, most recently at a 20% to 25% discount. Some market participants, including the Shippers, are reluctant to enter into long term contracts that are not supported by long-term spreads past three or four years as they are subject to mark-to-market accounting rules. These mark-to-market rules would require shippers to take a loss or negative financial position on their financial statements.[57]

67. Based on the limited market interest in the 2010 binding open season and the Shippers' decision not to proceed, DGLP did not secure enough market support to proceed with the project in 2011. The decision to proceed has now been postponed until November 2011. DGLP will continue to market transportation services to potential shippers through direct negotiations as well as potentially offering transportation services in another open season later in 2011. In

[54] Union Evidence, Exhibit C, p. 11.
[55] Union Evidence, Exhibit C, p. 11.
[56] Union Evidence, Exhibit C, p. 11.
[57] Union Evidence, Exhibit C, p. 12.

addition, DGLP will continue discussions with Shippers up to November 2011 by which time the Shippers must elect whether to proceed with the Dawn Gateway pipeline or not.[58]

68. **Current Status**. At present, the Dawn Gateway project remains on hold pending market support. Union and DGLP continue to believe that the project is important to Ontario and for the liquidity of the Dawn Hub. As Union indicated in the Natural Gas Market Review, "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".[59]

C. ISSUES

69. The issues for this hearing set out in the Board's Procedural Order of March 7, 2011 are:

(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,

- As of what effective date should deferral accounts 179-121 and 179-122 be disposed?
- What are the amounts in the accounts as of that date?
- What is an appropriate methodology to apportion the amounts across customer rate classes?
- Does the St. Clair Transmission Line remain in Union Gas Limited's rate base?

70. It is Union's position that the answer to the first question comes down to the following: were the Deferral Accounts intended to benefit ratepayers, regardless of whether the St. Clair

[58] Union Evidence, Exhibit C, p. 12.

[59] Submission of Union Gas Limited, EB-2010-0199, November 2, 2010, CME Cross Motion Record, Tab 18, p. 9.

Transmission Line transaction took place, or were they specifically tied to that transaction and intended to compensate for harm arising therefrom?

D. SUBMISSIONS

Disposition of the Deferral Accounts is Dependent on the Completion of the Dawn Gateway Transaction

71. The purpose of the Deferral Accounts is to compensate ratepayers for harm that *would* arise *if* the Dawn Gateway sale were to close. The harm arises because the PSA provides for a sale at book value as opposed to fair market value. Not only is this purpose evident from the Board's Decisions, it has been admitted by the parties. It is fundamental that, as no sale has occurred, ratepayers have not been harmed and there is no reason, or basis, for clearing the Deferral Accounts.

72. The proceedings in EB-2008-0411 that followed the Board's November 27, 2009 Decision were about accounting — about determining an amount payable to ratepayers on the basis of a deemed transaction date. CME argues that it can be inferred from what DGLP and Union said in those and other proceedings that, regardless of whether the transaction went ahead, ratepayers would be entitled to the amounts in the deferral accounts. This is simply not the case. There is no support in any of the Board's Decisions in EB-2008-0411 or EB-2009-0422 for this remarkable proposition. Moreover, the very question was never put to any of Union or DGLP's witnesses at the time (it has since been rejected[60]), and was not even an issue during the proceedings.

Reply to the Submissions of CME, CCC and FRPO

73. **CME argument**. CME makes two primary arguments in support of its position that the Deferral Accounts should be cleared. It argues that the Deferral Accounts should be cleared:

(a) to adhere to representations made by Union and DGLP; and

(b) because clearance would be consistent with the conduct of arms length parties.

74. Each of CME's arguments is discussed below.

[60] Transcript, EB-2010-0039, April 6, 2011, pp. 21-31.

75. *Representations Made By Union And DGLP*. CME says that the relief granted by the Board in EB-2008-0411 and EB-2009-0422 was induced by representations that the sale of the St. Clair Line would take place following issuance of regulatory decisions satisfactory to DGLP. It also says that Union and DGLP represented that ratepayers would be entitled to the balances in the Deferral Accounts at the same time.

76. Quite apart from the fact that the underlying premise of CME's argument is wrong, as discussed below, it suffers from a threshold weakness. The argument fails to address, at all, the purpose for which the Deferral Accounts were created. The submission asks the Board to disregard the essential question of whether ratepayers have been harmed as contemplated by EB-2008-0411. In effect, CME asks the Board to sanction Union based on representations CME says were made *to the Board* whether or not harm has occurred *to ratepayers.*

77. As described above, in none of its decisions does the Board suggest that ratepayers have a vested right in the balances in the Deferral Accounts. On the contrary, the thrust of the comments that bear on the issue and on the certainty of the transaction all reinforce that the Board was well aware that the transaction might not proceed in 2010 or ever. This is most evident from the sunset provision contained in the Board's leave to sell order dated November 2009 as described in para. 28 above.

78. In any event, the suggestions that the Board was induced by representations by Union or DGLP to grant the relief it did, or that they represented that ratepayers had a "vested" entitlement to the balances in the Deferral Accounts on acceptance by DGLP of the Board's Decision in EB-2009-0422, are demonstrably wrong.

79. Both suggestions hinge on a strained, out-of-context interpretation of evidence given by Mr. Baker on March 1, 2010 which disregards the status of proceedings then before the Board, and the clear wording of the questions asked by counsel.

80. As described above, the context of Mr. Baker's evidence was a dispute between the parties as to the date of the transaction to be included in what became Deferral Account No. 179-

121. It was Union's and DGLP's position that the sale date should be March 1, 2010 having regard to the fact that both then anticipated a sale shortly thereafter.[61]

81. CME, along with other intervenors, did not agree. The Board captured this dispute succinctly in its March 2, 2010 Decision, rendered after Mr. Baker had testified:

> Both parties [CME and FRPO] submitted that this statement [as to the transaction date] is incompatible with Union's initial filing where Union stated that it may take several years to obtain all the requisite regulatory approvals to put the Dawn Gateway pipeline into service.
>
> * * *
>
> … Therefore, CME and FRPO believe that the most equitable date for the purposes of calculating the cumulative under-recovery is December 31, 2010."[62]

82. Ultimately, the Board settled on March 1, 2010 as the transaction date. The Board did so, not in reliance on any view as to the anticipated transaction date, but because it also determined that under any scenario there would be an additional impact on ratepayers for the period between the deemed transaction date and the actual transaction date at some point in the future that could be captured in a second deferral account. The Board held:

> The Board finds that the March 1, 2010 transaction date proposed by Union is appropriate for purposes of determining the cumulative under-recovery, <u>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.</u>" [Emphasis added.][63]

83. In other words, the Board rendered the entire issue of the transaction date irrelevant. It is absurd to now suggest that the Board, in reliance on that evidence, changed the purpose for which the Deferral Accounts were created. There is nothing in the Board's Decision to suggest this is the case. In fact, just the opposite is apparent from the structure of the Deferral Accounts. With Account No. 179-121 covering the period prior to March 1, 2010 and Account No. 179-122

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[61] Transcript, Vol. 1, EB-2009-0422, March 1, 2010, CME Cross Motion Record, Tab 6, pp. 23, 25.

[62] March 2, 2010 Decision, Union Key Documents, Tab 2, paras. 26, 27.

[63] March 2, 2010 Decision, Union Key Documents, Tab 2, para. 46 (emphasis added).

covering the period thereafter, the Board had no reason then (or now) to be concerned with any party's view as to the probable transaction date, let alone whether the project would ultimately close.

84. CME's argument also glosses over the important context created by its own counsel's opening questions. As set out above, the entire line of questioning on which CME bases so much of its argument began with comments by its counsel asking the witness to recall the debate about "how much ratepayers should get" and to "explore" with him "the ratepayer harm issue" as set out in the parties' respective financial calculations.[64] To assert, as CME does throughout its argument, that Mr. Baker's evidence was not given having regard to this important context is incorrect.

85. *What Parties Acting At Arm's Length Would Do.* CME says that a consideration of what arm's length parties would have done in similar circumstances reinforces that "ratepayer entitlement" to the Deferral Account balances "has ripened".[65]

86. In support of its argument, CME advances four questions and answers it urges the Board to consider.[66] Not one of the questions was put to Union's witnesses. The questions are:

(a) What would an arm's length seller in Union's position have done when DGLP refused to complete the purchase of the St. Clair Line?

(b) What would an arm's length utility shipper wanting service have done?

(c) What would an arm's length pipeline have done in respect of the agreement of purchase and sale?

(d) What would an arm's length pipeline have done in response to Shippers seeking amendments to their contracts?

87. The overarching response to all of CME's comments is that they, again, fail to address the purpose for which the Deferral Accounts were created.

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[64] Transcript, Vol. 1, EB-2009-0422, March 1, 2010, pp. 23, 25.

[65] CME Argument, para. 109.

[66] CME Argument, paras. 110-122.

88. The thrust of CME's argument is that arm's length parties would have acted differently; they would have forced, somehow, the sale of the St. Clair Line. In other words, CME says, arm's length parties would have *brought about* the very harm the Deferral Accounts were intended to remedy and, therefore, the Deferral Accounts should be cleared.

89. This misses the point that if the sale has not occurred, then ratepayers have not been harmed and there is no reason to clear the Deferral Accounts.

90. Indeed, as a matter of reason, CME, and all intervenors, should be indifferent between the sale and no sale of the St. Clair Line scenarios. In the former, harm occurs but it is remedied. In the latter, no harm occurs, and ratepayers do not receive a windfall in the form of the balances in the Deferral Accounts. They do continue to receive the opportunity to earn future revenues on the St. Clair Line.

91. In fact, the reasonable inference that can be drawn from CME advocating for a "sale for regulatory purposes" scenario, is that it and other believe that the harm reflected in the Deferral Accounts is overstated.

92. In any event, Union disagrees with each of the answers given by CME to its hypothetical questions.

93. *(i) What An Arm's Length Seller Would Do*. CME suggests that based on representations made by DGLP to Union that the sale of the St. Clair Line would be completed following the Board's issuance of regulatory approvals satisfactory to DGLP, Union should have taken the position that there was "an express" agreement to complete the transaction or treated DGLP's conduct as a waiver of the conditions precedent and complained to the Board or sued for specific performance.

94. CME's position disregards, at least, the following:

(a) the undisputed evidence that Union was concerned about its own longstanding business relationship with the other Shippers, through the purchase of gas for system sales customers and the sale of regulated services, and for this reason, it

was prepared to accept a unanimous decision by the Shippers to delay the project;[67] and,

(b) the fact that no seller would bring an action to try to compel a sale in circumstances where it had not suffered a loss and would, in any event, almost certainly lose such a claim.

95. As to (b) above, no party would complain to the Board as suggested by CME. Specific performance is an equitable remedy. It is doubtful whether the remedy can be granted by the Board. CME cites no authority for the proposition that it could be, nor does it point to a single analogous Board proceeding.

96. Courts have consistently held that specific performance should only be awarded in limited circumstances, involving unique property.[68]

97. Union, or any arm's length seller, would then be left with a claim in damages. Other than out of pocket costs, however, Union has not suffered any damages. It continues to own the St. Clair Line and there is no evidence that the line has declined in value.

98. As to out of pocket costs, they are an irrelevant consideration because ratepayers have never been called upon to pay any costs related to the Dawn Gateway project.[69]

99. In any event, Union, or any party, would lose a claim for breach of the PSA against DGLP regardless of the forum.

100. CME argues at various points that DGLP waived the conditions precedent when it testified in the EB-2009-0422 proceeding. This argument is without merit.

101. As a starting point, it is substantially based on CME's strained interpretation of Mr. Baker's March 1, 2010 evidence as discussed above.

102. Further, it is legally unsound. The PSA is specific as to the circumstances necessary for Closing to occur. As set out above, pursuant to Art. 4, Closing is conditional on, among other

[67] Transcript, EB-2010-0039, April 6, 2011, p. 80.

[68] *1117387 Ontario Inc. v. National Trust Co.*, 2010 ONCA 340. There is nothing unique in the legal sense about the St. Clair Line. The calculation of FMV was done based on an assessment of replacement cost.

[69] Transcript, EB-2010-0039, April 6, 2011, p. 141.

things, receipt by Union of notice from DGLP that the conditions precedent in Art. 3.1, all of which are for its exclusive benefit, have been satisfied, complied with or waived. That notice, pursuant to Art. 9.1, must be in writing.

103. Contrary to CME's argument at paras. 13 to 15, which focuses solely on Art. 9.1 of the PSA, having regard to all of the relevant provisions of the PSA, the parties intended that they would notify each other via a "notice" (as defined) that the conditions precedent had been satisfied, complied with or waived, and not through conduct or any other means.

104. In this respect, CME's reliance on the Modification or Waiver clause in Union's Precedent Agreement is equally misplaced, confusing "waiver" of a condition precedent with "waiver" of a breach of the agreement.

105. The Modification or Waiver clause in the Precedent Agreement addresses: (i) the prospect of an amendment (i.e. a modification) of the terms and provisions of the precedent agreement to provide that no such amendment (or modification) of the agreement will be effective except by the execution of a written amendment by both parties to the agreement; and (ii) the circumstance where a party waives a *breach or violation of the precedent agreement* once, to provide that such waiver shall not be interpreted to mean that such party automatically waives a *future breach or violation* of any provision of the precedent agreement.

106. The Modification or Waiver clause has nothing to do with the "waiving" of conditions precedent – the "waiving" discussed in this Modification or Waiver addresses *only waivers of a breach or violation* of the agreement

107. *(ii) What An Arm's Length Shipper Would Do?* CME says that an arm's length Shipper would never have agreed to amend its contract as Union did in this case. It argues further that Union should have insisted on the same terms as those given to the other Shippers.

108. Under its initial Precedent Agreement, Union had no ability to demand service on the Dawn Gateway pipeline. Union's Precedent Agreement, like all others, contained conditions precedent in favour of *each* of Spectra and DTE including conditions that sufficient firm capacity subscription exist at acceptable rates, as determined by them in their sole discretion and that all necessary Canadian and US regulatory approvals had been received. There should be no dispute

that these conditions had not been satisfied – particularly, the US approvals which have not yet been sought. The conditions precedent could only be extended or modified in writing.

109. As to CME's second point – that Union should have insisted on the same call right given the other Shippers – here, again, CME proceeds on a misapprehension as to the parties' contractual arrangements.

110. Contrary to CME's argument at para. 116, the Amended Precedent Agreements do not entitle any one Shipper, acting alone, to call for construction of the Dawn Gateway pipeline. The Amended Precedent Agreements provide that notice in writing must be given to DGLP by "Shipper and all Other Shippers" that they want service.[70]

111. Accordingly, even if Union's Precedent Agreement had been amended as CME suggests it should have been, Union could not have called for construction, unless all "Other Shippers" agreed and provided notice to DGLP to this effect, something they obviously would not have done given their view of the market.

112. From this point, CME's argument devolves at para. 117 into the suggestion that no arm's length shipper would have ignored the "vested" interests of its ratepayers. Of course, this argument is completely circular and depends on prior acceptance that those ratepayer interests had in fact vested – the matter now at issue before the Board.

113. To make matters worse, CME then proceeds to accuse Union of having "collaborated" in an arrangement designed to benefit its owner (ignoring entirely DTE's role and the fact that it is a 50/50 partner). To put the matter bluntly, CME's assertion is offensive; it lacks any substance and should be rejected out of hand by the Board.

114. Even CME appears to admit that its accusation amounts to nothing more than unsubstantiated speculation. At para. 79 of its argument, CME introduces the accusation as follows:

> 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

[70] Agreement and Amendment to Precedent Agreement, Union Evidence, Exhibit E2.4, Agreements #1-5, Attachment 2, p. 2, Article 4.

> Michigan and Dawn could affect current prices for commodity and unregulated storage areas in each area. The extent to which this outcome of the arrangements made by DGLP and Union benefit DTE, Spectra and/or the DGLP Shippers, including Union, is unknown. [Emphasis added.][71]

115. In fact, the evidence which does exist on this point indicates that storage values have declined. While Union is not aware of an impact on its unregulated storage business, if anything, the decline in values suggests that the delay has been disadvantageous to Union, Spectra and DTE.[72]

116. CME's argument, which also manifests itself in its description of events surrounding the amendment to the Precedent Agreement, also defies common sense. CME says at para. 73(c) of its argument that senior officials of DGLP, Union and DTE devised and promoted a plan to replace [redacted] of long-term commitments supporting the plan with the Amended Precedent Agreements.

117. Setting aside CME's colourful use of language, if anything, this paragraph underscores the seriousness of the renewal risk DGLP would be undertaking with the Dawn Gateway project. Why would DGLP agree to amend the Precedent Agreements unless it was concerned about the financial viability of the project in the long run? In particular, why would DTE agree to the amendments? It has no stake in this proceeding or in the Deferral Accounts. None. It agreed to amend the Precedent Agreements because doing so made good business sense and for no other reason.

118. As a final matter, at paras. 48, 122 and elsewhere of its argument, CME describes the Precedent and Amended Precedent Agreements as "subject to OEB approval and supervision". This comment is not entirely accurate. Pursuant to Appendix C of the Board's EB-2009-0422 Decision, DGLP was ordered to comply with STAR. STAR requires, among other things, that amendments to any tariff (being standard terms of service, allocation methods and rate schedule) be filed with the Board for approval, that transmitters have a standard form of contract and that

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[71] CME Argument, para. 79 (emphasis added).

[72] Interrogatory Response, Exhibit E2.4(e)

negotiated contracts be posted. There is no general requirement that transportation contracts be approved.[73]

119. *(iii) What An Arm's Length DGLP Would Do?* CME says that an arm's length pipeline company would have adhered to its representations to the Board and completed the pipeline project or advised the Board before deciding not to.

120. In addition to omitting the important context for DGLP's earlier evidence, CME's argument again defies common sense. As discussed above, no third party, acquiring an "at risk" pipeline, would ever have proceeded to complete the purchase of the St. Clair Line and forced Shippers into a project they clearly did not (and still do not) want.

121. Also to this point, at para. 73(k) of its argument, CME asserts that short term Dawn/Michigan spreads suggest enhanced short term commitment for the project and that the risk of renewal seems remote. There is no basis for this proposition; it was not put to a single witness. The evidence is that long term commitments are required to back a long term pipeline.[74] The renewal risk is evidenced by the parties' decision to delay the project, as discussed above.

122. CME's argument also disregards the fact that DGLP did advise the Board, Board staff and intervenors in April 2010 that DGLP had "agreed to delay construction of the pipeline", that an assessment of market conditions would be made with Shippers in the fall and that DGLP would continue to keep the Board advised of developments.[75] DGLP further asked that its letter be brought to the attention of the Board panel members who had heard the matter. Not a single party, nor the Board, contacted DGLP to indicate surprise that the project was on hold, let alone argue that DGLP was somehow in breach of commitments it had made.

123. *(iv) What An Arm's Length DGLP Would Do In Response To Shippers' Concerns?* In answer to this question CME effectively repeats its suggestion that an arm's length DGLP would have forced Shippers to have proceeded with the project.

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[73] Storage and Transportation Access Rule, rules 2.1.4 and 2.3

[74] Interrogatory Response, Exhibit E2.6(f)

[75] Letter from Dawn Gateway Limited Partnership dated April 19, 2010, EB-2009-0422, Union Key Documents, Tab 5.

124. Again, the notion that DGLP and its partners should have strong-armed the Shippers and put at risk the economic viability of the project over the long term is wrong. Surely, those parties, and not CME, are in the best position to assess the appropriate course of conduct having regard to the "at risk" nature of their investment.

125. Further, CME's argument does nothing to address DTE's perspective. Mr. Bering's uncontradicted evidence was that DTE was not prepared to proceed with the project absent market support as evidenced by a desire by the Shippers to proceed.[76] In other words, the Board already has direct evidence as to what an arm's length pipeline company would have done – it would not have proceeded, just as DTE decided not to.

126. **Other CME Arguments.** In responding to Union's Argument in Chief, CME makes four submissions, which are based in large measure on their arguments discussed above. With respect, none of the submissions withstands scrutiny.

127. *Compatibility with the EB-2008-0411 Decision.* Clearly aware that the relief it seeks is contrary to the rationale for the creation of the Deferral Accounts in the first instance, CME says that rationale was changed by later Board Decisions. There is no basis for this proposition in any of those Decisions.

128. At para. 132 of its argument, CME claims that, "[b]y March 2010, the Board had made a determination that the 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 said no such thing in its March 2 and May 11, 2010 Decisions.

129. The opening paragraphs of the Board's March 2 and May 11, 2010 Decisions lay out the purpose of those Decisions. As discussed above, they relate to accounting — the amount to be included in the Deferral Accounts.[77] They do not vest in ratepayers an entitlement to the amounts in the Deferral Accounts regardless of whether the sale of St. Clair Line closes. In fact, later in the March 2 Decision, the Board, in commenting on the estimated replacement cost of the

[76] Transcript, EB-2010-0039, April 6, 2011, pp. 141-142.

[77] March 2, 2010 Decision, EB-2008-0411, Union Key Documents, Tab 2, paras. 1-3; Decision and Order, ("May 11, 2010 Decision"), EB-2008-0411, Union Key Documents, Tab 3, paras. 1-4.

St. Clair Line (a necessary function of the FMV calculation), indicates that the sale would occur "some time in the future", not unequivocally in March.[78]

130. Further, CME's argument on this point is contradictory. On the one hand, CME says that ratepayers had a vested right to the amounts in the Deferral Accounts based on the Board's March Decisions. It says that the "timing of ratepayer entitlement was expressed in the EB-2008-0411 Decision as the date of transaction that was ultimately determined by the Board to be March 2010".[79]

131. However, immediately before that, CME argues that ratepayer entitlement rested upon the issuance of a "Board Order before March 11, 2010, acceptable to DGLP".[80]

132. Even putting the matter as CME does, ratepayer entitlement could not be said to be absolute if it was conditional on DGLP acceptance of the Board's Decision.

133. In fact, even this interpretation by CME is inconsistent with (1) the Board's Decisions as discussed above and (2) the very evidence relied upon by CME. As to the latter, at para. 40(i) of its argument, CME quotes from Mr. Baker's March 1 evidence. The following is apparent from that evidence:

(a) That even CME recognized that something could go wrong on the US side at a later date.

> 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 – 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.[81]

[78] March 2, 2010 Decision, EB-2008-0411, Union Key Documents, Tab 2, para. 21 (emphasis added).

[79] CME Argument, para. 133.

[80] CME Argument, para. 133.

[81] Transcript, Vol. 1, EB-2009-0422, March 1, 2010, p. 28 (emphasis added).

(b) That it was always recognized that DGLP could "crater" the deal on receipt of the Board's Decisions.[82]

134. Finally, under this heading, CME asserts that once the Board issued its March 9, 2010 Decision, "risks associated with the sale, including its actual sale, ceased to be ratepayer risk".[83] The fallacy of this argument is that ratepayers have never been at risk whether related to closing or otherwise. They bear no costs of the transaction, and are fully protected from harm if it does close.

135. *No Waiver.* CME again asserts that the conditions precedent could be, and were waived by DGLP's conduct. For the reasons set out above, this submission is legally and factually incorrect. In any event, it does not provide a reason to dispose of the Deferral Accounts.

136. *No Harm.* CME suggests that the declaratory relief sought by Union harms ratepayers. The argument CME advances is circular. CME repeats its submission that the March Decisions resulted in ratepayer entitlement and then says ratepayers have been harmed by Union's failure to clear those accounts.

137. CME also makes the peculiar comment that the "no sale - no harm" concept may apply in an arm's length sale but does not apply here. CME says ratepayers have been harmed because Union has not forced DGLP to purchase the St. Clair Line or paid the $7.5 million that it would if the sale were completed. But ratepayers are not harmed if the sale goes through; they are harmed if it goes through and the Deferral Accounts are not cleared, all as decided by the Board.

138. *Practice, Precedent and Investment Climate.* This section largely repeats CME's other arguments. What is more interesting is the concession at para. 149 where CME says:

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

139. The evidence in the EB-2008-0411 and EB-2009-0422 Decisions, including that of Mr. Baker, and the Decisions themselves could not mean something different if the purchaser were TCPL as opposed to DGLP. And what about DTE, which is arm's length? It is apparent that

[82] Transcript, Vol. 1, EB-2009-0422, March 1, 2010, p. 28.
[83] CME Argument, para. 137.

CME's focus on the relationship between DGLP and Union is misplaced. The arguments are a distraction from the real issue, *viz*. the purpose of the Deferral Accounts in the first place.

140. **CCC and FRPO Arguments**. CCC hypothesizes in its submissions that "[Union] could have insisted on the fulfillment of [its shipper contract]" and that "Doing so would have forced completion of the project, and resulted in the clearing of the deferral accounts to its ratepayers."[84] Speculation in this regard is not merely unfounded, it runs squarely contrary to the evidence in this proceeding.

141. In essence, CCC makes the same argument as CME in its question (ii). For the reasons set out above, CCC's argument is without merit.

142. Both CCC and FRPO further suggest that the Board should require the disposition of the accounts in order to "protect the interests of ratepayers."[85] The logic of this argument is fundamentally flawed.

143. If the sale of the St. Clair Line proceeds, the Board has determined that ratepayers will be harmed and should be allocated the amounts in the Deferral Account to compensate for that harm. If the sale does not proceed, ratepayers will not be harmed and will continue to have the opportunity to earn revenues on the St. Clair Line. Each of those scenarios represents a situation that the Board has deemed to be fair to ratepayers.

144. Instead of either of those options, and like CME, CCC and FRPO argue that they are entitled to the amounts in the Deferral Accounts to prevent against "this risk of ongoing losses and continued subsidy from Union's ratepayers" being "shifted from Union's shareholder to its ratepayers."[86] This characterization is entirely wrong. In fact, there will be no shift in risk.

145. What CCC is actually asking for is a payment (the amounts in the Deferral Accounts) from Union's shareholder to ratepayers that would compensate ratepayers for past losses on the St. Clair Line, and also the opportunity for ratepayers to earn future revenues on the same line. There is no justification for this in the purpose for the Deferral Accounts. Further, it is

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[84] Argument of Consumers Council of Canada ("CCC Argument"), EB-2010-0039, April 15, 2011, para. 13.

[85] CCC Argument, paras. 16, 20; Argument of Federation of Rental-Housing Providers of Ontario ("FRPO Argument"), EB-2010-0039, April 15, 2011, para. 17.

[86] CCC Argument, para. 15; FRPO Argument, paras. 7, 9.

effectively an invitation that the Board engage in impermissible retroactive ratemaking contrary to *ATCO* decision,[87] and convey a windfall to ratepayers at the expense of Union's shareholder. Finally, as detailed in Union's Argent in Chief, a focus on the recovery of the St. Clair Line in the no sale scenario to the exclusion of the overall just and reasonable nature of rates across Union's system is misplaced.

E. CONCLUSIONS AND RELIEF REQUESTED

146. The Deferral Accounts were created by the Board to compensate ratepayers for future harm arising from a sale of the St. Clair Line. All parties agree on this fact. The Deferral Accounts were not created to confer on ratepayers a windfall, nor to compensate them for harm that has not occurred.

147. The sale of the St. Clair Line has not closed, and it may never close. There is, accordingly, no reason to dispose of the Deferral Accounts at this time. To do so would represent a departure from the underlying rationale for the Deferral Accounts in the first place. It would impose on Union economic regulation in respect of a transaction that has not taken place.

148. Focusing as CME, CCC and FRPO do on events subsequent to the Board's initial Decision in EB-2008-0411 distracts from this fundamental reality. They ask the Board to conclude that harm has occurred to ratepayers when it clearly has not. Alternatively, they ask the Board to conclude that some other party would have brought about the sale and thus have caused them harm. Again, this does not amount to harm in fact.

149. In any event, the various arguments advanced by CME, CCC and FRPO are not supported by any of the Board's Decisions and lack legal and evidentiary substance.

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

150. For all of the reasons set out above and in its Argument in Chief, Union respectfully requests an Order confirming that question 1 posed in the Board's Procedural Order of March 7, 2011 be answered in the affirmative.

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