March 16, 2012

Ms. Kirsten Walli
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms.Walli:

Re: EB-2012-0048 – Union Gas Limited – Request for Approval to Close Deferral Account No. 179-121 and 179-122 – Redacted Reply Argument

Dear Ms. Walli:

Please find attached Union's Redacted Reply Argument in the above noted proceeding. The Confidential Reply Argument has been sent to the Board via mail.

Sincerely,

[original signed by Angela Galick on behalf of]

Karen Hockin
Manager, Regulatory Initiatives

cc: EB-2012-0048 Intervenors
C. Smith (Torys)
N. McKay (Board staff)

EB-2012-0048

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 approving closure of Deferral Account 179-121 and Deferral Account 179-122 as of April 1, 2012.

REDACTED REPLY ARGUMENT OF UNION GAS LIMITED

A. OVERVIEW

1. This is Union's Reply Argument, responding to the submissions of the Building Owners and Managers Association (Greater Toronto) ("BOMA"), Canadian Manufacturers and Exporters ("CME") and the Federation of Rental-Housing Providers of Ontario ("FRPO") (together, "the intervenors").

2. In this proceeding, Union is seeking the Board's approval to close two deferral accounts (179-121 and 179-122) (the "Deferral Accounts") related to the now-cancelled sale of the St. Clair Transmission Line. This purpose is narrow and straightforward and neither Board Staff nor any of the intervenors in this proceeding has taken issue with the proposed closure of the accounts.

3. While not contesting the proposed closure of the accounts, intervenors have taken the opportunity of this proceeding to rehash unfounded attacks on Union that failed to persuade the Board in the EB-2010-0039 proceeding. These attacks defy the well-developed evidentiary record from that proceeding and, in Union's submission, should be disregarded. In any event, they are not properly the subject of this proceeding.

B. FACTS

4. Set out below is a detailed factual record of events surrounding the proposed sale of the St. Clair Transmission Line, and the creation of the Deferral Accounts. While this factual record is extensive, it is, in Union's submission, necessary to dispel the serious allegations made by the intervenors.

The Proposed Sale of the St. Clair Transmission Line

5. In 1989, Union built the St. Clair Transmission Line, for the purpose of increasing diversity of gas supply in Ontario.[1] Since its completion, the St. Clair Line has performed below capacity.

6. In May, 2009, Union entered into a Purchase and Sale Agreement ("PSA") pursuant to which it agreed to sell the St. Clair Line to Dawn Gateway Limited Partnership ("DGLP"). DGLP planned to integrate the St. Clair Line into the proposed Dawn Gateway Pipeline.[2]

7. The PSA included a number of conditions precedent in favour of DGLP, which were for the exclusive benefit of DGLP, and which could only be waived by DGLP. These conditions, which were set out in Art. 3.1 of the PSA, 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.[3]

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[1] Answers to Interrogatories, EB-2012-0048, Exhibit A2.1.

[2] Pre-Filed Evidence of Union Gas Limited ("Union Evidence"), EB-2010-0039, Exhibit C, p. 8.

[3] Purchase and Sale Agreement, Brief of Confidential Documents of Union Gas Limited ("Union Confidential Documents"), EB-2010-0039, Tab 1, pp. 10-12, Article 3.1.

8. Article 4 of the PSA related to Closing. It provided that Closing will occur if, and only if, Union had received notice from DGLP that the conditions precedent in Art. 3.1 were satisfied, complied with, or waived. Specifically, the PSA provided that:

REDACTED[4]

9. The notice contemplated by Article 4.1 was written notice. In this respect, Art. 9.1 of the PSA provided:

REDACTED[5]

10. Union never received written notice of DGLP's satisfaction, compliance or waiver of the conditions precedent set out in para. 7, above. Nor were the conditions precedent waived by the Closing (as defined under the PSA), as the Closing never occurred.[6]

The EB-2008-0411 Proceeding

11. On December 23, 2008, Union brought an application for approval of its proposed sale of the St. Clair Line to DGLP.

12. 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."[7]

13. 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

[4] Purchase and Sale Agreement, Union Confidential Documents, EB-2010-0039, Tab 1, p. 13, Article 4.1.
[5] Purchase and Sale Agreement, Union Confidential Documents, EB-2010-0039, Tab 1, p. 23, Article 9.1.
[6] Union Evidence, EB-2010-0039, Exhibit C, p. 8.
[7] Decision and Order ("November 27, 2009 Decision"), EB-2008-0411, para. 81.

> 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.[8]

14. Nonetheless, the Board granted Union's application, on the condition that Union allocate to 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 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.[9]

15. In a subsequent proceeding, 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.[10] The Board ordered that the $6.402 million should be placed into a deferral account. Recognizing that there would be an additional impact of 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

[8] November 27, 2009 Decision, EB-2008-0411, para. 92.

[9] November 27, 2009 Decision, EB-2008-0411, paras. 122-123.

[10] Decision and Order ("March 2, 2010 Decision"), EB-2008-0411, paras. 46, 49, 56.

deferral account to capture the effect of removing the St. Clair Transmission Line from rates effective March 1, 2010.[11]

16. The Deferral Accounts were created and maintained in accordance with the Board's decisions until December 31, 2011. Because the St. Clair Line sale never took place, the amounts in the Deferral Accounts have now been reversed.[12]

The Proposed Dawn Gateway Pipeline

17. In 2008, DGLP was formed for the purpose of developing a new gas transmission line. DGLP was a limited partnership between Spectra Energy Transmission ("Spectra") (Union's parent company) and DTE Energy ("DTE").[13]

18. The proposed Dawn Gateway Pipeline was a 34 km gas transmission line between Belle River Mills Compression Station in Michigan and the Dawn Compressor Station in Ontario. DGLP intended to integrate the St. Clair Line (once purchased from Union) into the new transmission line.

19. **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. Subsequently, five shippers (including Union) entered into Precedent Agreements with DGLP to subscribe for transportation service on the Dawn Gateway Pipeline.[14]

20. Each of the Precedent Agreements contained 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.[15]

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[11] March 2, 2010 Decision, EB-2008-0411, para. 56.
[12] Answers to Interrogatories, EB-2012-0048, A1.1.
[13] Union Evidence, EB-2010-0039, Exhibit C, p. 5.
[14] Union Evidence, EB-2010-0039, Exhibit C, p. 6.
[15] Precedent Agreement, Union Confidential Documents, EB-2010-0039, Tab 2, p. 3, Article 3(a) and (c).

21. For clarity (and contrary to CME's unfounded assertion at para. 9), the Precedent Agreements *did not* give any Shipper the right to force construction of the Dawn Gateway Pipeline.

22. In March, 2010, DGLP received a telephone call from one of the Shippers indicating that, due to changes in market dynamics, the Shipper was looking to postpone its commitment to the Dawn Gateway Pipeline.[16]

23. 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.[17]

24. 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.[18]

25. The Shippers were 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.

26. 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.[19]

27. 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.[20] Although it was not obligated

[16] Transcript, EB-2010-0039, April 6, 2011, p. 11.
[17] Union Evidence, EB-2010-0039, Exhibit C, p. 9.
[18] Transcript, EB-2010-0039, April 6, 2011, pp. 11-12.
[19] Transcript, EB-2010-0039, April 6, 2011, pp. 11-12.
[20] Union Evidence, EB-2010-0039, Exhibit E2.3.

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.[21]

28. 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 agree to reimburse Dawn Gateway for its project costs to date and to decide how to allocate the reimbursement among the Shippers.[22]

29. 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.[23]

30. 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.[24]

31. **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.[25]

32. Under the Amended Precedent Agreements signed by the Shippers other than Union, those Shippers had the right to call for construction of the Dawn Gateway pipeline for in-service in 2011 or 2012. Significantly, the call right had to be exercised by all of the Shippers. No one Shipper could demand service.[26]

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[21] Union Evidence, EB-2010-0039, Exhibit E2.3

[22] Letter from Dawn Gateway dated March 26, 2010, Union Confidential Documents, EB-2010-0039, Tab 3.

[23] Union Evidence, EB-2010-0039, Exhibit B3.17.

[24] Union Evidence, EB-2010-0039, Exhibit C, p. 10.

[25] Union Evidence, EB-2010-0039, Exhibit C, p. 9; Transcript, EB-2010-0039, April 6, 2011, p. 36.

[26] Agreement and Amendment to Precedent Agreement, Union Evidence, EB-2010-0039, Exhibit E2.4, Agreements #1-5, Attachment 2, p. 2, Article 4.

33. 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.

The EB-2010-0039 Proceeding

34. In EB-2010-0039, Union applied to the Board for an order declaring that the Deferral Accounts should not be disposed of until the Dawn Gateway project had closed or was cancelled. Consistent with the Board's earlier decisions, it was Union's position that the Deferral Accounts were created by the Board to compensate ratepayers for future harm arising from a sale of the St. Clair Line. They were not created to confer on ratepayers a windfall, nor to compensate them for harm that had not occurred. Given that the sale of the St. Clair Line had not closed at that time, and it might never close there was, accordingly, no reason to dispose of the Deferral Accounts.

35. Notwithstanding the above fundamental reality, CME and others opposed the requested relief. They asked the Board to conclude that harm had occurred to ratepayers when it clearly had not, and asked that the amounts in the Deferral Accounts be disposed of to ratepayers.

36. In opposing Union's requested relief, CME and others made many of the same arguments that they have revisited in this proceeding. For example:

(a) CME (and FRPO) argued that Union took steps to produce a situation benefitting its Shareholder at the expense of ratepayers[27];

(b) CME argued that Union ought to have forced the sale of the St. Clair Line[28];

(c) CME argued that Union ought to have forced the completion of the Dawn Gateway Pipeline[29]; and,

[27] Submissions of Canadian Manufacturers & Exporters ("CME Submissions"), EB-2010-0039, paras. 118-119.
[28] CME Submissions, EB-2010-0039, paras. 111-113.
[29] CME Submissions, EB-2010-0039, para. 117.

(d) CME argued that ratepayers have been harmed by Union's failure to force the sale of the St. Clair Line[30].

37. The Board gave no effect to these arguments. In the result, the Board agreed with Union, holding:

> The Board finds that Union is not required to dispose of the balances in Accounts 179- 121 and 179-122 until the St. Clair Line sale has closed.
>
> The Board finds that if the sale of the St. Clair Line occurs, the balances in Accounts 179-121 and 179-122 shall be disposed of to ratepayers (including interest) at that time. If the sale does not occur, Union shall close the cited deferral accounts and place the St. Clair Line back into ratebase.
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> * * * *
>
> The Board further finds that if the sale transaction does not proceed on or prior to December 31, 2011, it shall be considered cancelled, and the assets shall be returned to rate base, and the deferral accounts closed without disposition.

38. In the event the sale transaction did not proceed, the Board's order specifically directed Union to apply to the Board for an order approving the closure of the Deferral Accounts "in order to return the St. Clair Line to rate base."

39. In December, 2011, having regard to the continued lack of market support for the project, DGLP advised the Board that the Dawn Gateway project had been cancelled. Union subsequently commenced this proceeding for an order approving the closure of the Deferral Accounts.

C. ISSUES

40. In Union's submission, there is only one issue in this proceeding:

(1) Should Deferral Accounts 179-121 and 179-122 be closed?

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[30] CME Submissions, EB-2010-0039, paras. 139-146.

41. Board Staff, BOMA, CME and FRPO have made a number of additional arguments, raising the following issues:

(2) At what amount should the St. Clair Line be valued for the purpose of returning it to rate base?

(3) Are ratepayers entitled to compensation for alleged wrongful conduct by Union related to its sale of the St. Clair Line to DGLP?

(4) Should 2010-2012 revenues on the St. Clair Line be excluded from Union's earnings sharing mechanism and instead given directly to ratepayers?

42. While it is Union's position that these additional issues fall outside the scope of this proceeding, it has replied substantively to the arguments below.

D. SUBMISSIONS

Should the Deferral Accounts be Closed?

43. The purpose of the Deferral Accounts was to compensate ratepayers for harm that would arise if the St. Clair Line sale had closed. Because the sale never occurred, that harm was never realized and the purpose for which the Deferral Accounts were created has ceased to exist.

44. In Union's submission, the Deferral Accounts should be closed. Neither Board Staff nor any of the intervenors disputes that this course of action is proper.

45. The only comments made on this point were by BOMA, which suggested that ratepayers have ongoing entitlement to compensation for under-recovery on the St. Clair Line. BOMA argues that "the harm to ratepayers of the under-recovery continues" and has asked the Board to confirm that "compensation for the under-utilization of the St. Clair Line will be an issue in the 2013 rebasing rates case."[31]

46. In Union's submission, these comments reflect a misapprehension of the compensation that the Deferral Accounts were intended to provide. The purpose of the Deferral Account was to compensate ratepayers for the lost opportunity to recoup past subsidy for under-recovery of

[31] Submission of the Building Owners and Managers Association, Greater Toronto, pp. 4-5.

the St. Clair Line through future revenues.[32] Ratepayers were not to be compensated because they had been "wronged" by the line's under-recovery, but because the Board ruled that they were entitled to the opportunity to offset the under-recovery through future revenues.

47. With the cancellation of the sale of the St. Clair Line, ratepayers now have the opportunity that the Board identified as their entitlement -- they now have the opportunity to offset past under-recovery with future revenues on the St. Clair Line. There no longer exists any "harm" for which ratepayers are entitled to be compensated.

48. BOMA's suggestions that ratepayers should *both* have the opportunity to earn future revenues on the St. Clair Line *and* be compensated for past under-recovery on the line would result in a windfall to ratepayers and would amount to impermissible retroactive ratemaking contrary to the *Atco* decision.[33] In Union's submission, this suggestion must be rejected.

At What Value Should the St. Clair Line be Returned to Rate Base?

49. In response to interrogatories, Union expressed its intention to return the St. Clair Line to rate base at a value of $5.2 million, the amount at which it was removed from rate base in 2009. The rationale for this proposal was that, during the period 2009-2011, the asset was treated for accounting purposes as not being on Union books as it was intended for sale at the price of $5.2 million. Assets intended for sale are not treated as being subject to depreciation, even if the sale takes a considerable amount of time to close.

50. Board Staff, BOMA, CME and FRPO all argue that the St. Clair Line should be returned to rate base less accumulated depreciation for the years 2010 and 2011.

51. Union is of the view that this issue is technically beyond the scope of this proceeding (as it has no bearing on whether the Deferral Accounts can or should be closed). In Union's view, its upcoming cost of service proceeding provides the appropriate forum in which to consider this issue.

52. That said, Union accepts the conclusions of Board Staff to the effect that the St. Clair Line should be returned to rate base at the net book value as if the asset had never been

[32] November 27, 2009 Decision, para. 92.

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

transferred to "Assets Held for Sale". Union agrees that it will incorporate the St. Clair Line back into rate base in the EB-2011-0210 proceeding at net book value less deprecation for the period that it was removed from rate base.

Are Ratepayers Entitled to Compensation for Alleged Wrongful Conduct?

53. Each of BOMA, CME and FRPO devotes considerable space in their submissions to alleging misconduct on the part of Union and asserting that ratepayers should be compensated accordingly. These are serious allegations, and yet they have been made without any one of the intervenors bothering to adduce any evidence to shore them up. Rather than posing a single interrogatory on this point, these intervenors have chosen to hurl accusations based solely on their own speculation and hypotheses. In Union's submission, this conduct is particularly egregious because a clear evidentiary record exists in the EB-2010-0039 proceeding that squarely contradicts all accusations of misconduct. Indeed, as set out above, many of the arguments they advance were made in that proceeding and were given no effect by the Board.

54. Although the language used and specific proposals for compensation differ, BOMA, CME and FRPO all take the position that Union has behaved unfairly to ratepayers and that ratepayers are entitled to compensation as a result. In the submissions below, we address specific accusations made by CME and outline why we believe they must be rejected. For the same reasons as outlined below, we submit that the arguments of BOMA and FRPO must be similarly rejected.

55. CME's submissions are premised on its assertion that "Union has some accountability for the cost consequences for ratepayers of the 'no sale' outcome" of the St. Clair Line Transaction. In other words, it has taken as axiomatic that ratepayers are entitled to some remedy or consideration related to the St. Clair Line Transaction. This is contrary to the Board's Decision in EB-2010-0039 in which it stated:

> 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 [assertions regarding entitlement to consideration related to the St. Clair Line].[34]

[34] Decision and Order, May 25, 2011, EB-2010-0039, p. 11.

56. In Union's submission, no remedy or consideration is warranted because CME's central premise (a premise that also underpins the arguments of the other intervenors) is a faulty one. The premise must fail for at least four reasons:

(a) it is inconsistent with the Board's Decision in EB-2010-0039;

(b) there was, in any event, no behavior that privileged Union's shareholder at the expense of ratepayers;

(c) Union had no opportunity to force the sale of the St. Clair Line and is not responsible for its cancellation; and,

(d) there has been no harm to ratepayers.

57. **Inconsistency with EB-2010-0039 Decision.** In EB-2010-0039, the Board considered whether some consideration should be given, in closing the Deferral Accounts and returning the St. Clair Line to rate base, to the fact that the line had, historically, been underutilized. The Board stated: "[n]othing 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."[35]

58. Two conclusions can be drawn from the Board's statement. First, contrary to the very thrust of intervenor submissions which hinge on allegations of misconduct by Union, the Board did not find fault with any aspect of Union's conduct in relation to the Dawn Gateway project. The Board was focused on the question of utilization, nothing more. Second, the Board indicated that the proper proceeding in which to address the question of utilization was not this proceeding, but Union's next cost of service proceeding.

59. In any event, Union's position on utilization at the cost of service proceeding will be that no remedy or consideration is warranted, for two reasons. (1) In terms of ongoing utilization, the evidence is that utilization has been on the rise since 2007 and has increased dramatically in the last year.[36] Accordingly, no remedy or consideration is appropriate. (2) In terms of past utilization, the line's historical underperformance cannot properly be the subject of a remedy or

[35] Decision and Order, May 25, 2011, EB-2010-0039, p. 11.

[36] Answers to Interrogatories, EB-2012-0048, Exhibit A1.5.

consideration to ratepayers. Any remedy or consideration to ratepayers based on past underperformance would constitute retroactive ratemaking contrary to the *Atco* decision and would be inconsistent with fixing just and reasonable rates on a portfolio basis.[37]

60. **No Privilege to Shareholder at Expense of Ratepayers.** CME argues that Union privileged the interests of its shareholder at the expense of ratepayers because it gave up a right to force DGLP to construct the Dawn Gateway Pipeline. As was made abundantly clear in the EB-2010-0039 proceeding, neither Union nor any other Shipper had a right under the Precedent Agreements to call for construction of the Dawn Gateway Pipeline. Again, CME is rehashing the same arguments it made in the EB-2010-0039 proceeding and continues to misconstrue the evidence from that proceeding. As outlined below, their position continues to be wrong.

61. CME states at para. 9 of its submissions that "under its initial binding shipper Precedent Agreement… Union had a right to call on DGLP to construct the Dawn Gateway Pipeline." This is incorrect. 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 can be no dispute that these conditions were never satisfied.

62. In the same paragraph (and again at paragraph 13), CME hypothesizes that "[i]f DGLP did not honour the commitments it made to Union under that binding [Precedent Agreement], then Union could assert remedies against DGLP."

63. CME does not suggest what these remedies might be, and it is very difficult to see what remedies Union could successfully seek in such a scenario. Specific performance (*i.e.* forcing DGLP to build the Dawn Gateway Pipeline) would almost certainly be unavailable, as courts have consistently held that it should be awarded only in very limited circumstances, typically having to do with the sale of land.[38] A claim for damages would be difficult to advance because,

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

[38] *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 fair market value was done based on an assessment of replacement cost.

other than out-of-pocket expenses (which ratepayers have never been called upon to pay), Union would not have suffered any damages.[39]

64. Even if an appropriate remedy were conceivable, Union would, in any event, have lost any claim for breach of the Precedent Agreement. As outlined above, the Precedent Agreement included several conditions precedent in favour of DGLP that were never satisfied.

65. In paragraphs 10-14, CME goes on to allege that Union management "gave up Union's right" to call for construction of the Dawn Gateway Pipeline, and that it did so to benefit Union's shareholder, while ignoring detriment to ratepayers. As outlined above, the suggestion that Union ever had a right to call for construction of the Dawn Gateway Pipeline is false. In addition, CME's suggestion that Union was motivated by concern for its shareholder disregards to the evidence in EB-2010-0039. The undisputed evidence in that proceeding was 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 that it was for this reason that it was prepared to accept a unanimous decision by the Shippers to delay the Dawn Gateway project.[40]

66. In paragraph 11, CME asserts that, while Union management gave up the right to "call on an individual basis for construction of the [Dawn Gateway] pipeline", the other Precedent Agreement shippers retained that right through their Amended Precedent Agreements. Again, this is simply false. The Amended Precedent Agreements did 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.[41] Accordingly, even if Union's Precedent Agreement had been amended to match the other Shippers' Agreements, Union could not have called for construction unless all "Other Shippers" agreed and provided notice to DGLP to this effect, something they did not do.

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

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

[41] Agreement and Amended to Precedent Agreement, Union Evidence, EB-2010-0039, Exhibit E2.4, Agreements #1-5, Attachment 2, p. 2, Article 4.

67. **No Opportunity to Force the Sale of the St. Clair Line.** Even if there were evidence that Union had preferred the interests of its shareholder over ratepayers, that behavior could not have had any impact on the sale of the St. Clair Line.

68. Put simply, even if Union had a right to call for construction of the Dawn Gateway Pipeline (which it did not), and even if it had sought a remedy to enforce that right (which it could not), no action by Union could have forced the sale of the St. Clair Line.

69. 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 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. That notice was never given.

70. **No Harm to Ratepayers.** CME argues that ratepayers have lost benefits of "up to $10 million" because of Union's management's preference of the interests of Union's owner over the interests of its ratepayers, which was "contributorily causative" of the cancelled sale.

71. With respect, CME's arguments in this vein are difficult to take seriously. CME spent considerable time in the EB-2008-0411 proceeding arguing that the sale of the St. Clair Line would harm ratepayers and therefore entitle them to compensation -- a submission that the Board ultimately accepted. Now that the sale is not proceeding, CME is arguing that the non-sale of the St. Clair Line *also* harms ratepayers and therefore entitles them to compensation. This inconsistency (or, rather, consistent assertion of ratepayers' entitlement to compensation regardless of what occurs) defies common sense.

72. The cancellation of the sale of the St. Clair Line means that certain benefits will not accrue to ratepayers. However, other benefits, including the opportunity to earn revenues on the St. Clair Line, have been reinstated.

73. As a matter of reason, CME, and all intervenors, should be indifferent between the sale and no sale of the St. Clair Line scenarios. Had the sale gone ahead, the ratepayers would have been harmed, but compensated. Now that the sale is not proceeding, there is no harm and no

basis for compensation. Both of those scenarios represents a situation that the Board has deemed to be fair to ratepayers.

Should 2010-2012 Revenues Be Excluded from the Earnings Sharing Mechanism?

74. CME argues that as compensation for Union's alleged wrongful conduct, ratepayers should, at minimum, be entitled to all revenue in excess of the Board-approved level earned on the St. Clair Line for the years 2010-2012. FRPO makes a similar argument.

75. For the reasons outlined above, any allegation of wrongful conduct is simply incorrect. At minimum, it flies in the face of the following points of evidence in the EB-2010-0039 proceeding:

(a) Union never had a right to force the sale of the St. Clair Line;

(b) Union never had a right to force construction of the Dawn Gateway Pipeline;

(c) Union's was motivated by concern for its ongoing relationship with the other Shippers on the proposed Dawn Gateway Pipeline; and

(d) the Dawn Gateway Pipeline project was cancelled because of unfavourable market conditions.

76. In light of this evidence, there can be no possible basis for proposing a change to the terms of Union's Incentive Rate Mechanism and Earnings Sharing Mechanism ("ESM"). CME and FRPO are attempting to secure a windfall to ratepayers in addition to their entitlements under the Board-approved ESM.

77. If the St. Clair Line had never been proposed for sale, revenues on the Line would have continued to be subject to ESM. Union is proposing to include actual 2011 and 2012 revenue from the Line in utility earnings subject to sharing, consistent with the approach that would have been followed had the sale of the asset never been proposed.[42] Union's proposal is consistent with the approach outlined by Board Staff in its submissions.

78. Contrary to FRPO's assertion at para. 11, it is not the case that Union's shareholder has retained all revenues earned while the St. Clair Line was held for sale. For the year 2011, which

[42] Answers to Interrogatories, EB-2012-0048, Exhibit A4.1.

the Line continued to be held for sale, the utility earnings calculation did not include the associated revenue requirement components (O&M, depreciation, interest, return, and taxes).[43] To avoid inconsistency in the earnings sharing calculation, the associated revenue from the reversal of the Deferral Account balances was also excluded from the earnings sharing calculation. However, the excess revenues on the Line are included in the utility earnings calculation for sharing with the ratepayer.[44] The impact of this will be known once the evidence for Union's 2011 earnings sharing is filed.

79. **2010 Earnings.** Union's 2010 earnings sharing filing was submitted and approved while the St. Clair Line was still being held for sale. Because the Line was still being held for sale, Union excluded the revenue requirement of the removal of the St. Clair Line from rate base from its 2010 earnings sharing calculation. As a result, Union's actual approach to 2010 earning sharing differs from the approach that would have been adopted if the St. Clair Line had never been proposed for sale.

80. However, as submitted by Board Staff, there is no precedent or principled basis for adjusting earnings sharing with the benefit of hindsight.[45] Furthermore, also as submitted by Board Staff, any adjustment would be insignificant.[46] Union supports the submission of Board Staff that the 2010 earning sharing should remain intact.

E. CONCLUSIONS AND RELIEF REQUESTED

81. For the reasons set out above, Union respectfully requests an Order confirming that Deferral Accounts 179-121 and 179-122 should be closed.

[43] Answers to Interrogatories, EB-2012-0048, Exhibits A1.1, A1.2, A3.2.
[44] Answers to Interrogatories, EB-2012-0048, Exhibit A4.1.
[45] Submission of Board Staff, EB-2012-0048, p. 3.
[46] Ibid.

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