

PETER C.P. THOMPSON, Q.C.  
T 613.787.3528  
pthompson@blg.com

Borden Ladner Gervais LLP  
World Exchange Plaza  
100 Queen St, Suite 1100  
Ottawa, ON, Canada K1P 1J9  
T 613.237.5160  
F 613.230.8842  
F 613.787.3558 (IP)  
blg.com



**By electronic filing**

March 8, 2012

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

Dear Ms Walli,

**Union Gas Limited**  
**Closure of Deferral Account No. 179-121 and 179-122**  
**(St. Clair Line Related Deferral Accounts)**  
**Board File No.: EB-2012-0048**  
**Our File No.: 339583-000133**

Enclosed are the Submissions of Canadian Manufacturers & Exporters ("CME").

Yours very truly,

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

Peter C.P. Thompson, Q.C.

PCT\slc  
enclosure

c. Mark Kitchen (Union)  
Crawford Smith (Torys)  
Intervenors in EB-2012-0048  
Paul Clipsham (CME)  
Vince DeRose

OTT01\4965214\vl

**IN THE MATTER OF** the Ontario Energy Board Act 1998, S.O. 1998, c.14, Schedule B, and in particular, section 36(2) thereof;

**AND IN THE MATTER OF** an application filed by Union Gas Limited for an Order or Orders approving closure of Deferral Account 179-121 and Deferral Account 179-122 as of April 1, 2012.

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**SUBMISSIONS OF  
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)**

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**March 8, 2012**

Peter C.P. Thompson, Q.C.  
Vincent J. DeRose  
Borden Ladner Gervais LLP  
Barristers & Solicitors  
100 Queen Street  
Suite 1100  
Ottawa, ON K1P 1J9

Counsel for CME

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## I. INTRODUCTION

1. These submissions are made on behalf of Canadian Manufacturers & Exporters (“CME”).

## II. BACKGROUND

2. Union seeks Board approval for its closure of Deferral Accounts 179-121 and 179-122 effective December 31, 2011. The relief requested stems from the Board’s May 25, 2011 EB-2010-0039 Decision and Order (the “Decision”).
3. In the Decision, the Board ordered and directed Union Gas Limited (“Union”) as follows:

***“Union is required to dispose of the balances in Accounts 179-121 and 179-122 upon the closure of the transaction for sale of the St. Clair Line on or before December 31, 2011. In the event that the transaction is cancelled Union shall inform the Board and apply for approval to close Accounts 179-121 and 179-122 in order to return the St. Clair Line to rate base.”***

4. In the Decision, the Board determined the narrow issue that it framed for its consideration as follows:

***“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?”***

The focus of this issue was whether an actual sale was the “triggering event” that had to occur before the amounts recorded in the Deferral Account could be cleared to ratepayers. The Board answered this question in the affirmative and concluded that the disposition of amounts recorded in Deferral Accounts 179-121 and 179-122 was dependent upon a completed sale of Union’s St. Clair Line to Dawn Gateway Limited Partnership (“DGLP”).

5. The Decision rejected CME’s submissions to the effect that representations and acknowledgements made by Union and DGLP had the effect of making DGLP’s acceptance of the conditions that the Board imposed in its Leave to Construct approval as the event that triggered the entitlement of ratepayers to amounts recorded in Deferral

Accounts 179-21 and 179-122. As already noted, the Board determined that an actual sale was the triggering event for clearance of the Deferral Account amounts to ratepayers. However, in the Decision, the Board made no findings pertaining to Union's accountability to ratepayers in the event that a "no sale" outcome materialized. Until a "no sale" outcome emerged, it was unnecessary for the Board to decide whether Union had any accountability to ratepayers as a result of its actions that were contributorily causative to a "no sale" outcome contingency.

6. In the Decision, the Board recognized that an eventual "no sale" outcome could, in turn, lead to a consideration of possible remedies arising from the under-utilization of the St. Clair Line assets. On this point, the Board stated:

***"Nothing in this Decision shall be construed so as to prevent or inhibit parties from asserting that some remedy or consideration arising from the underutilization of the assets may be considered by the Board in subsequent cost of service rate proceedings. Neither should this decision be construed so as to be predictive, in any manner or degree as to how the Board may view or consider such assertions."***

7. Now that the "no sale" scenario has emerged, the issue of whether Union has some accountability for the cost consequences on ratepayers of a "no sale" outcome needs to be determined. The question that the Board has yet to determine is whether the management of Union, the corporation that owns and operates an OEB regulated utility, breached any obligations they owed to Union's ratepayers; and, if so, then have Union's ratepayers sustained a loss as a result of those actions. Based on the points of argument that follow, we submit that Union has some accountability for the cost consequences for ratepayers of the "no sale" outcome. This accountability is a factor that should be recognized in the Board's response to the explicit and implicit relief Union requests in this proceeding.

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**III. UNION'S ACCOUNTABILITY FOR A "NO SALE" OUTCOME**

8. In making the submissions that follow, we assume that the members of Board Panel hearing this application are familiar with the facts that were canvassed at length in the Board's EB-2010-0039 proceeding heard on April 6, 2011, and in Union's adjournment motion that preceded that hearing that the Board decided on December 3, 2010.
9. Based on the evidence that was before the Board in the EB-2010-0039 proceeding, we submit that it is common ground that Union, under its initial binding shipper Precedent Agreement ("PA") with DGLP, Union had a right to call on DGLP to construct the Dawn Gateway Pipeline, regardless of what other shippers wished and regardless of any rights Union had against DGLP under their Agreement of Purchase and Sale with respect to the St. Clair Line. If DGLP did not honour the commitments it made to Union under that binding PA, then Union could assert remedies against DGLP. Conversely, DGLP had the unfettered right to build the pipeline and to require the PA shippers to pay the agreed upon demand charges over the entire duration of the long-term contracts that each PA shipper had executed.
10. The evidence in the EB-2010-0039 proceeding revealed that Union management did not insist on retaining Union's right, as a single shipper, to call on DGLP to comply with the provisions of its PA with Union. Rather, Union management gave up Union's right, as a single shipper, to call on DGLP to honour its commitments and, in effect, allowed the other DGLP shippers, either separately or in combination, to exercise that right. Union gave up this right notwithstanding the material benefits that the Dawn Gateway Pipeline would bring to the entire commodity market in Ontario, as described in its submissions to the Market Review panel cited in paragraph 4 of CME's Corrected Confidential Argument in EB-2010-0039 dated April 15, 2011. The point is that, on the basis of Union's submissions to the Market Review panel, all gas consumers in Ontario would be

beneficiaries of its 10-year contract on the Dawn Gateway Pipeline. In addition, the evidence at Exhibit A3.3 in these proceedings, showing the use of the St. Clair Line system in 2010 and 2011 for the benefit of Union's system gas supply, corroborates that the beneficiaries of Union's 10-year shipping contract on the proposed Dawn Gateway Pipeline would include its in-franchise system gas customers and not merely its non-utility storage business. Moreover, even when they are dealing with a non-utility asset related to Union's integrated operations of gas transmission, storage and distribution, the management of Union cannot disregard conflicts between the interests of Union's ratepayers and the interests of Union's owner that arise in relation to the management of that asset. In such circumstances, the management of Union is obliged to act in a way that does not prefer the interests of Union's owner over the interests of Union's ratepayers.

11. Union's desire to have access to the Dawn Gateway Pipeline, regardless of the wishes of other shippers, is referenced in Exhibit B3.18 in the EB-2010-0039 proceeding attached as part of Exhibit 15 to the Affidavit of Jack Hughes sworn November 29, 2010. The initial and amended PA's between DGLP and its anchor shippers were filed as confidential exhibits in the EB-2010-0039 proceeding, along with various documents pertaining to the rapid sequence of events that led to Union management giving up a right that each of the other PA shippers retained, namely, to call on an individual basis for construction of the pipeline. The parties referred to these materials during the argument of Union's Motion for Adjournment held on December 3, 2010, and during the hearing held on April 6, 2011.
12. Other documents with respect to the arrangements DGLP made with its anchor shippers and Union, wherein Union gave up its rights as an individual shipper to call for DGLP to

proceed with the pipeline, are described in CME's Corrected Confidential Argument dated April 15, 2011, in paragraphs 73 to 82 inclusive, found at pages 28 to 36.

13. An exercise by Union management of Union's initial right to call on DGLP to construct the pipeline and, in the alternative, its breach of contract remedies against DGLP, if it refrained from constructing the pipeline, would benefit Union's ratepayers by forcing DGLP to either complete the Dawn Gateway Pipeline or be exposed to contractual claims for failing to honour that commitment. However, an exercise by Union, by itself, of its initial rights against DGLP could cause Union's parent considerable harm in that Union's parent would likely have to absorb the lion's share of the approximate \$10M of benefits that the Board had determined would accrue to Union's ratepayers in a completed sale scenario. In addition, Union would be on the hook for the 10-year demand charge commitment it had made to DGLP in the PA. Moreover, construction of the Dawn Gateway Pipeline, without the support of the other PA committed shippers, could reduce the returns Union's parent might reasonably anticipate as an indirect co-owner of the pipeline. Conversely, an exercise by Union of its right to require DGLP to honour its initial PA commitments would benefit Union's ratepayers.
14. The evidence revealed that, when faced with this conflict between the interests of its owner and the interests of its ratepayers, Union immediately chose to prefer the interests of its owner. We submit that these facts cannot reasonably be disputed.
15. We submit that the decision by Union to resolve the conflict of interest situation in which it found itself by preferring the interests of its owner to the interests of its ratepayers is a factor that needs to be considered when determining its accountability for the consequences of the "no sale" outcome that has materialized and the conditions, if any, that should attach to the relief that Union seeks in this proceeding. The actions of Union's management, in preferring the interests of Union's owner over the interests of its



ratepayers, were contributorily causative of the “no sale” scenario that has materialized. In these circumstances, we submit that Union has some accountability for the cost consequences for ratepayers of the “no sale” outcome.

#### **IV. CONSEQUENCES FOR RATEPAYERS OF A “NO SALE” OUTCOME UNDER UNION’S PROPOSAL**

16. The St. Clair Line subsidy burden on ratepayers that is embedded in 2007 Base Rates is shown in Column E, Line 11 of Exhibit A2.2 in the amount of \$1.196M, or about \$1.2M. This subsidy burden includes a Board approved utility return for Union’s owner. Over the 5-year duration of Union’s Incentive Regulation Mechanism (“IRM”) Agreement, the cumulative St. Clair Line subsidy burden on ratepayers is about \$6.0M (5 x \$1.2M per year = \$6.0M). Over the 3-year period from January 1, 2010 to December 31, 2012, the total St. Clair Line subsidy burden embedded in Base Year Rates is \$3.6M (3 x \$1.2M per year = \$3.6M).
17. The closure of Deferral Accounts 179-121 and 179-122 eliminates the potential benefits for ratepayers in an amount of up to \$10M linked to an actual sale of the St. Clair Line, being substantially more than either the 5-year or 3-year St. Clair Line subsidy burden of \$6.0M and \$3.6M respectively embedded in Base Year Rates. As the analysis hereunder shows, under Union’s Deferral Account Closure proposals, ratepayers not only lose the benefits linked to an actual sale of the St. Clair Line; they also continue to pay the full St. Clair Line subsidy burden embedded in Base Rates for the 3-year period 2010 to 2012 inclusive, and its shareholder keeps all of the cumulative St. Clair Line revenues Union actually realizes in 2010, 2011 and 2012 that exceed the \$120,000 of revenue embedded in Base Year Rates. For reasons that follow, we submit that this is an unfair outcome that should neither explicitly nor implicitly be approved in this proceeding.

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18. Subsumed in the Deferral Account Closure proposals Union asks the Board to approve are its allocation of all 2010 St. Clair Line revenues to non-utility revenue.<sup>1</sup> As shown in Columns H and I, at Line 1 of Exhibit A2.2, the total St. Clair Line revenue in 2010 is \$157,000, being \$37,000 more than the \$120,000 of revenues embedded in 2007 Base Rates.
19. Union proposes to treat all 2011 St. Clair Line revenue as utility revenue, subject to the Earnings Sharing Mechanism (“ESM”) in the IRM Agreement.<sup>2</sup> As shown in Column J of Line 1 in Exhibit A2.2, the total St. Clair 2011 revenue is \$1.455M. The amount of 2011 revenue incremental to the \$120,000 embedded in 2007 Base Year Rates is \$1.325M. Under Union’s proposal, all of the 2011 St. Clair Line revenue incremental to the \$120,000 embedded in Base Rates will accrue to Union’s owner because of the 200 basis dead band in the ESM formula.
20. Union proposes to treat the 2012 St. Clair Line revenue as utility revenue.<sup>3</sup> Union refrains from providing a 2012 estimate of revenue attributable to the St. Clair Line on the grounds that it does not separate forecasts of St. Clair and Bluewater throughput volumes.<sup>4</sup> The forecast revenues attributable to the combined St. Clair and Bluewater throughput estimates of 45,918,202/Gjs (Exhibit A1.5, page 2) are \$1,151,783. For the purposes of our analysis, we estimate St. Clair revenues for 2012 at about \$1.1M so that revenue incremental to the \$120,000 embedded in Base Year Rates is about \$1M. We urge Union to provide, in its Reply Argument, a breakdown of the combined St. Clair and Bluewater throughputs and revenues confined to the St. Clair Line. Under Union’s proposal, all of the 2012 St. Clair revenue, incremental to the \$120,000 embedded in

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<sup>1</sup> Exhibit A4.1, page 1.

<sup>2</sup> Exhibit A4.1, page 2.

<sup>3</sup> Exhibit A4.4(b).

<sup>4</sup> Exhibit A3.3(b); Exhibit A3.3, Attachment 1 Note.

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Base Rates, will accrue to Union's owner because of the 200 basis points dead band in the ESM formula.

21. Based on the foregoing, the cumulative impact on ratepayers of what Union is proposing as a result of the "no sale" outcome is a continuance of the St. Clair Line subsidy burden contained in Base Rates of \$1.2M per year for 3-years, for a total of \$3.6M, along with the payment to its owner, as an enhancement to the full utility equity return included in Base Rates, of the St. Clair Line revenues in 2010, 2011 and 2012 in excess of the \$120,000 per year embedded in Base Year Rates, being a total estimated amount of \$2.362M ( $\$0.037\text{M} + \$1.325\text{M} + \$1\text{M} = \$2.362\text{M}$ ) or rounded, about \$2.4M.
22. Implicit in Union's Deferral Account Closure proposal, and its proposed treatment of St. Clair Line revenues incremental to the \$120,000 of revenues embedded in Base Rates, is an assertion that it has no accountability to ratepayers whatsoever for the "no sale" outcome that has materialized and the consequential loss of benefits to ratepayers that could be valued in an amount that is as much as about \$10M.
23. We submit that ratepayers are not realizing benefits to off-set the St. Clair subsidy burden embedded in Base Rates in part because of the decision of Union's management to refrain from exercising Union's rights in a way that would have preferred ratepayers over its owner and instead, modifying those rights by agreement with DGLP in order to prefer the interests of Union's owner over the interests of Union's ratepayers.
24. We question the fairness of Union's proposal which, if granted, will allow Union's shareholder to keep all incremental revenue in excess of the \$120,000 of revenue included in Union's Base Rates. On fairness grounds, we submit that, at a minimum, ratepayers should get the full benefit of all St. Clair Line revenues in excess of the \$120,000 embedded in 2007 Base Year Rates which we estimate to be an amount of approximately \$2.4M. Union's owner should not have access to \$2.4M of incentive

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- payment amounts as a result of the “no sale” outcome which has materialized, either in whole or in part, as a result of the business decision of Union’s management to prefer the interests of its owner over the interests of its ratepayers.
25. These features of Union’s Deferral Account Closure proposal should not be approved. They are unfair and unreasonable.
26. The subsidy embedded in Base Rates provides Union’s owner with a full utility return on the St. Clair Line assets. Having regard to the conduct of Union’s management in preferring the interests of Union’s owner over the interests of its ratepayers, Union’s owner should not be allowed to benefit from any of the St. Clair Line revenues incremental to the \$120,000 per year embedded in Base Rates. At the very least, the measure of Union’s accountability for the actions of its management that were contributorily causative of a “no sale” outcome should be equal to the actual St. Clair Line revenues recovered in the period January 1, 2010 to December 31, 2012 that are incremental to the \$120,000 per year embedded in Base Rates.
27. For ratepayers, the best case scenario with respect to the measure of Union’s accountability for the actions of its management that were contributory causative of the “no sale” outcome that has occurred would be a finding that Union is accountable to ratepayers for the total value of benefits lost, being the sum of up to \$10M. Put another way, the total amount recorded in the Deferral Accounts of almost \$10M could be found to be an upper bound of the damages to ratepayers that the actions of Union’s management have contributorily caused. That said, it is clear that the Deferral Accounts 179-121 and 179-122 were not created to capture the measure of Union’s accountability to ratepayers arising from the actions of its management in preferring the interests of Union’s owner over the interests of Union’s ratepayers. The measure of Union’s accountability for these actions of its management is a determination that the Board has

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yet to make. Based on the foregoing, we submit that, on fairness grounds, the minimum measure of Union's accountability should be the cumulative extent by which actual St. Clair Line revenues recovered between January 1, 2010 and December 31, 2012 inclusive are incremental to the \$120,000 per year embedded in Base Rates.

28. Put another way, had Union come to the Board and asked for permission to refrain from exercising its PA rights against DGLP, rather than unilaterally deciding to favour the interests of its owner over the interests of its ratepayers, the Board would not likely have permitted Union to take the action that it took without directing, at a minimum, that all revenues incremental to the \$120,000 embedded in Base Rates accrue to the benefit of ratepayers.
29. Accordingly, for all of these reasons, we submit that on fairness grounds, all of the cumulative 2010 to 2012 St. Clair Line revenue incremental to the \$120,000 embedded in Base Rates should be flagged for crediting to ratepayers in the 2013 Rebasing case. As directed in the Decision, a final determination of matters pertaining to Union's accountability to ratepayers for the actions of its management that contributorily caused the "no sale" outcome that has emerged is to be made in Union's 2013 Rebasing case. That said, on the basis of the evidence described herein, Union's shareholder should not be allowed to earn enhanced profits from the St. Clair Line in 2010, 2011 and 2012 as a consequence of decisions taken by its management to prefer the interests of Union's owner over the interests of its ratepayers. As a result of the failure of its management to take advantage of Union's opportunity to materially benefit ratepayers, Union's shareholder should not earn any enhanced profits on the St. Clair Line in 2010, 2011 and 2012 at the expense of ratepayers.

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**V. WHAT NEEDS TO BE DONE IN THIS CASE TO PREVENT THE UNFAIR CONSEQUENCES OF UNION'S PROPOSAL**

30. For the foregoing reasons, we submit that the Board should condition its order permitting the closure of Deferral Accounts 179-121 and 179-122 on a requirement that all actual St. Clair Line revenues for the period January 1, 2010, to December 31, 2012, that are incremental to the \$120,000 embedded in Base Rates are not to be credited to Union's shareholder under the auspices of the ESM formula, as Union is proposing, but are to be brought forward in the 2013 Rate Case for crediting to ratepayers when matters pertaining to Union's accountability to ratepayers for the "no sale" outcome that has materialized are finally determined. Any other outcome is unfair.
31. The result that we are urging the Board to adopt is essentially tantamount to the result that would ensue with a removal of the entire St. Clair Line asset from the ambit of the IRM regime from December 31, 2009, when Union removed the St. Clair Line from the ambit of its utility operations, until December 31, 2012, the termination date of Union's 5-year IRM Plan. We understand that Mr. Quinn will be urging you to consider this type of an approach.

**VI. RATE BASE REINSTATEMENT VALUE OF THE ST. CLAIR LINE**

32. The depreciation expense embedded in Base Rates for 2010 and 2011 is \$278,000 per annum. The total depreciation expense for the 2-years is \$536,000. Deducting these depreciation expenses embedded in Base Rates produces a St. Clair Line Rate Base value at December 31, 2011, of about \$4.664M. For the 3-months between January 1 to March 31, 2012, St. Clair Line depreciation expense embedded in Rates is about  $\frac{1}{4}$  of \$278,000, or \$70,000. Based on the cumulative depreciation expense embedded in Base Rates for the period January 1, 2010, to March 31, 2012, we submit that the reinstatement Rate Base value of the St. Clair Line at March 31, 2012, should be no more than about \$4.6M (\$5.2M – \$606,000 = about \$4.6M).

33. From the foregoing, it follows that, in Union's 2013 Rebasing case, the Rate Base value for the St. Clair Line as of January 1, 2013, should be no more than about \$4.4M, being the \$5.2M at December 31, 2009, less 3-years of depreciation at \$278,000, for a total depreciation deduction of \$834,000, leaving reinstated Rate Base having a Net Book Value at January 1, 2013, of about \$4.366M or about \$4.4M rounded.

## **VII. COSTS**

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of March, 2012.



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Peter C.P. Thompson, Q.C.  
Vincent J. DeRose  
Counsel for CME