



EB-2012-0048

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

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

BEFORE: Marika Hare
Presiding Member

Paul Sommerville
Member

DECISION AND ORDER
DATED: March 28, 2012

Background

Union Gas Limited (“Union”) filed an application dated January 30, 2012 with the Ontario Energy Board (the “Board”) under section 36 of the *Ontario Energy Board Act*, 1998, S.O. c.15, Schedule B, for an order of the Board approving closure of Deferral Account 179-121 – Cumulative Under-Recovery – St. Clair Transmission Line and Deferral Account 179-122 – Impact of Removing St. Clair Transmission Line from Rates (together the “St. Clair Line Deferral Accounts”) (the “Application”). The Board assigned file number EB-2012-0048 to the Application.

Union noted that, with the cancellation of the Dawn Gateway Pipeline project and the related cancellation of the sale of the St. Clair Transmission Line (the “St. Clair Line”) to Dawn Gateway LP (“DGLP”), Union will not be disposing of the balances in the St. Clair Line Deferral Accounts. Union indicated that the entries in the St. Clair Line Deferral Accounts have been reversed, the balances are now zero, and Union has requested that the noted deferral accounts be closed.

The Board issued the Notice of Application and Procedural Order No. 1 on February 7, 2012. In the Notice of Application and Procedural Order No.1, the Board adopted the intervenors in EB-2008-0411, EB-2010-0039, EB-2011-0038 and EB-2011-0025 as intervenors in the proceeding. The Board also noted that intervenors that were eligible for costs in any of the above listed proceedings are deemed eligible for costs in this proceeding. The Board also set out the timeline for interrogatories and submissions.

The Board received submissions from Board staff, the Buildings Owners and Managers Association (“BOMA”), the Canadian Manufacturers and Exporters (“CME”), the Federation of Rental-housing Providers of Ontario (“FRPO”) and reply argument from Union.

Closure of Deferral Account 179-121 – Cumulative Under-Recovery – St. Clair Transmission Line and Deferral Account 179-122 – Impact of Removing the St. Clair Transmission Line from Rates

All parties agreed that both Deferral Account 179-121 – Cumulative Under-Recovery – St. Clair Transmission Line and Deferral Account 179-122 – Impact of Removing the St. Clair Transmission Line from Rates can be closed. Parties took positions on the rate base reinstatement value of the St. Clair Line and the amount that should be disposed of to ratepayers to prevent what some suggested would be unfair consequences of Union’s proposal.

Rate Base Reinstatement Value of the St. Clair Line

In response to Board staff interrogatories, Union noted the following:

- a) The costs associated with the St. Clair Line are included in Union’s 2007 Board approved cost allocation study, which underpins Union’s delivery rates during the 2008 to 2012 Incentive Regulation (“IR”) term. Union’s delivery rates were not adjusted during IR to reflect the removal of the St. Clair Line from rate base. In lieu of adjusting rates, two deferral accounts were established. Deferral account 179-121 recorded the cost of removal for the St. Clair Line to be equal to the amount of cumulative under-recovery of the St. Clair Line from 2003 to February

28, 2010. Deferral account 179-122 recorded the impact of removing the St. Clair Line from rates effective March 1, 2010.¹

- b) The revenue requirement impact of the removal of the St. Clair Line from rate base has been excluded from earnings as well as the earnings sharing calculation as demonstrated through the accumulated balance in Deferral Account No. 179-122.²
- c) Union plans to return the St. Clair Line to rate base at its approximate net book value of \$5.2 million.³ Union noted that actual net book value of the St. Clair at December 31, 2009 (when it was taken out of rate base) was \$5,182,879.48.⁴

Board staff submitted that the Board's intention in establishing the St. Clair Line Deferral Accounts was to protect ratepayers from harm arising from Union's proposed sale of the St. Clair Line.

Board staff submitted that the principle that the Board should be seeking to achieve in its Decision is to create a "status quo" situation where ratepayers are in the same position as they would have been had the St. Clair Line never been removed from rate base (and the St. Clair Line Deferral Accounts had never been established). The creation of a status quo situation ensures that ratepayers are protected from any harm arising from Union's decision to not go forward with the sale of the St. Clair Line.

Board staff submitted that, to achieve a status quo situation, the Board should direct Union to incorporate the St. Clair Line back into rate base in its rebasing proceeding (EB-2011-0210) at the net book value of the line calculated as if the asset was never transferred to "Assets Held for Sale" and had continued to depreciate normally during the period that it was removed from rate base. Board staff submitted that the Board should direct Union to file a revised net book value of the St. Clair Line (reflecting the depreciation that would have been recorded to the asset had it continued to be included

¹ See EB-2012-0048, Interrogatory Responses, Ex. A1.4 (c).

² See EB-2012-0048, Interrogatory Responses, Ex. A1.2 (e) iii.

³ See EB-2012-0048, Interrogatory Responses, Ex. A1.3 (e).

⁴ See EB-2012-0048, Interrogatory Responses, Ex. A3.2 (b).

in rate base) for inclusion in rate base in its rebasing proceeding.⁵ BOMA⁶ and CME⁷ took similar positions in their submissions.

Union agreed with 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 transferred to “Assets Held for Sale”. Union agreed that it will incorporate the St. Clair Line back into rate base in the EB-2011-0210 proceeding at the net book value less depreciation for the period that it was removed from rate base.⁸

Consequences for Ratepayers of a “No Sale” Outcome under Union’s Proposal and Proposed Remedy

CME noted that as a “no sale” scenario has emerged, the issue of whether Union has some accountability for the cost consequences for ratepayers of this outcome needs to be determined. CME noted that the question that the Board has yet to determine is whether the management of Union breached any obligations they owed to Union’s ratepayers; and, if so, have Union’s ratepayers sustained a loss as a result of those actions. Based on the points of argument that follow, CME submitted that Union has some accountability for the cost consequences for ratepayers of the “no sale” outcome. CME submitted that 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.

CME submitted that based on the evidence that was before the Board in the EB-2010-0039 proceeding, it is common ground that, 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. CME noted that if DGLP did not honour the commitments it made to Union under that binding PA, then Union could seek remedies from 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.

⁵ See EB-2012-0048, Board Staff Submission, pp. 2-3.

⁶ See EB-2012-0048, BOMA Submission, pp. 5-7.

⁷ See EB-2012-0048, CME Submission, pp. 11-12.

⁸ See EB-2012-0048, Union Reply Submission, pp. 11-12.

CME noted that 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.

CME noted that an exercise by Union management of Union's initial right to call on DGLP to construct the pipeline or, in the alternative, its ability to seek breach of contract remedies from 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. CME submitted that 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 \$10 million of benefits that the Board had determined would accrue to Union's ratepayers in a completed sale scenario. CME noted that Union would also be responsible 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.

CME submitted that when faced with a conflict between the interests of its owner and the interests of its ratepayers, Union chose the interests of its owner. CME submitted 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. CME submitted that the actions of Union's management, in preferring the interests of Union's owner over the interests of its ratepayers, were partially causative of the "no sale" scenario that has materialized.

CME submitted that to remedy this situation, the Board should condition its order permitting the closure of the St. Clair Line Deferral Accounts 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 already embedded in Base Rates are not to be

credited to Union's shareholder under the auspices of the Earnings Sharing Mechanism ("ESM") formula, as proposed by Union. CME submitted that, instead, these amounts should be brought forward in Union's 2013 Cost of Service proceeding (EB-2011-0210) for crediting to ratepayers. CME noted that the result of its proposal is essentially the same as the result that would occur with the removal of the entire St. Clair Line asset from the ambit of the IR regime from December 31, 2009 (when Union removed the St. Clair Line from its utility operations), until December 31, 2012 (the termination date of Union's 5-year incentive regulation term).⁹ BOMA¹⁰ and FRPO¹¹ took similar positions to CME.

FRPO argued that, at a very minimum, the Board should order Union to compensate ratepayers an amount equal to the revenue requirement of the St. Clair Line while it was used as a non-utility asset (approximately \$2.2 million). FRPO submitted that this approach would correct a potential omission in the design of relief for an asset that was held (and used) outside of utility operations during the IR term. FRPO submitted, as a more comprehensive approach, the Board could order that both the revenue requirement (FRPO's submission) and the incremental revenues through until December 31, 2012 (CME's submission) be returned in aggregate to ratepayers as part of Union's 2013 Cost of Service Proceeding.¹²

In its reply argument, Union submitted that no compensation is warranted. Union noted that the positions of CME, BOMA, and FRPO are inconsistent with the Board's Decision in EB-2010-0039, are not based on fact, and that there is no harm to ratepayers of the "no sale" scenario.¹³

Union noted that 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: "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

⁹ See EB-2012-0048, CME Submission, pp. 3-11.

¹⁰ See EB-2012-0048, BOMA Submission, pp. 4-6.

¹¹ See EB-2012-0048, FRPO Submission, pp. 1-9.

¹² See EB-2012-0048, FRPO Submission, pp. 7-9.

¹³ See EB-2012-0048, Union Reply Submission, pp. 12-18.

assets may be considered by the Board in subsequent cost of service rate proceedings.”¹⁴

Union noted that there are two conclusions that can be drawn from the above noted passage from the EB-2010-0039 Decision. 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 Pipeline 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.

In response to CME’s argument that Union favoured 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, Union submitted that neither Union nor any other Shipper had a right under the PAs to call for construction of the Dawn Gateway Pipeline. Union noted that under its initial PA, it had no ability to demand service on the Dawn Gateway pipeline. Union’s PA, 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. Union submitted that there can be no dispute that these conditions were never satisfied.

Union submitted that CME’s suggestion that Union was motivated by concern for its shareholder disregards the evidence in the EB-2010-0039 proceeding. Union noted that the evidence in that proceeding was that Union was concerned about its own longstanding business relationship with the other DGLP 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 DGLP shippers to delay the Dawn Gateway project.¹⁵

Union submitted that even if there were evidence that Union had preferred the interests of its shareholder over ratepayers, that behaviour could not have had any impact on the sale of the St. Clair Line. Union noted that even if Union had a right to call for

¹⁴ EB-2010-0039, Decision and Order, p. 11.

¹⁵ EB-2010-0039, Transcripts, April 6, 2011, p. 80.

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. Union noted that the Purchase and Sale Agreement (“PSA”) between Union and DGLP is specific as to the circumstances necessary for closing to occur. Union submitted that closing is conditional on, among other things, receipt by Union of notice from DGLP that the conditions precedent in Article. 3.1 of the PSA, all of which are for DGLP’s exclusive benefit, have been satisfied, complied with or waived. Union submitted that that notice was never given.

Union agreed that 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. Union submitted that ratepayers 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. Union submitted that both of those scenarios represent a situation that the Board has deemed to be fair to ratepayers.

In response to CME’s position 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, Union submitted that any allegation of wrongful conduct is incorrect. Union noted, that at a minimum, these allegations are incompatible with the evidence in the EB-2010-0039 proceeding. Union noted that the evidence in that proceeding is to the effect that it never had a right to force the sale of the St. Clair Line, it never had a right to force construction of the Dawn Gateway Pipeline, it was motivated by concern for its ongoing relationship with the other Shippers on the proposed Dawn Gateway Pipeline and the Dawn Gateway Pipeline project was cancelled because of unfavourable market conditions.

On the basis of this evidence, Union noted that there can be no possible basis for proposing a change to the terms of Union’s Incentive Rate Mechanism and ESM. If the St. Clair Line had never been proposed for sale, revenues on the St. Clair Line would have continued to be subject to ESM. Union noted that it is proposing to include actual 2011 and 2012 revenue from the St. Clair 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.¹⁶

Union noted that 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, while the St. Clair 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). Union noted that 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 St. Clair Line are included in the utility earnings calculation for sharing with the ratepayer.¹⁷ The impact of this will be known once the evidence for Union's 2011 earnings sharing is filed.

Union noted that the 2010 earnings sharing filing was submitted and approved while the St. Clair 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 the St. Clair Line was still being held for sale. As a result, Union's actual approach to 2010 earnings sharing differs from the approach that would have been adopted if the St. Clair Line had never been proposed for sale. Union noted, in agreement with Board staff's submission, there is no precedent or principled basis for adjusting earnings sharing with the benefit of hindsight.¹⁸

Future Entitlement of Ratepayers for Compensation for Under-Recovery on the St. Clair Line

BOMA submitted that the harm to ratepayers related to the under-recovery on the St. Clair Line continues and has asked that the Board acknowledge that compensation for the under-utilization of the St. Clair Line will be an issue in Union's 2013 Cost of Service proceeding (EB-2011-0210).

Union submitted that BOMA's comments reflect a misapprehension of the compensation that the Deferral Accounts were intended to provide. Union stated that the purpose of the Deferral Account was to compensate ratepayers for the lost

¹⁶ See EB-2012-0048, Interrogatory Responses, Ex. A4.1.

¹⁷ See EB-2012-0048, Interrogatory Responses, Ex. A4.1.

¹⁸ See EB-2012-0048, Board Staff Submission, pp. 3.

opportunity to recoup past subsidy for under-recovery of the St. Clair Line through future revenues.

Union submitted that, with the cancellation of the sale of the St. Clair Line, ratepayers 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.

Board Findings

The Board finds that Deferral Account 179-121 – Cumulative Under-Recovery – St. Clair Transmission Line and Deferral Account 179-122 – Impact of Removing the St. Clair Transmission Line from Rates can be closed.

The Board finds that the St. Clair Line shall be returned to rate base in the EB-2011-0210 proceeding at the net book value of the St. Clair line less depreciation for the period that it was removed from rate base as agreed to by Union in its reply submission.

The Board notes that the St. Clair Line Deferral Accounts were created to protect ratepayers from harm as described in the EB-2008-0411 Decision and Order:

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.

The Board further finds, however, that this harm can be mitigated through an appropriate allocation to ratepayers upon completion of the transaction based on a fair market value for the asset.¹⁹

The Board notes that the St. Clair Line Deferral Accounts were designed to compensate ratepayers for the harm caused by the sale of the St. Clair Line as ratepayers would no longer have the opportunity to recover the past under-recovery of the St. Clair Line

¹⁹ See EB-2008-0411, Decision and Order, pp. 23-24.

through future revenues. However, with the sale of the St. Clair Line cancelled, the Board finds that there is no harm to be addressed and therefore no compensation is due to ratepayers.

In addition, the Board notes that there was much discussion of Union's perceived accountability for causing the "no sale" scenario. The Board is of the view that Union did not act inappropriately in its negotiations with DGLP or the other shippers regarding the Dawn Gateway Pipeline project. Therefore, there is no basis for the Board to find Union accountable to provide ratepayers with compensation for the fact that the Dawn Gateway Pipeline project and the sale of the St. Clair Line have been cancelled (or for any other reason).

The Board notes the issue of under-utilization of the St. Clair Line is within the scope of Union's 2013 Cost of Service Proceeding (EB-2011-0210) and may be raised in that proceeding should parties wish to do so.

Cost Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

The Board will issue a Decision on Cost Awards after the steps set out below have been completed.

THE BOARD THEREFORE ORDERS THAT:

1. Union shall close Deferral Account 179-121 – Cumulative Under-Recovery – St. Clair Transmission Line effective April 1, 2012.
2. Union shall close Deferral Account 179-122 – Impact of Removing the St. Clair Transmission Line from Rates effective April 1, 2012.
3. Union shall return the St. Clair Line to rate base, effective January 1, 2013, at the net book value of the St. Clair line (less depreciation for the period that it was

removed from rate base). The necessary evidence shall be filed by Union as part of the EB-2011-0210 proceeding.

4. Intervenors shall file with the Board and forward their respective cost claim to Union within 14 days from the date of this Decision.
5. Union shall file with the Board and forward to the intervenors any objections to the claimed costs of the intervenors within 21 days from the date of this Decision.
6. If Union objects to the intervenor costs, intervenors shall file with the Board and forward to Union any responses to any objections for cost claims within 28 days of the date of this Decision.
7. Union shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2012-0048**, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All parties must also provide the Case Manager, Lawrie Gluck, Lawrie.gluck@ontarioenergyboard.ca with an electronic copy of all comments and correspondence related to this case.

DATED at Toronto, March 28, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary