

BEFORE THE ADDITIONAL FACILITY OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTE (ICSID)

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant / Investor

AND:

GOVERNMENT OF CANADA

Respondent / Party

ICSID CASE NO. ARB(AF)/12/(3)

GOVERNMENT OF CANADA

REJOINDER MEMORIAL

31 March 2015

Departments of Justice and of
Foreign Affairs, Trade and
Development
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
	A. Executive Summary	1
	B. Measures at Issue	11
	C. Materials Submitted by Canada	17
II.	FACTUAL BACKGROUND.....	21
	A. The Claimant Has An Obligation to Supply its Mill Energy Needs.....	21
	1. The Claimant is Required to Displace its Load with the Self-Generation from its Original Turbine under the Terms of the Ministers' Order.....	21
	2. Celgar Pulp Applies for an Energy Project Certificate	26
	3. The Evidence Concerning the Ministers' Order	28
	4. The Claimant's Numerous Allegations Concerning the Ministers' Order.....	31
	B. British Columbia's Policy Developments with Respect to Self-Generators of Electricity	42
	1. The BCUC Directs BC Hydro to Establish a Short-Term Program to Enable Sales of Self-Generation for Export from British Columbia in Order G-38-01	42
	2. BC Hydro Attempts to Procure Electricity from Self-Generators and Develops the Concept of a GBL in the 2002 Customer Based Generation Call for Power	46
	3. BC Hydro Procures Electricity from Self-Generators in the Bioenergy Call for Power Phase I and the Integrated Power Offer	48
	a) The 2007 Energy Plan.....	48
	b) Bioenergy Call for Power	50
	C. The Claimant's Treatment in the Bioenergy Call for Power	55
	1. The Claimant's False Assertions that BC Hydro Did Not Consider all of the Data and that Celgar Did Not Understand that the GBL would be Set to Reflect an Annual Period.....	55
	2. Mr. Merwin's Baseless Claim that He Could Not Describe Normal Operations at the Celgar Pulp Mill	60

3. Celgar's Negotiations with BC Hydro Concerning the Exclusivity Clause and the Side Letter Agreement	62
D. The Claimant's Treatment at the BCUC.....	65
1. BCUC Order G-48-09	65
2. Subsequent Proceedings Relating to a FortisBC-Celgar GBL.....	66
3. Subsequent Proceedings Relating to the Claimant's "Access" to FortisBC's Embedded Cost Power	73
4. The Claimant's Allegation of "Regulatory Indeterminacy" is a Product of its Own Making	77
E. BC Hydro's Treatment of Skookumchuck	78
1. BC Hydro's Treatment of Skookumchuck in the 1997 EPA Prior to the Existing Regulatory Framework	78
2. BC Hydro's Consideration of Skookumchuck in the 2009 EPA	82
F. BC Hydro's Treatment of Howe Sound Pulp and Paper	86
1. BC Hydro's Negotiation of a Generation Threshold with Howe Sound Pulp and Paper in 2001.....	86
2. BC Hydro's Treatment of Howe Sound in the Integrated Power Offer.....	88
G. The BCUC's Approval of a Baseline Negotiated with FortisBC, the City of Kelowna and Tolko (Riverside).....	91
III. THE TRIBUNAL SHOULD NOT CONSIDER CLAIMS THAT ARE INADMISSIBLE OR THAT DO NOT FALL WITHIN ITS JURISDICTION	93
A. Concise Statement of Canada's Position	93
B. NAFTA Articles 1102 and 1103 Do Not Apply to BC Hydro's Negotiation of Celgar's GBL and Section 7.4 by Virtue of the Procurement Exception in Article 1108(7)(a)	94
C. BC Hydro's Negotiation of the GBL and Section 7.4(b) Was Not An Exercise of Delegated Governmental Authority and Cannot be the Subject of a Claim Under NAFTA Chapter Eleven	97
1. A State Enterprise Does Not Engage Article 1503(2) Merely Because It Has "Wide Discretion" or Because Its Acts Are Not "Purely Commercial"	98

2. BC Hydro's Negotiation of the GBL and Section 7.4(b) In Its Procurement of Electricity From Celgar Did Not Engage Article 1503(2).....	100
D. The Claimant's Claim Related to Section 7.4 and BC Hydro's Setting of Celgar's GBL are Time-Barred under Articles 1116(2) and 1117(2).....	104
IV. THE CLAIMANT HAS FAILED TO PROVE THAT CANADA HAS BREACHED ARTICLE 1102 OR 1103.....	107
A. Concise Statement of Canada's Position	107
B. The Claimant Misunderstands the Law under NAFTA Articles 1102 and 1103	108
1. The Claimant Misapplies the Three-Part Test under NAFTA Articles 1102 and 1103.....	108
2. Nationality is a Critical Factor under NAFTA Articles 1102 and 1103	110
3. An Allegedly Illegitimate Governmental Objective is Not an Independent Ground for Liability under Article 1102 or 1103	113
C. The GBL Setting Methodology Applied by BC Hydro To The Claimant Under The 2007 Energy Plan Was Consistent With NAFTA Articles 1102 and 1103.	116
1. BC Hydro Applied a GBL Methodology that the Claimant Understood.....	118
2. BC Hydro's GBL Methodology is Reasonably Related to Legitimate Policy Objectives.....	125
3. The Claimant Has Failed to Show Less Favourable Treatment.....	129
a) The "Below-Load Access Percentage" is an Inappropriate Measure of Less Favourable Treatment.....	129
b) The Claimant Has Not Demonstrated the Absence of a Uniform Methodology	130
c) BC Hydro Consistently Applied its GBL Methodology.....	133
4. The Different Results of BC Hydro's Consistent Application of its GBL Methodology Are Explained by the Unique Circumstances of Each Mill.....	139
a) Howe Sound (Port Mellon)'s 2010 EPA	139
b) Tembec (Skookumchuck)'s 2009 EPA.....	144
D. The Claimant has Failed to Show that the Other Instances of GBL-Related Treatment it Identifies are Inconsistent with NAFTA Articles 1102 and 1103..	149
1. Tembec (Skookumchuck)'s 1997 EPA.....	150
2. Howe Sound's 2001 Consent Agreement	153
3. Tolko Kelowna's 2001 Exemption Order	155

E. The Claimant Has Failed to Prove that the Restriction on Third-Party Sales in Section 7.4(b) of its EPA with BC Hydro is Inconsistent with NAFTA Articles 1102 or 1103	157
F. The Claimant Has Failed to Prove that BCUC Order G-48-09 is Inconsistent with NAFTA Articles 1102 or 1103	159
V. THE CLAIMANT HAS FAILED TO DEMONSTRATE A VIOLATION OF ARTICLE 1105 – THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT	162
A. Concise Statement of Canada's Position	162
B. Principles Governing a Claim under NAFTA Article 1105(1).....	163
1. The Claimant Bears the Burden of Proving the Rules of the Customary International Law Minimum Standard of Treatment It Alleges Have Been Breached.....	163
2. Arbitral Case Law Does Not Create Custom	165
3. The Threshold for Establishing a Breach of Article 1105(1) is High	166
C. The Claimant Has not Established That Any of the Complained of Measures Rise to the Level Required to Breach Article 1105(1).....	168
1. The Acts of BC Hydro Did not Breach Article 1105(1)	169
a) The Claimant Fails to Establish that BC Hydro “Discriminated” Against the Celgar Mill Contrary to the Customary International Law Minimum Standard of Treatment.....	169
b) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Failing to Act “Transparently”	171
c) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Acting in an “Arbitrary” Manner	174
d) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Acting in a “Grossly Unfair, Unjust or Idiosyncratic” Manner	175
2. The Claimant Fails to Establish a Breach of Article 1105(1) due to the Failure to Provide a “Stable Regulatory Environment”	177
3. The Claimant Fails to Establish that the Acts and Omissions of the BC Ministry of Energy and the BCUC Violated Article 1105(1).....	178
D. Conclusions.....	182

VI. DAMAGES	182
E. The Claimant's Damages Related to Celgar's <i>Below</i> -GBL Self-Generation are Unfounded.....	184
1. Celgar had No Financially Viable Market for its Below-GBL Energy	185
a) Celgar Cannot Make Profitable Sales at Mid-C	187
b) Celgar Does Not Have the Required Transmission Rights in Order to Sustain Profitable Sales in the US in the Long-Run	190
c) Celgar's Energy Does Not Qualify as a Renewable Energy Resource in the North West United States.....	192
2. BC Hydro would not have purchased Celgar's below-GBL electricity.....	196
3. The Ministers' Order Required Celgar to Use the Turbine Installed in 1993 Expansion to Serve its Own Load.....	198
F. The Claimant's Damages Related to its Alternative GBL Scenarios are Unfounded.....	199
1. The Claimant's Proposed GBLs are Arbitrary and Have no Basis in Provincial Procurement Policy	201
2. The Claimant wrongly assumes that the EPA would be renewed	201
3. The Claimant Overstates the Damages Relating to its GBL.....	204
4. Like its First Report, Navigant's Second Damages Report is Fatally Flawed.....	205
5. The Claimant ignores the effect of the 1991 Ministers' Order	208
G. The Claimant Fails to Independently Quantify its Article 1105 Damages Claim	208
VII. COSTS.....	208
VIII. CONCLUSION AND REQUEST FOR RELIEF	209

I. INTRODUCTION

A. Executive Summary

1. Proponents responding to a competitive call for the procurement of energy sometimes disagree with the contractual terms and conditions proposed, which define the parameters of the procurement. In these circumstances, the proponent has a choice: it can accept these terms and conditions; it can attempt to negotiate new terms and conditions; or it can walk away from the process. It is not reasonable, however, for a proponent to expect the procuring entity to offer terms and conditions that differ fundamentally from the mandate of the call and that would effectively reduce the amount of the energy procured.

2. This is precisely what the Claimant alleges should have happened when it claims that BC Hydro should not have “imposed” a “restriction” on Celgar through the exclusivity clause in its Electricity Purchase Agreement (“EPA”). It also complains that the B.C. Utilities Commission (“BCUC”) effectively continued this “restriction” on its ability to sell electricity in Order G-48-09. Much of the Claimant’s case now appears to rest on these supposed “restrictions.” The Claimant, however, also continues to complain about the amount of electricity BC Hydro procured when it set a Generator Baseline (“GBL”) for Celgar.

3. The Claimant in complaining about these “restrictions” expects this Tribunal to assume the role of BC Hydro, a state enterprise, in the context of a competitive procurement so that it can assess the commercial reasonableness of the exclusivity clause, which applied to all proponents. It also requests this Tribunal to substitute its judgement for that of BC Hydro when it made complex and highly technical decisions concerning the amount of electricity it would procure when it set GBLs. The Tribunal is then expected to vault into the role of the BCUC to interpret its previous regulatory decisions and replace the BCUC’s weighing and balancing of what is in the “public interest” with decisions that would only be in the Claimant’s interest. It is not the role of a NAFTA

Chapter 11 tribunal to act in the stead of state enterprises and administrative tribunals in this manner.

4. Perhaps more importantly, the Claimant's alleged "restrictions" are not really restrictions at all. The Claimant asserts that BC Hydro used the exclusivity clause to "force"¹ Celgar to use its self-generated electricity for its own load and to prevent it from selling its electricity in the U.S. market. Mr. Merwin tries to paint BC Hydro in an unfavourable light alleging that it foisted the clause on Celgar in the context of the EPA negotiations at the "11th hour," leaving the Claimant with no choice but to accept it.²

5. Nothing could be further from the truth. The exclusivity clause is a standard provision of every EPA (including the Tembec and Howe Sound EPAs) and formed part of the terms and conditions when the Claimant made its bid into the competitive call for power. As Mr. Scouras explains in his second witness statement, it was Mr. Merwin who requested the removal of the clause relatively late in the negotiations.³

6. The exclusivity clause ensures that BC Hydro will have security of supply under the EPA, and thus its removal was a concern. BC Hydro nonetheless "wanted to be responsive to the interests of Celgar"⁴ and proposed a compromise—a Side Letter Agreement that would require the parties to amend the exclusivity clause if the BCUC decided that Celgar could sell below-GBL electricity in "any pending or future regulatory

¹ Claimant's Reply, ¶ 1.

² Brian Merwin Statement II, ¶ 13. ("Just before the presentation to its Board, however, BC Hydro insisted on changing the text of Section 7.4, in a new Version 8 of the draft EPA, to preclude Celgar from selling its below-GBL energy to a third party. I remember this change well, as I was on vacation with my family at the time, and this 11th hour highly significant change disrupted that vacation".)

³ Jim Scouras Statement II, ¶ 18.

⁴ Jim Scouras Statement II, ¶ 25.

proceeding.⁵ No other pulp mill in British Columbia has received an accommodation similar to the Side Letter Agreement.⁶

7. Mr. Merwin's testimony leaves the impression that BC Hydro strong-armed Celgar into accepting the exclusivity clause in the EPA.⁷ This misleading version of events, however, is contradicted by Mr. Merwin's own contemporaneous report to his CEO on this issue, which indicates that:

[O]n Friday Hydro added one major wrinkle to our negotiations. This wrinkle was not unexpected and approximately 4 weeks ago we had reached agreement on how this issue would be addressed. The issue at hand is our current activities to allow us to sell all of Celgar's existing generation (the Arbitrage Project). ... A number of weeks ago we reached agreement with Hydro that we would leave this issue for the BC Utilities Commission to decide and withdrew the term from the EPA and agreed to set up a side letter acknowledging this withdrawal and that neither party could use this omission to further their argument. BC Hydro came back to us on Friday with the position the wording should be left in the contract to prevent us from selling our mill load and we would have a side letter acknowledging that subject to certain conditions this term would be removed. ... They however indicated they are prepared to live by the principles we established several weeks ago which [sic] was to leave this to the BCUC to decide.⁸

8. This email stands in stark contrast to how the Claimant and Mr. Merwin now attempt to characterize the discussions concerning the exclusivity clause in the context of the EPA negotiations.⁹

9. BC Hydro and the Claimant subsequently negotiated the Side Letter Agreement and executed it alongside the EPA on January 27, 2009.¹⁰ The parties effectively agreed

⁵ Jim Scouras Statement II, ¶ 25. [Emphasis added.]

⁶ Jim Scouras Statement II, ¶ 33.

⁷ Brian Merwin Statement II, ¶¶ 12-13.

⁸ Email from Brian Merwin to David Gandossi and Jimmy Lee, RE: Celgar EPA negotiations with BC Hydro, 8 November 2008, MER00071253, **R-528**. [Emphasis Added]

⁹ See Brian Merwin Statement I, ¶¶ 102-105; Brian Merwin II, ¶¶ 11-13.

¹⁰ Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, RE: Electricity

in the Side Letter Agreement that they would to leave it to the BCUC to decide the issue of Celgar's sales of below-load electricity.

10. BC Hydro had separately applied to the BCUC to determine whether FortisBC was permitted under the terms of its 1993 Power Purchase Agreement ("1993 PPA") with BC Hydro to supply electricity to customers such as the City of Nelson and Celgar who intended to engage in arbitrage. The Claimant intervened in this proceeding to push its buy all, sell all scheme. Mr. Merwin, contrary to his most recent testimony,¹¹ was fully aware that there was a risk that the BCUC could reject his "Arbitrage Project." Mr. Debienne, Vice President of Power Supply and Strategic Planning for FortisBC, had discussed with Mr. Merwin the relevant BCUC regulatory precedents and informed him that there was a 50 percent chance that the BCUC could reject the project.¹² The Claimant had also advised its Board of Directors of this regulatory risk.¹³

11. FortisBC's reservations turned out to be right. The BCUC in Order G-48-09 amended the 1993 PPA to prevent FortisBC from selling electricity supplied under this agreement to a customer that was selling electricity below their load (*i.e.*, engaging in arbitrage). The Claimant characterizes Order G-48-09 as the second "restriction" on its ability to sell below-GBL electricity because it allegedly "prevents" FortisBC from supplying *any* embedded cost energy to facilitate arbitrage. This, however, mischaracterises Order G-48-09, which places no restrictions on FortisBC's ability to source the Claimant from its own embedded cost resources.

Purchase Agreement, with Effective Date of January 27, 2009, 27 January 2009, bates 026183-026184, **R-138**.

¹¹ Brian Merwin Statement II, fn 30.

¹² Dennis Swanson Statement II, ¶¶ 5 and 9-10.

¹³ Mercer International Group, Celgar Electricity Opportunities, July 2007, at 9-10, **R-278**. [REDACTED]

[REDACTED]

12. The Claimant, for this reason, would subsequently request the BCUC to direct FortisBC to develop a matching methodology which would allow FortisBC to supply Celgar using non-1993 PPA sources of electricity. The Claimant argued that that this non-PPA electricity could then be “matched” against its load so that it could engage in below-load sales without arbitraging electricity under the 1993 PPA.¹⁴ FortisBC agreed that this approach might be feasible¹⁵ and the BCUC thus directed FortisBC in Order G-188-11 to develop a rate based on this “matching methodology.” The BCUC also confirmed that “Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power.”¹⁶ Indeed, Mr. Merwin would explain to his Board of Directors that BCUC Order G-188-11 was a “major victory”.¹⁷

13. Mr. Merwin would also write BC Hydro shortly after BCUC Order G-188-11 to request that it exercise the Side Letter Agreement and amend the exclusivity clause from the EPA.¹⁸ BC Hydro was not adverse to this request and contacted FortisBC to discuss how the accounting would be done for Celgar’s EPA sales to BC Hydro in conjunction

¹⁴ Letter from KC Moller to Alanna Gillis, Re: Zellstoff Limited Partnership (“Celgar”) Complaint Regarding the Failure of FortisBC Inc. (“FortisBC”) and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges (the “Complaint”) – Project No. 369836, dated August 15, 2011, attaching “Final Submissions of Zellstoff Celgar Limited Partnership”, p. 30, ¶¶ 6-15, **R-529**.

¹⁵ Letter from Ludmilla Herbst to Alanna Gillis, Re: Zellstoff Limited Partnership (“Celgar”) Complaint Regarding the Failure of FortisBC Inc. (“FortisBC”) and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, dated August 22, 2011, attaching Submissions of FortisBC, ¶ 57, **R-530**.

¹⁶ BCUC, Decision G-188-11, p. 49, **R-275**.

¹⁷[Emphasis in Original.] Memorandum from Management to Mercer International Board of Directors, Re Update on Celgar’s Generator Baseline Issue, 7 December 2011, at MER00191043, **R-531**.

¹⁸ Letter from Brian Merwin to BC Hydro, December 6, 2011, **R-485**.

with the new rate.¹⁹ Regrettably, the Claimant then decided instead that it would file its Notice of Intent under the NAFTA and never followed-up with its request.²⁰

14. FortisBC subsequently proposed a “Non-PPA Embedded Cost Power” (“NECP”) rate to facilitate the Claimant’s below-GBL sales.²¹ The BCUC in Order G-202-12 confirmed that the Claimant could nominate as much as 100% percent of its load²² for service from FortisBC using the NECP rate.

15. The Claimant argues in this arbitration that the NECP rate would not reflect “traditional” embedded cost rates and that “[u]nlike all other FortisBC customers, Celgar would receive none of the benefit of FortisBC’s existing, low cost generation assets.”²³ This is not accurate. Mr. Dennis Swanson, Vice President of Corporate Services for FortisBC, explains that the NECP rate would be sourced from all of FortisBC’s resources with the exception of BC Hydro’s 1993 PPA electricity.²⁴ These resources would include FortisBC’s traditional embedded cost power from sources such as its hydro-electric facilities. He also explains that the NECP rate would have been no higher than the rates Celgar has received since BCUC Order G-48-09.²⁵

¹⁹ Jim Scouras Statement II, ¶ 38.

²⁰ Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven and Articles 1503(2) and 1502(3)(A) of the North American Free Trade Agreement, *Mercer International Inc., v Government of Canada*, ¶ 20, “[U]ntil November 2011 [*i.e.*, until Order G-188-11] Celgar was the only pulp mill with self-generation capacity in the Province of British Columbia that was restricted from accessing any electric power from its local electric utility company, while selling to the market any of its self-financed, self-generated electric power.” The Claimant’s new position - that it has been “forced” to self-supply - conflicts with its own earlier pleadings.

²¹ Dennis Swanson Statement II, ¶ 27.

²² BCUC, Order G-202-12 and Decision, in the Matter of FortisBC Inc., Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, ¶ 3 of the Order, p. 3 of Decision, **R-265**.

²³ Claimant’s Reply, fn. 256.

²⁴ Dennis Swanson Statement II, ¶ 28.

²⁵ Dennis Swanson Statement II, ¶¶ 33-35.

16. The Claimant's argument that the BCUC has imposed a "restriction" that has denied it "access" to embedded cost power is thus false.²⁶ The BCUC has in fact made considerable efforts to accommodate the Claimant's demands to sell its below-GBL electricity. The Claimant has criticized the NECP rate even though it suggested this approach as a solution.²⁷ In any event, the fact that a customer of one utility could have a slightly higher rate than a customer of another utility is not a valid ground for a NAFTA complaint—especially when the customer has requested this rate so that it can secure a right to sell electricity in a way that no other self-generating customer has in the province.

17. The Claimant's intransigence over the NECP rate is also surprising in light of its repeated assertions that it could sell its electricity as "green" or renewable energy at prices that would surpass the cost of the NECP. For example, Mr. Merwin testifies that he "targeted [REDACTED] as a prospective buyer" and had "fruitful preliminary discussions."²⁸ Roger Garrett of Puget Sound, however, testifies that he has no recollection of the Claimant²⁹ and that Claimant's electricity would not have, in any event, qualified as renewable or green energy under Washington state law.³⁰

18. Canada raised significant concerns in its Counter-Memorial over the Claimant's failure to provide evidence that it could sell its electricity to third parties.³¹ In its Reply, the Claimant again failed to provide any meaningful evidence and merely recycled the same unsupported claims that it made in its Memorial. Canada thus contacted Michael

²⁶ Claimant's Memorial, ¶ 369. ("Since Order G-48-09 issued in May 2009, Celgar has been unable to access embedded cost utility electricity below its 2007 load, and thus has been unable to sell any of its below-load electricity.")

²⁷ Claimant's letter to BCUC, August 15, 2011, p. 21, **R-529**. ("FortisBC's concerns regarding jeopardizing its access to [PPA power] may be addressed through ensuring that any additional Celgar load served by FortisBC following the establishment of a FortisBC GBL *is notionally matched to and served from additional third party energy purchases.*")

²⁸ Brian Merwin Statement I, ¶¶ 82 and 144; Claimant's Memorial, ¶ 298; Claimant's Reply, ¶ 566.

²⁹ Roger Garratt Statement, ¶¶ 15-16.

³⁰ Roger Garratt Statement, ¶ 18.

³¹ Canada's Counter Memorial, ¶ 507.

McDougall, Director of Trade Policy and Information Technology of Powerex, and Dean Krauss, Director of Business Development and Contract Services for NorthPoint, the Claimant's former electricity broker, to determine whether the Claimant could actually have sold its electricity in the manner that Mr. Merwin and its experts suggest.

19. Mr. McDougall testifies that Celgar's electricity was not eligible as renewable electricity in the states of Washington,³² Oregon,³³ Montana,³⁴ California,³⁵ New Mexico,³⁶ and Arizona.³⁷ He also explains that Alberta, Idaho, Wyoming and Utah do not have renewable energy markets.³⁸ Mr. Krauss also explains that NorthPoint has never sold "green" or renewable electricity.³⁹ The Claimant thus had no market for this electricity as renewable energy. Nor did it have a broker that had experience marketing renewable energy.

20. Mr. McDougall and Mr. Krauss also explain that U.S. wholesale electricity prices tumbled towards the end of 2008, a few months after the peak prices the Claimant repeatedly refers to in its pleadings,⁴⁰ and that these electricity prices have remained low since that time at first as a result of the U.S. recession and later due to the increase in U.S. shale gas production.⁴¹ Mr. McDougall and Mr. Swanson have also provided NERA's

³² Michael McDougall Statement I, ¶¶ 73-80.

³³ Michael McDougall Statement, ¶ 81.

³⁴ Michael McDougall Statement, ¶¶ 82-83.

³⁵ Michael McDougall Statement, ¶¶ 84-89.

³⁶ Michael McDougall Statement, ¶ 94.

³⁷ Michael McDougall Statement, ¶ 91.

³⁸ Michael McDougall Statement I, ¶¶ 96-97. Mr. McDougall also explains that while it might be theoretically possible to sell to renewable energy in Nevada and Colorado the incentives in those markets have incentives for other forms of domestically produced renewable energy. Moreover, the distance of these renewable energy markets from British Columbia would make these sales impracticable. See Michael McDougall Statement, ¶¶ 93 and 95.

³⁹ Dean Krauss Statement, ¶ 31.

⁴⁰ Claimant's Memorial, ¶ 298, Brian Merwin Statement I, ¶ 83, Claimant's Reply, ¶ 507, and Robert Friesen Statement, ¶ 8.

⁴¹ Michael McDougall Statement I, ¶¶ 59-62; and Dean Kraus Statement I, ¶¶ 16 and 24.

Dr. Rosenzweig with data concerning Mid-Columbia market prices, line losses and transmission costs. Dr. Rosenzweig has “done the math” with this data and concluded that the Claimant could not have sold its electricity in a profitable manner on the Mid-Columbia market in the manner described in their Reply from 2009 onwards.⁴² Mr. McDougall and Mr. Krauss also explain some of the numerous transmission challenges the Claimant would face marketing its electricity in the United States.

21. For this reason, the Claimant is forced in its Reply to claim that BC Hydro would procure *all* of the Claimant's below-load electricity absent the measures while in the same breath stating that BC Hydro is “not legally obligated to buy it.”⁴³ The Claimant's argument remains nothing more than a thinly veiled attempt to realize the profits from its “Arbitrage Project”, which BC Hydro properly rejected in the context of the Bioenergy Call for Power.

22. The Claimant spends hundreds of pages alleging that BC Hydro had no GBL methodology,⁴⁴ that it set the Claimant's GBL with “no rules”,⁴⁵ that it has fabricated a “current normal” GBL methodology,⁴⁶ that even if such a standard existed it was applied less favourably to the Claimant,⁴⁷ and that in any event the energy policies underlying BC Hydro's procurement of electricity are “not legitimate.”⁴⁸ Each one of these baseless accusations has been made to support a claim that BC Hydro set the Claimant's GBL “*too high*,”⁴⁹ and that the Claimant should be compensated on the basis of a “nondiscriminatory GBL.” This is most evident in Table 12 of Mr. Kaczmarek's most

⁴² NERA Expert Report II, ¶¶ 144-154.

⁴³ Claimant's Reply, ¶ 36.

⁴⁴ Claimant's Reply, pp. 124-221.

⁴⁵ Claimant's Reply, ¶¶ 513-520.

⁴⁶ Claimant's Reply, ¶¶ 263 and 266.

⁴⁷ Claimant's Reply, ¶ 291.

⁴⁸ Claimant's Reply, ¶ 181.

⁴⁹ Claimant's Reply, ¶ 553 [Emphasis added]

recent report which provides the Tribunal with numerous GBL “options,” all of which are lower than the Claimant’s actual GBL of 40 MW. Mr. Kaczmarek then proceeds to quantify damages on the basis that the proper “but-for” world is one where BC Hydro should have procured additional electricity.⁵⁰ The Claimant seemingly wants to transform this Tribunal into a “Court of GBLs” asking it to examine these GBLs in granular detail, frequently without any evidence that another pulp mill in like circumstances received the same treatment.

23. The Claimant and its experts continue to allege that BC Hydro afforded the Howe Sound and Skookumchuck pulp mills more favourable treatment when it set their GBLs. It does so with little regard for the unique technical and operational circumstances of each mill. Canada has already submitted witness statements from Pierre Lamarche and Fred Fominoff concerning these critical differences at the Howe Sound pulp mill.⁵¹ Mr. Christian Lague, the Energy Manager at the Skookumchuck pulp mill, has now submitted a witness statement with this Rejoinder that confirms the basis on which BC Hydro determined a GBL for the 2009 Tembec EPA.⁵²

24. The Claimant’s case also fails for an entirely different reason—it is required to use its 52 MW turbine to provide electricity to meet its mill load. This commitment was made during a proposed expansion of the pulp mill in the early 1990s where the Claimant’s predecessor, Celgar Pulp Co., repeatedly used energy self-sufficiency as a selling point for the project’s approval.

25. Mr. Ostergaard and now Dr. Jon O’Riordan, the former Assistant Deputy Ministers from the Ministries of Energy and Environment, were responsible for supervising the review of Celgar Pulp Co.’s Energy Project Certificate application and

⁵⁰ Navigant Expert Report II, p. 62.

⁵¹ Pierre Lamarche Statement I, ¶¶ 28-34; Pierre Lamarche Statement II, ¶¶ 4-11; Fred Fominoff Statement I, ¶¶ 15-20.

⁵² Christian Lague Statement I, ¶¶ 42-52.

both testify that Celgar's representation that it would use this electricity for the purpose of load displacement was a critical consideration in approving the application and issuing the Ministers' Order.⁵³ Ms. Denise Mullen, the Director of the Projects and Policy Branch after Mr. Ostergaard, explains that the Ministry would have expected the Celgar Pulp Co. to request an amendment to the Ministers' Order if it intended to use the electricity for a purpose other than load displacement. Rather than request an amendment, the Claimant has instead raised numerous arguments in an attempt to evade the obligations imposed by this order, or alternatively, to render it unenforceable.

26. Finally, Canada will explain the Claimant's strategy of using BCUC litigation as a means to "[REDACTED]"⁵⁴ by raising issues that would have "[REDACTED]"⁵⁵ The Claimant was able to adopt this strategy because applicants such as FortisBC normally underwrite much of the cost of intervenors in BCUC proceedings. This improper litigation strategy has contributed to an annual rate increase of 1.5% for all ratepayers in FortisBC's service area.⁵⁶

27. Canada submits that Claimant's allegations when properly understood are devoid of factual or legal merit. Canada therefore requests that the Tribunal dismiss these claims and award Canada its full costs in this arbitration.

B. Measures at Issue

28. The Claimant's allegations concern two fundamental measures in this arbitration. First, the Claimant complains that BC Hydro's setting of a GBL for Celgar during the Bioenergy Call was arbitrary and discriminatory. It does so while also attempting to maintain that it is not alleging that BC Hydro was required to procure this electricity.

⁵³ Peter Ostergaard Statement I, ¶ 17; Jon O'Riordan Statement I, ¶ 75.

⁵⁴ Memorandum from Management to Mercer International Board of Directors, Re Update on Celgar's Generator Baseline Issue, 7 December 2011, MER00191043 at MER00191044, **R-531**.

⁵⁵ Memorandum from Management to Mercer International Board of Directors, Re Update on Celgar's Generator Baseline Issue, 7 December 2011, MER00191043 at MER00191044, **R-531**.

⁵⁶ Dennis Swanson Statement I, ¶ 152.

29. Second, the Claimant asserts that BC Hydro and BCUC Order G-48-09 imposed “restrictions”, which prevented it from selling its self-generated electricity below its GBL. In particular, it alleges that BC Hydro forced Celgar to accept an exclusivity clause in its EPA that prevented it from selling below-GBL electricity (i.e., section 7.4(b) of the EPA) and that the BCUC, in Order G-48-09, prohibited FortisBC from providing Celgar with access to “embedded cost electricity” which has meant that it has not been able to receive the replacement electricity that would be necessary in order for Celgar to sell to third parties.

30. The Claimant has mischaracterized the measures at issue, which this section will clarify.

31. The Claimant alleges that BC Hydro was not required to procure additional electricity from Celgar under its EPA. It asserts that:

- “Mercer makes no claim that BC Hydro was required to procure its below-load self-generated electricity.”⁵⁷
- “Mercer is not even claiming that BC Hydro was required to have purchased more energy from Mercer in the 2009 EPA.”⁵⁸
- Mercer makes no claim that BC Hydro was “legally obligated to” purchase Celgar’s below-load electricity.⁵⁹

32. The reason for this position is obvious—such a claim would fall under NAFTA Article 1108(7)(a), which provides a procurement exception for state enterprises with respect to NAFTA Articles 1102 and 1103. The Claimant does, however, maintain that “BC Hydro established a [GBL] for Celgar in a manner inconsistent with the ‘current normal operating conditions’ standard”⁶⁰ and, alternatively, that BC Hydro had “no

⁵⁷ Claimant’s Reply, ¶ 16.

⁵⁸ Claimant’s Memorial, ¶¶ 427-428; Claimant’s Reply, fn. 7.

⁵⁹ Claimant’s Reply, ¶ 36.

⁶⁰ Claimant’s Reply, ¶ 4.

consistently applied 'current normal' standard, but instead it made a series of *ad hoc* discretionary determinations in which it treated Celgar less favorably."⁶¹ It then alleges that these measures resulted in a GBL that was too high and offers a range of purportedly "non-discriminatory" GBL "options".⁶² These measures are the core of the Claimant's allegations against Canada under NAFTA Article 1102 and 1103,⁶³ as well as Article 1105.⁶⁴

33. Although it attempts to avoid the application of the procurement exception, the Claimant alleges with respect to the damages that:

To the extent BC Hydro set Celgar's GBL too high even under the "current normal standard," then the difference between that GBL of 349 GWh/year and Celgar's proper GBL reflects "new and incremental" electricity that would have been eligible for sale to BC Hydro under the terms of BC Hydro's Bioenergy Phase I power call. This electricity would have been above-GBL electricity but for BC Hydro's discriminatory measure in establishing an excessive GBL for Celgar ... [I]f Celgar's nondiscriminatory GBL should have been lower, it is all but certain that BC Hydro would have done what it did in every other EPA with a BC self-generator, and purchased all above-GBL electricity on a firm basis."⁶⁵

34. In short, the Claimant's argument that BC Hydro set its GBL improperly is as follows:

- BC Hydro infringed NAFTA Articles 1102, 1103, and 1105 when it set a GBL for the Celgar mill during the Bioenergy Call.

⁶¹ Claimant's Reply, ¶ 212.

⁶² Should the Tribunal find that a "current normal" method existed but was applied inconsistently the Claimant offers various GBLs in Figure 12 (Reply Memorial, ¶ 405) as non-discriminatory "options" for the Tribunal to consider. Should the Tribunal find that no standard existed, the Claimant alleges that it should be accorded a GBL based on the "best in jurisdiction" "below load access percentage" accorded to one of its competitors, which it provides in its Figure 22 (Reply Memorial, ¶ 214).

⁶³ Claimant's Reply, ¶¶ 32-36.

⁶⁴ Claimant's Reply, ¶ 473.

⁶⁵ [Emphasis Added] Claimant's Reply, ¶¶ 553-554.

-
- “But for” the unlawful manner in which BC Hydro set the GBL, the GBL would be lower.
 - To be made whole, the Claimant is entitled to be paid the difference between the lawful and unlawful GBLs under its EPA with BC Hydro.

35. The Claimant’s assertion that it is “not even claiming that BC Hydro was required to have purchased more energy from Mercer in the 2009 EPA,”⁶⁶ is therefore false. Its attempts to obfuscate this simple fact are without merit.

36. The second measure the Claimant complains about concerns the so-called “restrictions” on selling below-GBL electricity to third parties. The Claimant asserts that:

One measure (BCUC Order G-48-09) restricts Celgar’s access to embedded cost utility electricity; the other measure (BC Hydro’s GBL and related contractual exclusivity provisions) restricts Celgar sales of below-[GBL] self-generated electricity. Both have the same practical effect — Celgar must self-supply all electricity below [its GBL], Celgar cannot sell any of this below-[GBL] electricity to BC Hydro or a third-party, and Celgar has no access to FortisBC embedded cost electricity while selling electricity.⁶⁷

37. These allegations are quite simply false. Neither the BCUC nor BC Hydro have prevented the Claimant from selling its below-GBL electricity to third parties or, to use the Claimant’s confusing terminology, neither has “forc[ed] Celgar...to use *all* of it below-load self-generated electricity to serve its own load.”⁶⁸

38. First, the Claimant takes issue “with the restriction BC Hydro placed on Celgar’s sales of its below-GBL energy to third parties ...through the ... related exclusivity provisions in Section 7.4(b) of the 2009 EPA.”⁶⁹ This ignores the fact that every EPA that

⁶⁶ Claimant’s Memorial, ¶¶ 427-428.

⁶⁷ Claimant’s Reply, ¶ 35.

⁶⁸ Claimant’s Reply, ¶ 1. [Emphasis in original]

⁶⁹ Claimant’s Reply Memorial, ¶ 36. *See also e.g.* ¶ 35 (“Celgar must self-supply all electricity below the level of its 2007 load of 349 GWh/year [and] cannot sell any of this below-load electricity to BC Hydro or

BC Hydro has signed with self-generators contains an identical exclusion.⁷⁰ The Claimant has been treated no differently in this regard. To the contrary, the Claimant is the only self-generator with whom BC Hydro has signed a Side Letter Agreement, which permits the Claimant to sell its below-GBL electricity to third parties if the BCUC determines that these below-GBL sales are acceptable.⁷¹ The Side Letter Agreement provides that following such a BCUC decision, “section 7.4(b) of the EPA in its present form should have no force or effect.”⁷² No other mill has been accorded this type of accommodation.⁷³ Perhaps not surprisingly, the Claimant mentions the Side Letter Agreement only once in a footnote in its Reply.⁷⁴

39. The BCUC has also *agreed* that the Claimant should be allowed to sell its below-GBL electricity to third parties. In BCUC Order G-188-11 the BCUC agreed to allow the Claimant to “sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources.”⁷⁵ Following this decision, Mr.

a third party.”); ¶ 17 (Section 7.4(b) “preclude[es] Celgar from selling below-GBL electricity... to a third party.”)

⁷⁰ See e.g. BC Hydro and Howe Sound Pulp and Paper Limited Partnership, Electricity Purchase Agreement, Integrated Power Offer, 7 September 2011, bates 016362 to 016499, at section 8.4, **R-62**; BC Hydro and Domtar Pulp and Paper Products Inc., Electricity Purchase Agreement, Bioenergy Call for Power – Phase I, dated January 27, 2009, bates 065025 to 065132, section 7.4, **R-136**; BC Hydro and Tembec Electricity Purchase Agreement, 13 August 2009, bates 017023 to 017132, section 7.4, **R-198**.

⁷¹ Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, RE: Electricity Purchase Agreement, with Effective Date of January 27, 2009 (“EPA”), dated January 27, 2009, bates 026183-026184, **R-138**. The Side Letter Agreement allows the Claimant to sell its below-GBL electricity to third parties should the BCUC “in any pending or future regulatory proceeding” determine (1) that FortisBC may supply electricity to the Claimant to serve the Celgar’s Mill Load, in circumstances where the Claimant sells self-generated electricity diverted from serving Mill Load; and (2) that the Claimant may sell such self-generated electricity in those circumstances.

⁷² Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, **R-138**.

⁷³ Jim Scouras Statement II, ¶ 33. (“[N]o other pulp mill to date in any BC Hydro power procurement process (including the Bioenergy Call for Power Phase I) has been given the same preferential treatment. To the contrary, every mill that has signed an EPA with BC Hydro has been subject to the same exclusivity provision found in section 7.4 of the 2009 EPA with Celgar. No other EPA proponent has been offered a similar Side Letter Agreement with BC Hydro.”)

⁷⁴ See Claimant’s Reply, fn. 699, where they acknowledge that “resolution of Celgar’s below-GBL sales” were left to the BCUC.

⁷⁵ BCUC, Decision and Order G-188-11, Zellstoff Celgar Limited Partnership Complaint Regarding the

Merwin wrote BC Hydro on November 29, 2011, requesting that the Side Letter Agreement be put into effect and that section 7.4(b) be amended out of its EPA.⁷⁶ BC Hydro did not object to putting the Side Letter Agreement into effect; however, while BC Hydro discussed the details of the amendment with FortisBC (i.e., the rate and service that would be provided by FortisBC for replacement of the Claimant's electricity) the Claimant filed its Notice of Intent under the NAFTA on January 26, 2012. It has not since followed-up with its request to exercise the Side Letter Agreement.

40. For these reasons, it is patently false for the Claimant to assert that BC Hydro has unlawfully prevented it from selling below-GBL electricity to third parties as a result of the exclusivity clause in the EPA. Not only does the Claimant fail to mention the Side Letter Agreement, it also fails to mention the favorable decisions of the BCUC that allow it to sell its below-GBL electricity to third parties.

41. Second, the Claimant is wrong to assert that the BCUC has restricted the Claimant's "access to FortisBC embedded cost electricity while selling electricity,"⁷⁷ or that it has imposed on Celgar "a 'net-of-load' access standard that it applied to no other BC pulp mill."⁷⁸ To support its claim, the Claimant focuses solely on, and mischaracterizes, BCUC Order G-48-09.

42. The BCUC in Order G-48-09 prohibited FortisBC from purchasing BC Hydro's 1993 PPA electricity to provide to customers that were also selling electricity unless those customers were "net-of-load" on dynamic basis. BCUC Order G-48-09 did not prohibit FortisBC from using other resources to supply electricity to customers engaging

Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, November 14, 2011, p. 49, **R-275**.

⁷⁶ Letter from B. Merwin to BC Hydro dated December 6, 2011, **R-485**, (CAN003246) CAN003765. Mr. Merwin requested "that BC Hydro enter into an amendment agreement effecting the changes to the EPA contemplated by the Letter Agreement." *See also*, letter from B. Merwin to BC Hydro dated January 23, 2012, **R-570**.

⁷⁷ Claimant's Reply, ¶ 35.

⁷⁸ Claimant's Reply, ¶ 4.

in below load sales—FortisBC simply had a difficult time determining how it would separate BC Hydro's 1993 PPA electricity from the rest of its resources.

43. The BCUC determined in Order G-188-11 that “Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power”⁷⁹ and subsequently confirmed that Celgar can in fact sell up to 100% of its load.⁸⁰

44. In response to BCUC Orders G-188-11 and G-202-12, FortisBC developed the NECP rate as the replacement cost of power to facilitate sales. FortisBC proposed to source the NECP electricity from all of its sources with the exception of BC Hydro 1993 PPA power.⁸¹ The Claimant alleges that the NECP rate would not reflect “traditional embedded cost rates”. However, Mr. Dennis Swanson confirms that since 2009 the cost of the NECP rate would have been no different than FortisBC's normal rate for industrial customers (i.e., Rate Schedule 31).⁸²

45. Thus, the Claimant's contention that the BCUC unlawfully “impose[d] a net-of-load access standard on Celgar by effectively preventing FortisBC from selling Celgar any embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity”⁸³ is patently false.

C. Materials Submitted by Canada

46. Canada's Rejoinder is accompanied by exhibits and legal authorities. In addition, Canada submits the following Witness Statements and Expert Reports in support of its Rejoinder:

⁷⁹ BCUC Decision and Order G-188-11, Reasons for Decision, p. 49, **R-275**.

⁸⁰ BCUC Order G-202-12, p. 3, **R-265**.

⁸¹ Dennis Swanson Statement II, ¶ 28.

⁸² Dennis Swanson Statement II, ¶ 33.

⁸³ Claimant's Reply, ¶ 33.

Second Witness Statement of Les MacLaren:

- Mr. Les MacLaren, the Assistant Deputy Minister of the Electricity and Alternative Energy Division of the Ministry of Energy, corrects the Claimant's mischaracterizations of B.C. energy policy, BC Hydro's procurement practices and regulation by the BCUC. He also explains that the 1991 Ministers' Order, which requires Celgar to use its self-generated electricity to displace its load, remains in force.

Second Witness Statement of Jim Scouras:

- Mr. Jim Scouras, BC Hydro's former Manager of Commercial Acquisitions, describes the negotiations between BC Hydro and Celgar that led to the execution of the 2009 Side Letter Agreement, and explains that the exclusivity provision of the EPA cannot be understood without it. He also corrects the Claimant's mischaracterisation of certain facts relating to BC Hydro's procurement processes and Seller Consumed Energy.

Second Witness Statement of Lester Dyck:

- Mr. Lester Dyck, Sector Manager of Pulp & Paper and Customer Generation at BC Hydro, reiterates that BC Hydro uses GBLs to define what constitutes incremental energy that BC Hydro will consider procuring in an EPA. He also corrects certain of the Claimant's mischaracterisations relating to the setting of GBLs for BC Hydro's EPAs with Celgar, Tembec and Howe Sound.

Second Witness Statement of Pierre Lamarche:

- Mr. Pierre Lamarche, formerly Manager – Energy at the Howe Sound mill, explains that Howe Sound and BC Hydro [REDACTED]

Second Witness Statement of Dennis Swanson:

- Mr. Dennis Swanson, Vice President of Corporate Services at FortisBC, corrects certain of the Claimant's mischaracterizations of the negotiations of the Power Supply Agreement between Celgar and FortisBC and on the establishment of a FortisBC GBL for Celgar. He also explains that, under FortisBC's matching methodology, Celgar would not be prevented from accessing low-cost power from FortisBC even when selling its below-load energy to market.

Witness Statement of Dr. Jon O'Riordan:

- Dr. O'Riordan, former Assistant Deputy Minister, Environmental Programs at the BC Ministry of Environment, Lands and Parks (1989 to 1994) explains that, during the Celgar mill expansion project review, Celgar's representatives touted expected electrical self-sufficiency as an important feature of the project.

Witness Statement of Dean Krauss:

- Mr. Krauss is the Director of Business Development and Contract Services at NorthPoint Energy Solutions Inc. His statement explains that NorthPoint has never identified sales opportunities in the US for Celgar for a period greater than three months, that Mid-C prices tumbled after 2008, and that NorthPoint has never brokered renewable power on green markets.

Witness Statement of Michael MacDougall (Powerex):

- Mr. MacDougall is the Director of Trade Policy & Information Technology for Powerex Corp. and has been employed by Powerex since February 1999. Mr. MacDougall explains that Celgar could not have entered into profitable long-term sales of self-generated power in the US for lack of proper transmission rights, attractive Mid-C prices, and access to renewable markets.

Witness Statement of Roger Garatt (Puget Sound):

- Mr. Garatt, Director Strategic Initiatives at Puget Sound Energy, Inc., explains that he has no specific recollection of Mercer, and that Puget Sound was not likely interested in purchasing Celgar's self-generated electricity.

Witness Statement of Denise Mullen:

- Ms. Mullen, former Director of the Projects and Policy Branch of the B.C. Ministry of Energy, Mines and Petroleum Resources (1988 to 2002), explains how Energy Project Review processes were conducted in BC in the late 1980s and early 1990s. She confirms that Ministry officials would have considered Celgar's self-supply commitments to be important.

Witness Statement of Christian Lague:

- Mr. Lague is Engineer, Projects and Energy at Skookumchuck Pulp Inc. and has been working at the mill since 1987. He describes the terms of Tembec's 1997 EPA with BC Hydro, and explains the circumstances leading to the negotiation and conclusion of Tembec's 2009 EPA with BC Hydro, including the setting of the GBL.

Second Expert Report of NERA Economic Consulting:

- Dr. Michael Rosenzweig, Special Consultant with NERA Economic Consulting, has provided a rebuttal expert report correcting Dr. Fox-Penner's, Mr. Switlshoff's and Mr. Kaczmarek's mischaracterisations and flawed assumptions. His expert report concludes that the challenged measures have not caused the Claimant to suffer economic harm.

Second Expert Report of Pöyry Management Consulting Inc.:

- Mr. James Stockard, Senior Consultant with Pöyry Management Consulting Inc, has provided a second expert report analyzing Celgar's normal operations, including energy generation in 2007, and concluding that Celgar would have continued to operate in a similar manner without the FortisBC and NorthPoint sales contracts. He also provides additional analysis of the GBLs set for Tembec and Howe Sound.

Expert Report of David Bursey:

- Mr. David Bursey is a practicing lawyer in British Columbia and an expert on energy regulation in the Province. His expert report summarizes the regulatory regime under which the BCUC operates and reviews key principles established by the BCUC to regulate industrial customers' entitlement to receive utility power supply while selling self-generated power. He also concludes that the 1991 Ministers' Order remains in effect and imposes self-sufficiency obligations on Celgar.

II. FACTUAL BACKGROUND

A. The Claimant Has An Obligation to Supply its Mill Energy Needs

47. As explained in Canada's Counter-Memorial,⁸⁴ the Celgar Pulp Company's (which previously operated the mill) proposed installation of a new turbine in the early 1990s required it to apply for an Energy Project Certificate from the Minister of Energy. Celgar in its application for the new turbine committed to use the turbine for the purpose of self-supply. That commitment is still binding today, in effect through a Ministers' Order that was granted in response to the application, which the Claimant assumed in 2005 when it purchased the mill.

48. The Claimant dedicates nearly 50 pages of its Reply Memorial to this issue, alleging that no such commitment was either made, or that the commitment should no longer be of any effect.⁸⁵ It also filed three new witness statements and a new expert report to address the issue. The extent of the Claimant's arguments is telling as to the implications of the Ministerial Order because the Claimant's entire NAFTA case depends on its ability to sell its self-generation from the turbine installed in 1993.

49. As shown below and through the witness statements of Peter Ostergaard, John O'Riordan, and Denise Mullen, as well as the expert report of David Bursey, the Claimant's attempts to sidestep its legal obligation to self-supply have no merit.

1. The Claimant is Required to Displace its Load with the Self-Generation from its Original Turbine under the Terms of the Ministers' Order

50. As Canada explained in its Counter Memorial,⁸⁶ the Celgar pulp mill was operated by Celgar Pulp Co. ("Celgar Pulp") a joint venture of CITIC B.C. and Power Consolidated (China) Pulp Inc. in the late 1980s. Celgar Pulp had repeatedly failed to

⁸⁴ Canada's Counter-Memorial, ¶¶ 173-187.

⁸⁵ Claimant's Reply, ¶¶ 27-64.

⁸⁶ See generally, Canada's Counter Memorial, ¶¶ 170-187.

meet provincial emissions standards which forced the Ministry of Environment to issue a Variance Order that provided it with a limited amount of time to bring its emissions back into line with provincial regulations.⁸⁷

51. Celgar Pulp estimated that the cost of bringing the mill into compliance with provincial environmental regulations would be C\$ 110-150 million.⁸⁸ It determined that it could only afford to make this investment if it was part of a larger project to modernize the pulp mill and double its production capacity. This proposal was controversial as the pulp mill had attracted a considerable amount of negative attention following the Variance Order and the Kootenay region had a long history of environmental activism.⁸⁹

52. Celgar Pulp submitted a Prospectus with its proposal to modernize the pulp mill in accordance with the B.C. Major Projects Review Process in December 1989.⁹⁰ The Major Project Review Committee distributed the Prospectus widely to 26 agencies within the provincial government, the federal government and certain U.S. agencies for comment; the Committee subsequently determined that the project should proceed to Stage II and a joint federal-provincial environmental review.⁹¹ The Ministry of Energy also determined that the installation of a large thermal electric plant required a separate application for Energy Project Certificate (“EPC”).

53. Celgar Pulp’s Prospectus was also the first in a series of not less than 7 separate representations that it made — often in response to comments from the Ministry of

⁸⁷ Jon O’Riordan Statement, ¶¶ 16-20. *See also* B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, s. I.1, at 1-2, **R-327**; BC Environment Briefing Note, CITIC (50% owners of Celgar Pulp) to Review Permit Amendments Issued by Order-in-Council June 28, 1991, dated July 10, 1991, at 1, **R-328**.

⁸⁸ B.C. Ministry of Environment and Ministry of Regional and Economic Development, Review of Prospectus for Celgar Pulp Mill Expansion, July 1990, s. I.2, at 2, **R-327**.

⁸⁹ Jon O’Riordan Statement, ¶¶ 17-18.

⁹⁰ Celgar Pulp Company, Proposed Modernization and Expansion Project, 1989, **R-395**.

⁹¹ Jon O’Riordan Statement, ¶¶ 25, and 31-35.

Energy — that it would use its self-generation to displace its load so that the pulp mill would be energy self-sufficient.

Celgar Pulp’s Submissions Concerning Load Displacement

Submission	Process	Date	Representation
Prospectus	Major Project Review Process	December 1989	<i>The modernized mill will be up to 90% energy self-sufficient, compared to the existing mill which only provides 11% of its own power.</i> ⁹²
Environmental Impact Assessment	Major Project Review Process	December 1989	The expanded mill will require 52 megawatts, though the mill will generate 47 megawatts, which is 90% self-sufficient for power requirements compared to the existing mill’s capability to produce 11% of its requirements. ⁹³
Stage II Report – Special Interests Public Concerns	Major Project Review Process	July 1990	The modernized mill, as <i>designed</i> , will be 90% energy self-sufficient. This is a large improvement over the existing mill, that produces only 11% of the energy it requires. Only a small amount of electrical energy will be purchased to operate the modernized mill, in addition to stand-by power for start-up requirements. ... Celgar will continue to explore all energy alternatives that it believes will help it to achieve even more complete self-

⁹² [Italics and Bold in original] Celgar Pulp Company, Proposed Modernization and Expansion Project, 1989, p. 7, **R-395**.

⁹³ Celgar Pulp Company, Bleached Kraft Mill Expansion, Environmental Impact Assessment, December 1989, ss. 2.2.3, “Steam Production and Power Consumption”, p. 13, **R-405**.

PUBLIC VERSION
CONFIDENTIAL AND RESTRICTED ACCESS INFORMATION REDACTED

Mercer International Inc. v. Government of Canada

Canada's Rejoinder Memorial
March 31, 2015

			sufficiency in energy and to maximize the efficiency of its energy use. ⁹⁴
Major Project Review Committee Meeting	Major Project Review Process	August 16, 1990	Celgar explains that the proposed energy cogeneration aspects of the pulp mill expansion project would be in the range of 48 MW. ⁹⁵
Draft Energy Project Certificate Application	Energy Project Review Process	September 11, 1990	The expanded mill will require 52 megawatts, though the mill will generate 47 megawatts, which is 90% self-sufficient for power requirements compared to the mill's existing capacity to produce 11% of its requirements." ⁹⁶ [...] The modernized mill will require approximately 54 MVA. The new turbogenerator will be capable of producing 48 MVA and the balance (estimated at 4-6 MVA) will be purchased from West Kootenay Power." ⁹⁷
Energy Project Certificate Application	Energy Project Review Process	October 12, 1990	The heat generated in burning the black liquor will be used to produce steam. This steam, when passed through a turbo-generator, will under normal conditions supply 100% of the modernized mill's electrical power

⁹⁴ [emphasis in original] See Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C., Stage II Report, Volume 1, Overview and Environmental Summary, July 1990, pp. 35-36, **R-102**.

⁹⁵ Jon O'Riordan Statement, ¶ 44.

⁹⁶ Celgar Pulp Company, "Application for an Energy Project Certificate (E.P.C.A.) Under Section 18 of the Utilities Commission Act", September 11, 1990, p. 13, **R-408**.

⁹⁷ Celgar Pulp Company, "Application for an Energy Project Certificate (E.P.C.A.) Under Section 18 of the Utilities Commission Act", September 11, 1990, p. 7, **R-408**.

			<p>requirements. [...]</p> <p>It is estimated that the expanded mill will require approximately 50 megawatts of power and will be capable of generating 50 megawatts, which will make the mill 100% self-sufficient under normal operating conditions.⁹⁸</p> <p>[...]</p> <p>This fuel, combined with a larger, higher pressure and more efficient recovery boiler affords the opportunity to increase the power generating potential and make the mill more energy self-sufficient. The present mill relies on West Kootenay Power for the majority of its electrical power requirements – approximately 22 MVA. The existing mill operates a 2.5 MW extraction/condensing turbogenerator which supplies the balance. The modernized mill will require approximately 50 megawatts of power. The new turbogenerator will be capable of producing 50 megawatts. An additional tie-transformer (20MVA) is proposed to allow the purchase of the additional power requirements necessary to run the modernized mill during the infrequent, but essential, outages of the 50 [sic] megawatts turbogenerator.</p>
<p>Celgar Expansion Review Panel – Celgar Pulp’s Closing Statement</p>	<p>Celgar Expansion Review Panel – Federal-Provincial</p>	<p>November 9, 1990</p>	<p>The Panel was presented with the following specific examples of state-of-the-art, but proven, technology that will be used in the modernized mill: [...]</p> <p>(viii) a turbo generator will be installed</p>

⁹⁸ [Emphasis in Original] Affidavit of the General Manager of Celgar, Robert W. Sweeney, October 12, 1990 and Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act*, Celgar Pulp Company (“Celgar 1990 EPC Application”), ss. (b) and (c)(i), **R-97**

	Environmental Review		which will allow the mill to produce up to 90 percent of its electrical power requirements from by-product steam. The existing mill produces only 11% of its electrical energy requirements. ⁹⁹
--	----------------------	--	--

54. These multiple representations emphasized that Celgar Pulp would use its self-generation to displace its load and were used to sell the proposed expansion to the B.C. government and the general public. This strategy was successful with the joint federal-provincial review panel expressly recognising self-generation and load displacement as a pivotal consideration for approving the project while at the same time acknowledging that the regulation of the new turbine fell primarily under the jurisdiction of the B.C. Energy Project Review Process.¹⁰⁰

2. Celgar Pulp Applies for an Energy Project Certificate

55. As a result of Celgar Pulp's representations to the B.C. Major Project Review Committee, Peter Ostergaard, then an Acting Assistant Deputy Minister, wrote to Richard Wigen, Assistant Project Manager for the Celgar project, to advise him that Celgar Pulp was required to submit an Energy Project Certificate application for expansion of its thermal electric plant under the *UCA*.¹⁰¹ He also emphasized the following policy concern in his correspondence:

The Ministry of Energy and B.C. Hydro have identified pulp mill expansions as a significant component of incremental electricity demand in British Columbia during the 1990s. The Ministry wants to ensure that load displacement (e.g., through conservation, energy efficiency measures, self-

⁹⁹ Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Mill, Castlegar, B.C., Closing Statement, 9 November 1990, pp. 42 and 46, **R-413**.

¹⁰⁰ Celgar Expansion Review Panel, Final Report, February 1991, p. 43, **R-330**. The Claimant ignores the fact that the Celgar Expansion Review Panel did not have jurisdiction over the approval of the thermal electric plant when it observes that the Celgar Expansion Review Panel did not make recommendations with respect to energy self-sufficiency. See Claimant's Reply, ¶ 88.

¹⁰¹ [Emphasis Added] Letter from Peter Ostergaard to R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, dated August 23, 1990, pp. 1-2, **R-96**. Peter Ostergaard Statement, ¶ 13.

generation and cogeneration) is thoroughly explored before utilities are forced to build new generation resources to serve expanded industrial loads. For this reason, the Ministry supports initiatives to increase the energy efficiency and self-sufficiency of Celgar's proposed pulp mill expansion.¹⁰²

56. Mr. Ostergaard therefore requested that Celgar explain whether it intended to displace its load through self-generation¹⁰³ so that utilities such as FortisBC were not forced to build new generation resources.

57. On October 12, 1990, Celgar Pulp submitted its EPC application in which it stated the following with respect to self-generation:

The heavy black liquor, which contains the lignin and spent cooking chemicals from the digester, will be burned in a new recovery boiler (27). The recovery boiler will burn the organic material (i.e., lignin) in the heavy black liquor and converts the inorganic chemicals primarily to sodium carbonate and sodium sulphide. The inorganic chemicals will be removed as molten smelt. The heat generated in burning the black liquor will be used to produce steam. This steam, when passed through a turbo-generator, will under normal conditions supply 100% of the modernized mill's electrical power requirements.

[...]

It is estimated that the expanded mill will require approximately 50 megawatts of power and will be capable of generating 50 megawatts, which will make the mill 100% self-sufficient under normal operating conditions.¹⁰⁴

These are the only statements in the entire EPC application, aside from sub-headings, that were bolded. The EPC application also stated under "Project Justification" that:

¹⁰² Letter from Peter Ostergaard to R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, dated August 23, 1990, p. 1, **R-96**. Mr. Allan confirms that this statement reflected the Ministry of Energy policy at this time. See John Allan Statement, ¶¶ 17-18.

¹⁰³ The production of self-generated electricity is often referred to as cogeneration by the Ministry of Energy in the early 1990s.

¹⁰⁴ [Emphasis in Original] Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act*, Celgar Pulp Company, pp. 10-11, **R-97**.

This fuel, combined with a larger, higher pressure and more efficient recovery boiler affords the opportunity to increase the power generating potential and make the mill more energy self-sufficient. The present mill relies on West Kootenay Power for the majority of its electrical power requirements – approximately 22 MVA. The existing mill operates a 2.5 MW extraction/condensing turbogenerator which supplies the balance. The modernized mill will require approximately 50 megawatts of power. The new turbogenerator will be capable of producing 50 megawatts. An additional tie-transformer (20MVA) is proposed to allow the purchase of the additional power requirements necessary to run the modernized mill during the infrequent, but essential, outages of the 50 [sic] megawatts turbogenerator.¹⁰⁵

58. To remove any doubt Lorne Parnell, Vice President of Celgar Pulp, stated in a covering letter submitted with the EPC application that "... the pulp mill will be essentially self-sufficient in energy as purchased power will be significantly reduced after the implementation of the electric generation project."¹⁰⁶

59. On May 23, 1991, the Minister of Energy and the Minister of Environment approved Celgar Pulp's EPC application to install a new thermal electric generator through a Ministers' Order issued pursuant to section 19(1)(c) of the *UCA*. The Ministers' Order required Celgar Pulp to design, locate, construct and operate its thermal electric plant in accordance with its EPC application.

3. The Evidence Concerning the Ministers' Order

60. The Ministers' Order, the EPC Application and the related contemporaneous correspondence are clear and are also considered the most compelling form of evidence in an international arbitration.¹⁰⁷ Mr. Ostergaard raised policy concerns the Ministry of

¹⁰⁵ [Emphasis in Original] Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act*, Celgar Pulp Company, p. 17, **R-97**.

¹⁰⁶ Letter from Lorne Parnell to Peter Ostergaard, October 12, 1990 [attached at end of EPC application], **R-97**.

¹⁰⁷ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Grotius Publications, 1987), pp. 318-219, **RA-52** ("[D]ocumentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the

Energy had with respect to self-generation and load displacement.¹⁰⁸ Celgar Pulp submitted an EPC application that directly addressed these policy concerns. The Ministers' Order subsequently directed them to operate their turbine in accordance with the representations made in the application.

61. The officials that were involved in or that had direct knowledge of Celgar Pulp's EPC application have also testified that it was their understanding that Ministers' Order required the pulp mill to operate turbine displace its load which would make it 100% energy self-sufficient in normal conditions.¹⁰⁹ Mr. Ostergaard has already testified that he supported the EPC application for this reason.¹¹⁰ Similarly, Dr. O'Riordan, the Assistant Deputy Minister, Environmental Programs, at the Ministry of Environment at the time also recalls personally briefing David Mercier the new Minister of Environment on the Celgar EPC application.¹¹¹ Dr. O'Riordan testifies that the fact that the project was energy self-sufficient was a selling point to himself and Mr. Doug Dryden who was the Ministry of Environment representative on the Energy Project Coordinating Committee. The Minister agreed and signed the Ministers' Order on that basis.¹¹²

62. The Claimant's witnesses all lack first-hand knowledge of the development of Celgar's EPC application or the subsequent approval of Ministers' Order. Mr. Sweeney, for example, admits that he believes that the EPC Application "... must have been developed by others and presented to me as a document that was a routine submission for

presentation of a claim or the support of a contention in a suit, is ordinarily free from distrust and considered of higher probative value."); and Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London, Sweet & Maxwell, 2004), pp. 307-308, **RA-53** ("In general, arbitral tribunals tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents.")

¹⁰⁸ See Letter from Peter Ostergaard to Mr. R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, dated August 23, 1990, **R-96**.

¹⁰⁹ Peter Ostergaard Statement, ¶ 20; and Jon O'Riordan Statement, ¶ 77.

¹¹⁰ Peter Ostergaard Statement, ¶¶ 17, 18-21.

¹¹¹ Jon O'Riordan Statement, ¶¶ 74-75.

¹¹² Jon O'Riordan Statement, ¶ 75.

governmental approval ...”¹¹³ Similarly, Mr. Allan, who after leaving the civil service spent more than 15 years representing the forest products sector,¹¹⁴ admits that he does “not have a specific recollection of the Order”¹¹⁵ and observes that he is not “a lawyer and leave[s] to others the legal issues in this case”¹¹⁶—immediately before offering opinion evidence concerning the interpretation of the Ministers’ Order as a fact witness.¹¹⁷ Finally, Mr. McLaren, Celgar’s former Environmental Manager, explains that he was involved in the federal-provincial environmental review, but is ambiguous concerning his involvement in the EPC application.¹¹⁸ This is because he had no direct involvement in the process. Dr. O’Riordan relates that Mr. Dryden, the former Director of the Environmental Assessment Branch, has informed him that he has no recollection of consulting Mr. McLaren concerning this EPC application.¹¹⁹

63. Mr. Allan and Mr. McLaren are also not disinterested third party witnesses. Rather, these witnesses are consultants with close business and personal relationships with the Claimant and direct involvement in its attempt secure energy subsidies from the B.C. Government and BC Hydro. Mr. Allan casts himself as an “independent”¹²⁰ consultant. However, he does not disclose in his witness statement that during his time with the Council of Forest Industries he actively supported the lobbying efforts of the Pulp and Paper Task Force to convince the B.C. Government to provide the pulp and

¹¹³ Robert Sweeney Statement, ¶ 3.

¹¹⁴ John Allan Statement, ¶ 9.

¹¹⁵ John Allan Statement, ¶ 12.

¹¹⁶ John Allan Statement, ¶ 19.

¹¹⁷ John Allan Statement, ¶¶ 19-20. *See e.g.* Meeting Notes, Pulp and Paper Task Force on Self-Generation, **R-532**. Allan was present at Task Force meetings between January 2008 to June 2008. *See also* Draft Terms of Reference, Working Group on Pulp and Paper Self-Generation Sales Policy, March 25, 2008, **R-533**.

¹¹⁸ *See* James McLaren Statement, 12 December 2014, ¶ 10. (“I was an official of the Ministry of the Environment when Celgar filed its [EPC] Application to expand and modernize the pulp mill.”)

¹¹⁹ Jon O’Riordan Statement, ¶ 81.

¹²⁰ John Allan Statement, ¶ 9.

paper industry with energy subsidies. Similarly, Mr. McLaren was intimately involved in assisting Mr. Merwin's with his "Arbitrage Project" during his tenure in Celgar. His antipathy to BC Hydro is reflected in some of his contemporaneous internal communications.¹²¹ This Tribunal, therefore, should treat the *post hoc* evidence provided by these consultants with caution.

4. The Claimant's Numerous Allegations Concerning the Ministers' Order

64. The Claimant first attempts to assert that the Ministers' Order does not impose a condition to use the turbine to displace its load as the description Celgar Pulp provided in the EPC application was only an estimate.¹²² In particular, it relies heavily on one of the statements in the EPC application which indicates that: **"[i]t is estimated that the expanded mill will require approximately 50 megawatts of power and will be capable of generating 50 megawatts, which will make the mill 100% self-sufficient under normal operating conditions."**¹²³

65. Canada observes that Celgar Pulp's first representation in the EPC application which is made on the previous page is not qualified as an "estimate". Celgar Pulp indicated that: **"[t]he heat generated in burning the black liquor will be used to produce steam. This steam, when passed through a turbo-generator, will under normal conditions supply 100% of the modernized mill's electrical power requirements."**¹²⁴ This statement isn't ambiguous. Celgar Pulp represented here that the

¹²¹ Email from J. MacLaren to B. Merwin, Re: Phase I Request for Proposals: Notice to Customers of GBL, May 4, 2008, **R-534** ("Good luck in getting a meeting with Scouras as we need to be blunt regarding their new found belief that we are [sic] their customer. I have had too many re-buffs over the years from BC Hydro telling me that I am not a customer and that I would not get that same treatment as their customers. ... If we can't break the BC Hydro position that the existing TG GBL portion is ineligible, then we must fight to establish our GBL to be as low as credible – I support your logic of picking a GBL of 33 MW to reflect conditions prior to Mercer's energy investments.")

¹²² Claimant's Reply, ¶ 68. Robert Sweeney Statement, ¶ 6.

¹²³ [Emphasis in Original] Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act*, Celgar Pulp Company, p. 11, **R-97**.

¹²⁴ [Emphasis in Original] Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the

steam from burning black liquor in the recovery boiler alone will normally be sufficient to meet all of the pulp mill's electrical power requirements.¹²⁵ Mr. David Bursey, Canada's legal expert, concludes that the Ministers' Order is clear and that requires the Claimant to use its electricity to supply the mill.¹²⁶ Nor is this an inflexible requirement to maintain 100% energy self-sufficiency at all times. Rather, Celgar Pulp indicated that this would only occur under "normal conditions".

66. The Claimant's assertions also ignore the fact that Celgar Pulp was required to provide specific information in its EPC application by regulation.¹²⁷ Ms. Denis Mullen, the former Director of the Project and Policy Branch, at the Ministry of Energy explains that B.C. Reg. 388/80 and the Guide to the Energy Project Review Process detailed the information that should be included in an EPC application including a detailed description of the purpose of the project.¹²⁸ The purpose of installing the turbine in this instance is clear – Celgar Pulp planned to use the turbine to displace as much of its load as possible so that it was essentially self-sufficient in terms of electricity. The Ministers' Order required Celgar Pulp to operate the turbine for this purpose which is set out in a clear manner in its application.¹²⁹

Utilities Commission Act, Celgar Pulp Company, p. 10, **R-97**.

¹²⁵ Mr. Sweeney also asserts that Celgar Pulp provided this information as a "good faith" estimate and that never intended to make commitments with respect to energy self-sufficiency. See Robert Sweeney Statement, ¶ 6. Mr. Sweeney, however, has also testified that he has no recollection of the EPC application and that he believes that it was prepared by others. See Robert Sweeney Statement, ¶ 3. This means he has no knowledge of the intent of Celgar Pulp's counsel and the other staff that prepared the EPC application. Nor is this assertion particularly relevant. Celgar Pulp provided this information in its EPC application in bold font in its Project Description and then repeated it in its Project Justification. The Ministers' Order then bound them to these representations. The fact that Celgar Pulp hoped that this would not be seen as a commitment is not relevant as to whether one was created.

¹²⁶ David Bursey Expert Report, ¶¶ 180-185.

¹²⁷ B.C. Reg. 388/80, s. 1, **R-412**.

¹²⁸ Denise Mullen Statement, ¶ 18.

¹²⁹ The Claimant asserts that load displacement "was the only use possible" for this electricity as British Columbia did not allow self-generators access to transmission at this time. See Claimant's Reply, ¶ 70. It then rather confusingly admits that Celgar Pulp could sell its electricity to West Kootenay Power. See Claimant's Reply, ¶ 113 and David Austin Expert Report, ¶ 31. The Claimant's assertions concerning

67. B.C. Reg. 388/80 also required technical studies and information.¹³⁰ The Guide to the Energy Project Review Process explained that this technical information should demonstrate the need for the electricity provided by the project by including how much electricity the project will supply.¹³¹ It also indicated that certain projects should provide “forecasts” and information on regional and provincial supply and demand. This information could then be used for resource planning purposes (i.e., the acquisition of new generation assets or transmission lines). Celgar Pulp forecast or “estimated” that the turbine would provide 50 MW of electricity which would have been sufficient to meet 100% of the pulp mill’s electrical requirements. This did not require a proponent to predict the precise amount of electricity the turbine would self-generate as a pulp mill’s energy production using black liquor is directly linked to its pulp production. However, it did have to provide the Ministry of Energy with a clear estimate of how much energy the expanded pulp mill would self-supply and periodically consume for resource planning purposes. This was particularly important given that Celgar Pulp was supplied by West

access to transmission are not entirely accurate. British Columbia’s Open Access Transmission Tariff did not exist at this time. However, Jack Davis, the Minister of Energy, Mines and Petroleum Resources issued a Statement on Power Export Policy in 1989 that indicated that the B.C. Government was willing to issue Export Removal Certificates for long term firm power sales on a project-by-project basis. *See* Jack Davis Statement on Power Export Policy, November 28, 1989, **R-505**. BC Hydro and West Kootenay Power were also willing to enter into EPAs with self-generators. For example, the Weyerhaeuser’s pulp mill in Kamloops B.C. proposed installing a thermal electric power plant that would make the pulp mill energy self-sufficient while providing a further [REDACTED] of electricity to BC Hydro. Self-Generation Project at Weyerhaeuser Canada Ltd., Kamloops Pulp Mill. Energy Project Certificate Application (Preliminary)”, July 1990, p. 2, **R-512**. Moreover, West Kootenay Power issued a Call for Power in 1993 as a result of a projected shortfall in electricity. Letter from RG Siddall to Bob Learmouth, “Re: West Kootenay Power’s All Source Supply-Side Power Acquisition Request for Proposal,” June 3, 1993 **R-508**. Celgar Pulp also entered into a short term electricity sales arrangements with Pope & Talbot. *See* Fax from Clyde Sharp to Bob Williams/R Koots (Pope and Talbot), Re: Energy and Demand, dated June 15, 1993, **R-510**.

¹³⁰ B.C. Reg. 388/80, s. 1(c)(i), **R-412**.

¹³¹ *See* B.C. Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen’s Printer for British Columbia, 1982), Appendix 2 – Information Requirements, **R-95**. Mr. Ostergaard provided Celgar Pulp a copy of Reg. 388/80 and this Guide at the start of the Energy Project Review Process. *See* Letter from Peter Ostergaard to R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, dated August 23, 1990, p. 2, **R-96**.

Kootenay Power (“WKP”) which had insufficient resources to meet its load and which was projecting an energy shortfall.¹³²

68. Mr. Allan and Mr. McLaren confuse this issue further by comparing the policy condition to operate the pulp mill in accordance with the EPC application to prescriptive environmental regulatory regimes such as the precise effluent and emissions controls under the B.C. *Waste Management Act*.¹³³ These regimes have very specific requirements as they concern public health and environmental protection from harmful emissions. This is the reason these requirements have their own regulatory regime for monitoring and reporting as well as an independent statutory decision maker that is responsible for them.

69. The Claimant also complains that the B.C. Ministry of Energy did not actively monitor Celgar Pulp’s compliance with its obligation to displace its load and suggests that there was no enforcement mechanism in the Ministers’ Order. The Claimant’s complaints ignore the fact that there was no need for the Ministry of Energy to monitor this commitment at that time. The B.C. electricity sector was very heavily regulated in the early 1990s. This meant that the Ministry of Energy would have been aware if the Celgar Pulp decided to put the electricity to another use. For example, the approval of an EPA with BC Hydro or WKP which would have required approval by the BCUC to confirm that they were in the public interest.¹³⁴ Moreover, British Columbia permitted electricity exports through Powerex but only after a proponent had secured an Energy Removal Certificate.¹³⁵ Finally, Celgar Pulp would also have to submit a request for a

¹³² Peter Ostergaard Statement, ¶ 17; Denise Mullen Statement I, ¶ 35; Letter from RG Siddall to Bob Learmouth, “Re: West Kootenay Power’s All Source Supply-Side Power Acquisition Request for Proposal,” June 3, 1993, **R-508**.

¹³³ John Allan Statement, ¶ 22; and James McLaren Statement, ¶¶ 15 and 18.

¹³⁴ *Utilities Commission Act*, S.B.C. 1980, c. 60, as amended, s. 85.3, **R-504**.

¹³⁵ *Utilities Commission Act*, S.B.C. 1980, c. 60, as amended, s. 22. (“So as to ensure the efficient use of resources and to ensure that the present and future requirements of the Province may be met, no person shall remove from the Province an energy resource produced, manufactured or generated within the Province, except in accordance with an energy removal certificate granted under this Part ...”), **R-504**.

modification to the Ministers' Order. This regulatory regime meant that there was no need to put in place an elaborate system to monitor compliance.

70. Mr. Allan also attempts to suggest that the Ministers' Order did not create binding commitments with respect to the EPC application as there was no "mechanism for accountability" and no "consequences for non-compliance."¹³⁶ This is not true. First, the Ministers' Order itself indicates that:

This Order may be rescinded at the discretion of the Minister [of Energy, Mines and Petroleum Resources] if:

- (a) Celgar commits a breach of the Conditions of this Order and fails to rectify the same, to the Minister's satisfaction, within 30 days after notice requiring remedy is given by the Minister to Celgar.¹³⁷

71. The Minister of Energy was empowered under section 124.1 to apply to B.C. Supreme Court to restrain a person from constructing or operating this project in a manner that was not in accordance with the Order. Finally, section 124(1)(g) made it an offence to contravene section 17 which could have resulted in a fine of as much as \$10,000 per day.¹³⁸ These provisions, which Mr. Allan does not appear to be familiar with, provided a means of enforcing the Ministers' Order. The Energy Project Review Process was replaced in 1995 by the new *Environmental Assessment Act*. The Ministers' Orders were transitioned under the provisions of this statute which also included mechanisms for their enforcement.¹³⁹

¹³⁶ John Allan Statement, ¶¶ 23-24.

¹³⁷ In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion, Ministers' Order dated May 23, 1991, s. 3, **R-100**. "Minister" is defined in the preamble as the Minister of Energy, Mines and Petroleum Resources.

¹³⁸ S.B.C. 1980, c. 60, ss. 124(4) and (5) **R-504**. Denis Mullen Statement, ¶ 16.

¹³⁹ See Les MacLaren Statement II, ¶¶ 33-32. David Bursley Expert Report, ¶¶ 170-175.

72. Mr. Allan also argues that the Ministers' Order does not create obligations in "perpetuity".¹⁴⁰ Canada agrees. The Ministers' Order remains in force for the lifespan of the regulated project unless it was rescinded before then.¹⁴¹ This is reflected in section 51(9) of the *Environmental Assessment Act*, which replaced the *UCA* and continued to govern EPCs and Minister's Orders. According to *EAA* s. 51(9), Orders remain in effect for the life of the project in respect of which it was issued."¹⁴² Nor is it difficult to modify a Ministers' Order.

73. Ms. Mullen testifies that proponents frequently requested amendments to Orders issued pursuant to section 19(1)(c) of the *UCA*.¹⁴³ For example, if a proponent intended to change the purpose of a regulated project, which would have affected the analysis of the need for this electricity it could simply request an amendment pursuant to section 18 of the *UCA*.¹⁴⁴ B.C. Reg. 388/80 set out the information that had to be included in a request for a modification.¹⁴⁵ Proponents made these requests when they wanted to increase the size of their turbine.¹⁴⁶ Similarly, Weyerhaeuser Canada submitted a draft EPC application in July 1990 to install a 50 MW turbine at its Kamloops pulp mill to displace its remaining load and sell the remaining [REDACTED] of surplus electricity to

¹⁴⁰ See e.g., John Allan Statement, ¶¶ 19 and 32; Claimant's Reply, ¶¶ 77, 82 and 87.

¹⁴¹ See In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion, Ministers' Order dated May 23, 1991, s.3, pp. 2-3, **R-100**.

¹⁴² Les MacLaren Statement II, ¶¶ 44; *Environmental Assessment Act*, SBC 2002, c.43, s. 51(9), **R-466**.
Environmental Assessment Act, RSBC 1996, c.119, s. 36, **R-94**.

¹⁴³ Denise Mullen Statement, ¶ 55.

¹⁴⁴ See e.g. Letter from Doug Dryden to Denise Mullen, Re: Modification to NW Energy Disposition Order, dated April 11, 1990, and attached draft modification order, **R-515**. See also, Letter from Doug Dryden to Denise Mullen-Dalmer, Re: NW Energy- Revision of Disposition order, dated December 16, 1993, and attached materials, **R-516**.

¹⁴⁵ B.C. Reg. 388/80, s. 2, **R-412**.

¹⁴⁶ Denise Mullen Statement, ¶ 55.

BC Hydro.¹⁴⁷ Weyerhaeuser Canada, however, had to resubmit its draft EPC application in 1994 when it changed the purpose of the project to selling all of its electricity.¹⁴⁸

74. The Claimant through Mr. Austin also claims that the Ministers' Order could not require its self-generation to be used to displace its load because it was not an energy "use" project. Mr. Austin in a rather novel argument claims that the Ministry of the Energy could only regulate how energy was used (i.e., the purpose of a project) if that project was an energy "use" project. David Bursey, however, disagrees.¹⁴⁹ This claim is not supported by the *UCA*, B.C. Reg. 388/80 or contemporaneous materials produced by the B.C. Ministry of Energy concerning energy "use" projects.

75. The Energy Project Review Process applied to "regulated projects" under Part 2 of the *UCA*. Regulated projects are in turn defined to include "energy use projects" which itself is defined in the following manner:

"energy use project" means a mill, factory, plant, smelter, oil refinery, metal refinery or other undertaking or facility designed to use, convert or process an energy resource or coal, or any combination of them, at the rate of 3 PJ or more a year, and for the purpose of this definition an energy resource other than electricity is used, converted or processed at that rate where it is of a quantity capable of yielding that amount of energy by combustion.¹⁵⁰

76. The entire focus of this definition is on the amount of energy that the project consumes or uses. These provisions were intended to regulate the amount of electricity

¹⁴⁷ See Weyerhaeuser Canada, Self-Generation Project at Weyerhaeuser Canada Ltd. Kamloops Pulp Mill, Energy Project Certificate Application (Preliminary), July 1990, pp. 1-2, **R-512**; Denise Mullen Statement, ¶ 46.

¹⁴⁸ Weyerhaeuser Canada Ltd., Kamloops Energy Recovery Project, Draft EPC Application, November 1994, pp. 1 and 18, **R-509**. In particular, Weyerhaeuser Canada proposed selling ██████████ of its electricity to Portland General Electric with the balance to be sold to other Canadian or U.S. utilities. Weyerhaeuser ultimately withdrew this application.

¹⁴⁹ David Bursey Expert Report, ¶¶ 193-201.

¹⁵⁰ Section 16 of the *UCA* defined an "energy resource" as "...natural gas and oil, and all other forms of petroleum and hydrocarbon, in gaseous or liquid state, and electricity." This definition does not include black liquor.

the proposed project would consume. This is confirmed by the Guide to the Energy Project Review Process which describes energy “use” projects as:

[A]ny new project capable of using 3 PJ per year, or the addition of 3 PJ to an existing project.¹⁵¹

77. The Guide then provides examples of projects with such capacity such as Alcan's smelter in Kitimat. It follows that the “use” in an “energy use project” refers to amount of energy that consumed and not the use that it was put to.

78. The Claimant, Mr. Austin and Mr. Allan also assert the rather unusual defense that the Ministers' Order no longer applies as a result of other subsequent changes in the regulatory changes in British Columbia. Mr. Bursey, however, concludes that Ministers' Order remains in force and effect.¹⁵² Mr. Bursey and Mr. MacLaren also explain how the Ministry of Energy transferred responsibility for Ministers' Order to the Environmental Assessment Office following the entry into force of the new *Environmental Assessment Act*.¹⁵³ The Claimant, of course, is aware of this as it corresponded with the Environmental Assessment Office when requested the assignment of the Ministers' Order to Celgar in March 2005.¹⁵⁴

79. The Claimant also complains that the Ministers' Order has not been raised at the BCUC proceedings involving Celgar before this NAFTA arbitration. The Claimant is correct, but this is understandable for a number of reasons. First, the Ministry of Energy was no longer responsible for oversight and supervision of the Ministers' Order. The Energy Project Review Process was wound up with the repeal of Part 2 of the *UCA* in

¹⁵¹ See B.C. Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen's Printer for British Columbia, 1982), p. 6, **R-95**.

¹⁵² David Bursey Expert Report, ¶ 202(c).

¹⁵³ David Bursey Expert Report, ¶¶ 170-175; and Les MacLaren Statement II, ¶¶ 31-33.

¹⁵⁴ See Letter from Tom Theodorakis, Sangra Moller, Barristers & Solicitors to Joan Hesketh, Executive Director, Environmental Assessment Office, Re Celgar Pulp Company – Minister's Order, dated February 16, 2005), **R-322**; and Letter from Joan Hesketh, Executive Director, Environmental Assessment Office to Tom Theodorakis, Sangra Moller Barristers & Solicitors, dated March 2, 2005, **R-310**.

1995.¹⁵⁵ British Columbia then adopted a more comprehensive environmental assessment process with the promulgation of the *Environmental Assessment Act*. The provisions of the new *Environmental Assessment Act* transitioned Orders issued pursuant to section 19(1)(c) of the *UCA* so that they remained in force and effect. Moreover, these Orders were subsequently transferred to the Environmental Assessment Office which was then responsible for their oversight and supervision in accordance with the *Environmental Assessment Act*.¹⁵⁶

80. Second, the BCUC proceedings involving the Ministry of Energy related to but did not directly concern Celgar's self-generation. The first BCUC proceeding in which both Celgar and Ministry of Energy were interveners was the proceeding resulting in BCUC Order G-48-09. This proceeding, however, was initiated in response to an application by BC Hydro to amend its 1993 PPA with FortisBC.¹⁵⁷ The Power Supply Agreement that the BCUC analyzed in this case was the agreement with the City of Nelson. The FortisBC-Celgar PSA was certainly discussed and evidence was filed concerning this proposal, but the proceeding really concerned the overall principle of the arbitrage of BC Hydro's Rate Schedule 3808 electricity. The Claimant had withdrawn the FortisBC-Celgar PSA before this proceeding commenced as both FortisBC and Celgar believed that it was less likely to survive a challenge than the City of Nelson agreement which was less commercial and involved smaller amounts of energy.

81. Third, the BCUC proceedings that followed were, for the most part, a dispute between FortisBC and Celgar. The Ministry of Energy did not believe that it was necessary to intervene.¹⁵⁸ The Ministry of Energy, therefore, did not review the Orders

¹⁵⁵ David Bursey Expert Report, ¶171.

¹⁵⁶ Les MacLaren Statement II, ¶ 31.

¹⁵⁷ Les MacLaren Statement II, ¶ 37.

¹⁵⁸ Les MacLaren Statement II, ¶ 38.

associated with the Celgar's existing 52 MW turbine until the Claimant asserted that it had never committed to use the electricity from this turbine to displace its load.¹⁵⁹

82. The Claimant fails to mention that this issue of the Ministers' Order was recently raised before the BCUC. On October 14, 2014, the B.C. Public Interest Advocacy Centre ("BCPIAC") wrote to the BCUC requesting permission to file the Ministers' Order and the witness statement of Mr. Ostergaard in the context of the BCUC considering a stand-by rate for Celgar.¹⁶⁰ The Claimant indicated that it did not object to the filing of the Ministers' Order but quite reasonably opposed the introduction of a witness statement filed in another proceeding.¹⁶¹ The BCPIAC subsequently withdrew its request to file the witness statement on October 17, 2014. The BCUC issued an Order G-166-14 amending the regulatory timetable.¹⁶² However, when the BCPIAC filed the Ministers' Order and the supporting EPC application the Claimant objected to the introduction of the EPC application on the basis that it did not form part of the Ministers' Order and that the resolution of this issue would require the filing of additional evidence.¹⁶³ The

¹⁵⁹ Les MacLaren Statement II, ¶ 34-35. *See also* Claimant's Memorial ¶ 575 ("Celgar never committed to use its self-generated electricity to meet its own load; nevertheless, BC Hydro and the BCUC did not permit Celgar to access embedded cost utility power at all while selling power. *See also* Brian Merwin Statement, ¶ 110 ("Celgar has never signed any load displacement or other agreement in which it has committed to use its self-generation to meet its load").

¹⁶⁰ Letter from Tannis Braithwaite, Executive Director to Erica Hamilton, Commission Secretary, Re FortisBC Inc. 2014 Stepped and Stand-by Rates for Transmission Voltage Customers, 14 October 2014, **R-535**.

¹⁶¹ Letter from Kim Moller, Sangra Moller LLP, to Erica Hamilton, Commission Secretary, Re: Zellstoff Celgar – Submissions re: BCPSO request for extension of time to file Intervener Evidence – FortisBC Inc. Application for Stepped and Stand-by Rates for [sic] Company Transmission Customers, 15 October, 2014, **R-536**.

¹⁶² BCUC Order G-166-13, In the matter of the Utilities Commission Act, R.S.B.C. 1996, Chapter 473 and FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Voltage Customers, October 27, 2014, ¶ 1, **R-537**.

¹⁶³ Letter from Kim Moller, Sangra Moller LLP, to Erica Hamilton, Commission Secretary, Re: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Application for Stepped and Stand-by Rates for Transmission Customers, 29 October, 2014, pp. 2-3, **R-538** and Letter from Kim Moller, Sangra Moller LLP, to Erica Hamilton, Commission Secretary, Re: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Application for Stepped and Stand-by Rates for Transmission Customers, 14 November 2014, **R-539**.

BCPIAC,¹⁶⁴ FortisBC,¹⁶⁵ the B.C. Government,¹⁶⁶ and BC Hydro¹⁶⁷ all supported the introduction of this evidence so that the BCUC could resolve this issue. The BCUC, cognizant of the Claimant's objections and the delay this could cause ultimately excluded the EPC application as late evidence.¹⁶⁸ The Claimant has therefore thwarted the BCUC from considering and resolving the interpretation of the Ministers' Order. The reason is simple: the BCUC is a professional quasi-judicial tribunal with expertise in this area and there was simply no chance that they would support the Claimant's unreasonable interpretation of the Ministers' Order.

83. Finally, Canada would request that this Tribunal exercise caution concerning some of the extreme positions the Claimant has adopted in the context of this arbitration. The Claimant and its consultants are essentially requesting that this Tribunal find that part of a domestic regulation is void for vagueness. It was very common for the Ministry of Energy and the Ministry of Environment to impose a condition when it was regulating energy and environmental projects that the applicant design and operate its project in accordance with its application. The Claimant's suggestion that this is "boilerplate" is convenient for their desired outcome, but ultimately irresponsible as it does not address the systemic consequences of such a decision. EPC applications and other applications relating to other energy and environmental projects may have been incorporated by

¹⁶⁴ Letter from Erin Prichard, Barrister & Solicitor to Erica Hamilton, Commission Secretary, Re: FortisBC Inc. (FBC) 2014 Stepped and Stand-by Rates for Transmission Voltage Customers – BCOAPO Submissions on Exhibit C-30, 5 November 2014, **R-540**.

¹⁶⁵ Letter from Diane Roy, Director, Regulatory Services to Erica M. Hamilton, Commission Secretary, FortisBC Inc. (FBC or Company) Application for Stepped and Stand-by Rates for Transmission Voltage Customers, Zellstoff Celgar Limited Partnership (Celgar) Exhibit C2-30, 5 November 2014, **R-541**.

¹⁶⁶ Letter from Josh Walters, Counsel to Erica Hamilton, Commission Secretary, Re: FortisBC Inc. Application for Stepped and Stand-by Rates for Transmission Voltage Customers, 5 November 2014, **R-542**.

¹⁶⁷ Letter from Ian Webb, Lawson Lundell LLP to Erica Hamilton, Commission Secretary, British Columbia Utilities Commission ("Commission") – FortisBC Inc. 2014 Stepped and Stand-by Rates for Transmission Voltage Customers, 5 November 2014, **R-543**.

¹⁶⁸ BCUC Order G-179-14 and Reasons, Re: In the matter of the Utilities Commission Act, R.S.B.C. 1996, Chapter 473 and FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Voltage Customers, 17 November 2014, ¶ 1, **R-544**.

reference into Orders and addressed serious regulatory and environmental issues. This NAFTA arbitration is being closely followed by other domestic interests and this Tribunal should not lightly find that B.C.'s regulations void for vagueness or that they are no longer in force or effect.

B. British Columbia's Policy Developments with Respect to Self-Generators of Electricity

1. The BCUC Directs BC Hydro to Establish a Short-Term Program to Enable Sales of Self-Generation for Export from British Columbia in Order G-38-01

84. As Canada explained in its Counter-Memorial,¹⁶⁹ the 2000 US energy shortage increased exponentially the market price of electricity. Howe Sound looked to capitalize on these higher energy prices by selling its self-generation into the market, and contacted BC Hydro to indicate its intentions.¹⁷⁰ Howe Sound posited that it was entitled to sell its self-generated electricity to the U.S. market.¹⁷¹

85. BC Hydro, however, had serious concerns with Howe Sounds proposals, which it relayed to Howe Sound in a letter on February 11, 2001:

BC Hydro ... and most likely the government as its shareholder, will have serious concerns about any potential proposal that will see customer self-generated power sold into market, and with BC Hydro then being required to supply make-up power under Schedule 1821. This will be financially detrimental to BC Hydro and its other ratepayers, both in the short and the long term.¹⁷²

86. It also indicated that:

¹⁶⁹ Canada's Counter Memorial, ¶¶ 112-113.

¹⁷⁰ Chronology of Events for Howe Sound Idle Generation, **R-78**.

¹⁷¹ Chronology of Events for Howe Sound Idle Generation, **R-78**. [REDACTED]

¹⁷² Letter from Craig Folkestad to Jerry Peet, Re: Howe Sound Pulp and Paper (HSPP) Power Export Opportunities, 12 February 2001, p. 1, **R-79**.

If the situation were one in which incremental power would be made available for sale in the market, ie. power which is not now being produced but the generation of which would be made attractive if it could be sold at market prices, I expect that the situation (and BC Hydro's view of it) would likely be different. Any incremental power supply in the province, regardless of where it is being sold (in the short term at least) would likely be viewed as positive.¹⁷³

87. In light of Howe Sound's request, BC Hydro sought guidance from the BCUC and requested, on February 23, 2001, that it initiate a proceeding concerning this issue. BC Hydro explained that:

BC Hydro has been made aware that some ... customers are interested in directing their self-generated output to market (BC Hydro's industrial tariff is \$34 per MWh, while market prices are roughly \$300 per MWh for a flat block looking ahead to the end of 2003). These customers have also indicated an expectation that any incremental energy required by the plant (i.e., load) would be served by taking additional service under standard tariffs from BC Hydro.

[...]

Were BC Hydro required to replace this 300 MW with additional RS 1821 supply, the cost is conservatively estimated to be in the region of \$400 million per year through 2003. This would translate to a general rate increase for all BC Hydro customers of roughly 18 percent.¹⁷⁴

88. BC Hydro requested that the BCUC initiate a Commission led workshop to "bring all interested parties into the process" including groups such as customers without self-generation who faced material exposure on this issue so that the BCUC could achieve the "fairest possible resolution to the matter."¹⁷⁵

¹⁷³ Letter from Craig Folkestad to Jerry Peet, Re: Howe Sound Pulp and Paper (HSPP) Power Export Opportunities, 12 February 2001, p. 1, **R-79**.

¹⁷⁴ Letter from BC Hydro to the British Columbia Utilities Commission, Re: British Columbia Hydro and Power Authority ("BC Hydro") Obligation to Serve Rate Schedule 1821 ("RS 1821") Customers with Self-Generating Capability, 23 February, 2001, pp. 1-2, **R-81**.

¹⁷⁵ Letter from BC Hydro to the British Columbia Utilities Commission, Re: British Columbia Hydro and

89. The BCUC granted this request and on March 19, 2001, 46 participants, including representatives of the B.C. Government, BC Hydro and a number of pulp and paper producers, attended the workshop.¹⁷⁶ The meeting notes indicated that:

B.C. Hydro indicated that it was looking for ways to bring idle generation on line without increasing the embedded cost load of the self-generating customers. B.C. Hydro did not want to deal with situations that simply resulted in transfers to self-generating customers from other customers.¹⁷⁷

Ms. Mullen, Director of the Electricity Development Branch, of the Ministry of Employment and Investment—which was responsible for the energy portfolio at that time—explained that: “... the provincial government is primarily concerned that other ratepayers not being harmed as a result of the activities of Rate Schedule 1821 self-generating customers.”¹⁷⁸

90. The workshop participants were subsequently provided with an opportunity to comment on the workshop discussion and emphasized that it was in the “interest of all parties, and the public in general, that idle generation not remain idle in light of the current shortage of electric power on the west coast of Canada and the United States.”¹⁷⁹

91. On April 5, 2001, the BCUC issued Order G-38-01 which indicated that:

[The BCUC] must act to meet the complementary objectives of creating conditions which allow B.C. Hydro to safeguard its own supply to British

Power Authority (“BC Hydro”) Obligation to Serve Rate Schedule 1821 (“RS 1821”) Customers with Self-Generating Capability, 23 February, 2001, p. 3, **R-81**.

¹⁷⁶ KPMG does not appear to have participated as the trustee in bankruptcy for Celgar.

¹⁷⁷ Meeting Notes, Workshop, B.C. Utilities Commission Hearing Room, British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 – Transmission Service Customers with Self-Generation Capability, March 19, 2001, p. 1, **R-83**.

¹⁷⁸ Meeting Notes, Workshop, B.C. Utilities Commission Hearing Room, British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 – Transmission Service Customers with Self-Generation Capability, March 19, 2001, p. 1, **R-83**.

¹⁷⁹ See *e.g.*, Letter from Brian Wallace on behalf of Howe Sound Pulp and Paper to Robert Pellatt, Commission Secretary, Re: Response to Issues Arising During March 19, 2001, Workshop, March 26, 2001, p. 1, bates 144037-144038, **R-545**.

Columbians at lowest cost, assisting British Columbia industries with idle self-generation capability to capitalize on current market opportunities, and helping to mitigate the potential energy shortages in the Pacific Northwest and California.¹⁸⁰

92. The BCUC issued Order G-38-01 in short order to permit B.C. self-generators to take advantage of the market opportunity provided by the energy crisis and help mitigate the energy shortages it caused.

93. The BCUC provided guidance concerning the establishment of a baseline for self-generators that would prevent the occurrence of harmful arbitrage:

The Commission directs BC Hydro to allow Rate Schedule 1821 customers with idle self-generation capability to sell excess self-generated electricity, provided that the self-generating customers do not arbitrage between embedded cost utility service and market prices. This means that B.C. Hydro is not required to supply any increased embedded cost of service to a RS 1821 customer selling its self-generation output to market. The Commission recognizes that considerable debate may ensue over whether a self-generator has met this principle, but the Commission expects B.C. Hydro to make every effort to agree on a customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator.¹⁸¹

94. The Staff Report appended to the Order shows that none of the stakeholders that participated in the workshop advocated that self-generators should be able to engage in harmful arbitrage—a stark contrast with the Claimant's position in this arbitration.

¹⁸⁰ BCUC, Order Number G-38-01, in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, 5 April 2001, p. 1, **R-19**.

¹⁸¹ BCUC, Order Number G-38-01, in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, 5 April 2001, p 2, **R-19**. It also provided the following direction concerning the resolution of potential disputes “In an effort to assist both the self-generator and B.C. Hydro/Powerex, the Commission directs that either party may request the views of the Commission staff on any unresolved issues before negotiations are terminated. Commission staff are to advise the Commission if there are any significant issues which the Commission must address to assist it in meeting the objectives of this program. The Commission believes that it would not be timely to debate the issue of filing of contracts within the context of establishing this short-term program of purchases and sales.” [Emphasis Added]

95. BCUC Order G-38-01 required BC Hydro to establish a short-term program to facilitate the export of electricity and provided guidance on the principles it should apply in setting a baseline under this program. It indicated that the “baseline” could be based on either consumption data or generation data. It did not use the term “generator baseline” or GBL.

96. No other self-generator than Howe Sound applied under the program, but the BCUC would subsequently consider a separate request to permit the Riverside sawmill to export its self-generation in excess of a baseline in BCUC Order G-113-01.¹⁸²

97. On March 2, 2002, BC Hydro filed a brief report with the BCUC concerning its experience with the program established by BCUC Order G-38-01. However, as Howe Sound was the only self-generator that had taken advantage of the program it had little to report. BC Hydro had no objection to extending the application of Order G-38-01. Nor did any other stakeholder raise concerns. Accordingly, the BCUC issued order G-17-02 which extended the application of this program.¹⁸³

2. BC Hydro Attempts to Procure Electricity from Self-Generators and Develops the Concept of a GBL in the 2002 Customer Based Generation Call for Power

98. On November 22, 2002, the Ministry of Energy and Mines issued the 2002 Energy Plan which directed BC Hydro to procure domestically-generated clean energy from the private sector to help meet growing demand for electricity.¹⁸⁴ BC Hydro had concurrently organized the 2002 Customer Based Generation Call for Power to procure new, competitively-priced electricity from its customers under long-term agreements,

¹⁸² See Canada's Counter-Memorial, ¶¶ 123-127.

¹⁸³ BCUC, Order G-17-02 in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, 14 March 2002, p. 2, **R-256**.

¹⁸⁴ The 2002 Energy Plan provided that “[t]he private sector [would] develop new electricity generation, with BC Hydro restricted to improvements at existing plants.” Energy For Our Future: A Plan for BC (“2002 Energy Plan”), 25 November 2002, Policy Action No. 13, at 30, **R-21**.

including customers with existing self-generation capacity.¹⁸⁵ It issued its Call for Tenders on September 2, 2002.

99. Since, under this Call for Power, BC Hydro would procure electricity from its self-generating customers, it was necessary to determine how to do so without allowing the arbitrage of embedded cost power, which would run counter to the purpose of the call and could harm other ratepayers. BC Hydro thus developed the concept of a “generator baseline” (or “GBL”) based on the principles set out in BCUC Order G-38-01. The GBL would establish the amount of electricity the self-generator normally produced; any generation in excess of this amount would be considered incremental and therefore eligible to be bid into the call.¹⁸⁶ Without the GBL concept, BC Hydro would procure “existing” rather than incremental electricity, which would not add to its resource base and would in effect transfer wealth from ratepayers to the competing mills.

100. In order to set GBLs, BC Hydro requested information from the proponents with self-generation including “historical operating data” for a period of three years,¹⁸⁷ and the peak output for the self-generator over a period of the last 10 years. BC Hydro ultimately received a limited number of bids for the call (none from NBSK pulp mills) and no self-generator was awarded a contract.¹⁸⁸ BC Hydro subsequently determined that the prices

¹⁸⁵ Customer-Based Generation, 2002 Call for Tenders, September 6, 2002, (“2002 Customer-Based Generation CFT”), p. 1, **R-109**.

¹⁸⁶ 2002 Customer-Based Generation CFT, p. 12, **R-109** (“As noted under Evaluation of Tenders and Prices/Award of EPAs, the proposed electricity supply must be new or incremental. Where the bidder’s project involves an increase in the capacity of, or energy from, existing facilities resulting from capital modifications, it is necessary to determine the generator’s historic generation capability. The historic generation capability is referred to in the Standard EPA as the Generator Baseline or “GBL”. For purposes of determining electricity eligible for sale to BC Hydro, the GBL will be deducted from the metered electricity.”)

¹⁸⁷ 2002 Customer-Based Generation CFT, p. 40, **R-109**.

¹⁸⁸ Jim Scouras Statement I, ¶ 31.

and terms it offered were not sufficient to incentivize pulp mills to undertake projects to produce incremental electricity.¹⁸⁹

101. No NBSK pulp mills or other self-generators raised the issue of the sale of their self-generation until after the B.C. Government announced its 2007 Energy Plan.

3. BC Hydro Procures Electricity from Self-Generators in the Bioenergy Call for Power Phase I and the Integrated Power Offer

a) The 2007 Energy Plan

102. On February 27, 2007, the Ministry of Energy issued its 2007 Energy Plan,¹⁹⁰ which mandated BC Hydro to achieve electricity self-sufficiency by 2016¹⁹¹ and acquire an additional 3,000 GWh of “insurance” electricity by 2026.¹⁹² The 2007 Energy Plan directed BC Hydro to issue a Request for Expressions of Interest (“RFEOI”), followed by a Call for Proposals, for electricity from sawmill residues, logging debris and beetle-killed timber.¹⁹³

103. The 2007 Energy Plan and the RFEOI both rekindled the interest of B.C. pulp mills in sales of self-generated electricity. The Bioenergy Call would effectively create a B.C. market for “green” biomass energy where none had previously existed.¹⁹⁴ The B.C. Pulp and Paper Task Force, a lobby group of the pulp and paper industry, viewed this as a significant financial opportunity.¹⁹⁵ Mr. Gandossi, the Claimant’s CFO, and Mr. Allan were members of the Task Force.

¹⁸⁹ Jim Scouras Statement I, ¶ 32.

¹⁹⁰ British Columbia Ministry of Energy, Mines and Petroleum Resources, “The BC Energy Plan: A Vision for Clean Energy Leadership” (“2007 Energy Plan”), **R-23**.

¹⁹¹ 2007 Energy Plan p. 39, **R-23**; Les MacLaren Statement II, ¶ 4; Jim Scouras Statement I, ¶ 34.

¹⁹² Les MacLaren Statement II, ¶ 4.

¹⁹³ Canada’s Counter-Memorial, ¶¶ 139-140; 2007 Energy Plan p. 17, **R-23**; Les MacLaren Statement II, ¶ 6; Jim Scouras Statement I, ¶ 36.

¹⁹⁴ Les MacLaren Statement II, ¶ 7.

¹⁹⁵ Les MacLaren Statement II, ¶¶ 7, and 22.

104. On November 22, 2007, the Task Force provided the B.C. Government with a position paper concerning Electricity Generation and Conservation. The Task Force took the position that BC Hydro should procure all of the electricity from NBSK pulp mills, regardless of whether that electricity was existing or incremental. In particular, it requested that BC Hydro purchase all existing self-generation at a price equivalent to BC Hydro's Tier 2 rate for industrial customers—a more expensive rate which is intended to encourage industrial customers to conserve energy.¹⁹⁶ The Task Force also suggested that the self-generation of incremental electricity should automatically receive the highest price paid by BC Hydro for green energy produced by Independent Power Producers.¹⁹⁷

105. From the Province's perspective, the Task Force proposals would have required the procurement of all of the self-generation from these industrial customers without regard as to whether BC Hydro was actually acquiring new electricity for the system.¹⁹⁸ The proposal was thus viewed as a request for a subsidy from the government, which would not contribute to the load-resource gap that BC Hydro had to fill and which also had the potential to harm other ratepayers.¹⁹⁹ Moreover, these proposals would have also undermined the competitiveness of the Bioenergy Call for Power by pre-determining the prices paid to pulp mills for their electricity.

106. On January 31, 2008, British Columbia released its 2008 Bioenergy Strategy which directed BC Hydro to proceed with a two-part Bioenergy Call for Power.²⁰⁰ The Ministry of Energy also reiterated a week later to the Claimant and other representatives

¹⁹⁶ Pulp and Paper Task Force, "Position Paper on Electricity Conservation & Generation", 22 November 2007, bates 063271-063285 at 063274, **R-28**.

¹⁹⁷ Pulp and Paper Task Force, "Position Paper on Electricity Conservation & Generation", 22 November 2007, bates 063271-063285 at 063275, **R-28**.

¹⁹⁸ Les MacLaren Statement II, ¶ 7.

¹⁹⁹ Les MacLaren Statement II, ¶ 8.

²⁰⁰ British Columbia Ministry of Energy, Mines and Petroleum Resources, BC Bioenergy Strategy Growing Our Natural Energy Advantage, 2008, p. 8, **R-24**.

of the pulp and paper industry that BC Hydro would not purchase self-generation that had historically been used to meet the self-generator's own load.²⁰¹

b) Bioenergy Call for Power

107. On February 6, 2008, BC Hydro issued its Request for Proposals ("RFP") for the Bioenergy Call for Power²⁰² with the intention of procuring 1,000 GWh per year of electricity. Its terms and conditions were based off of the feedback BC Hydro had received during the RFEOI process.

108. BC Hydro's RFP indicated in section 14 that eligible customer projects included:

[n]ew self-generation, or incremental self-generation, in any event excess of the Customer's GBL at a Customer's facility to serve the Customer's industrial load at the facility (i.e., load displacement) and/or effect net energy export to the System (i.e. Customer Projects), but excluding generation projects, where the current output [was] under contract through a load displacement or demand side management agreement with BC Hydro.²⁰³

109. The RFP was also consistent with the policy position the Ministry of Energy explained to the Claimant and other representatives of the pulp and paper industry in concurrent meetings concerning self-generation.²⁰⁴

110. At the same time, BC Hydro held a series of internal meetings concerning the GBL concept for the Call for Power which involved members of Key Accounts Management, Powersmart, and the Transmission Service Rates group.²⁰⁵ BC Hydro officials recognized that BCUC Order G-38-01 provided important context to the

²⁰¹ Les MacLaren Statement I, ¶ 94.

²⁰² BC Hydro, Bioenergy Call for Power – Phase I, Request for Proposals, 6 February 2008, **R-25**.

²⁰³ BC Hydro, Bioenergy Call for Power – Phase I, Request for Proposals, 6 February 2008, s. 14, **R-25**.

²⁰⁴ Les MacLaren Statement I, ¶¶ 92-94.

²⁰⁵ See generally, Lester Dyck Statement I, ¶ 55.

determination of a GBL.²⁰⁶ It also considered its work on the GBL concept from the 2002 Customer Based Generation Call,²⁰⁷ as well as from its draft Standing Offer Program Rules which, contrary to the Claimant's assertions,²⁰⁸ have always reflected the same GBL concept.²⁰⁹ Mr. Keir, the representative of the Transmission Service Rate group, provided his perspective of some of the important principles that were being developed in these meetings, including:

- The GBL should reflect a 365 day (annual period)
 - The GBL start point is the [Customer Baseline or "CBL"] establishment year
 - For most [BC Hydro] customers, calendar 2005 is the CBL establishment year
- [...]
- The GBL start point is actual calendar 2005 gross metered TG output (365 days)
 - The GBL may then need to be adjusted for unique customer circumstances (existing LD contracts, EPAs, market sales, etc.)²¹⁰

²⁰⁶ Email from David Keir to Alex Adams, Lester Dyck re: RE: BioEnergy Call | Use of GBL and its implication on CBL's, dated February 12, 2008, **R-171**. ("BCUC Order G-38-01 provides some important context and background to the establishment of a GBL that I expect will be relevant as things proceed."). The minutes of a meeting held on February 14, 2008 indicates that the group "Review[ed] the GBL concept in detail" including "Relevant precedents: 1.G38-01, 2. CBG [2002 Customer-Based Generation Call], 3. Other calls". Email from David Keir, to Lester Dyck *et al* re: RE: Review detailed design of GBL concept for interaction with TSR for customer and Power Smart program implications | Meeting Minutes, dated February 15, 2008 026774 at 026776, **R-172**.

²⁰⁷ Email from Janet Stewart to Lester Dyck, GBLv.2.doc, 15 February 2008, enclosing Customer Based Generation 2002 Call for Tenders and Standing Offer for Energy, 18 January 2008, bates 063503 at 060534, **R-546**.

²⁰⁸ See Claimant's Reply, fn 3, ¶ 168.

²⁰⁹ Email from Janet Stewart to Lester Dyck, GBLv.2.doc, 15 February 2008, enclosing Customer Based Generation 2002 Call for Tenders and Standing Offer for Energy, 18 January 2008, bates 063503 at 60538, **R-546**. Jim Scouras Statement II, ¶¶ 42-43; BC Hydro Standing Offer Program Rules, 11 April 2008, pp. 4-5, **R-487**.

²¹⁰ Email from David Keir, to Lester Dyck *et al* re: RE: Review detailed design of GBL concept for interaction with TSR for customer and Power Smart program implications | Meeting Minutes, dated February 15, 2008 at 026774, **R-172**.

111. For the Bioenergy Call for Power, BC Hydro determined that the GBL should reflect a 365 day period. It also decided that the logical starting point for a GBL determination for BC Hydro industrial customers should be gross metered turbogenerator output during the customer's CBL establishment year,²¹¹ which for most industrial customers was 2005.²¹² This approach, however, could not apply to the Claimant which was located in FortisBC's service area and did not have a CBL with BC Hydro.

112. BC Hydro was also aware that in determining GBLs the unique circumstances of each mill would have to be considered. This information was reflected in the Registration Form that proponents were required to fill out prior to submitting a proposal into the call. Schedule A of that Registration Form, entitled "Preliminary GBL data" provided the details necessary for proponents to estimate their own GBL

113. BC Hydro held two information sessions to discuss the parameters of the Bioenergy Call for Power and to explain its GBL methodology for any proponent that was interested in submitting a bid.²¹³ BC Hydro also ran an hour-long question and answer session on GBLs as part of the second information session for all interested

²¹¹ Canada explained in its Counter-Memorial that, in 2006, BC Hydro implemented a two-tiered rate schedule for its industrial customers as a mechanism to incentivize energy conservation. See Canada's Counter-Memorial, ¶ 427. Pursuant to this rate schedule, two different rates apply to different proportions of the customers normal purchases (BC Hydro applies a low Tier 1 rate for the first 90% of the customer's normal purchases, and a high Tier 2 rate for the remaining 10%.) In application of this rate schedule, BC Hydro determined the customer's the normal energy consumption of an industrial customer for the purposes of energy billing using a concept of "customer baseline" (or "CBL").

²¹² BC Hydro determines a unique customer baseline (CBL) for each of its industrial customers billed for energy under the RS 1823 Stepped Rate. The CBL represents the customer's normal annual energy purchases over a 365 day period prior to the customer taking service on the RS 1823 Stepped Rate. RS 1823 came into effect on April 1, 2006 and the CBLs for most industrial customers were determined based on calendar 2005 energy purchase data. As a BC Hydro industrial customer's annual energy purchases are equal to total mill load less self-generation for self-supply, a starting point for determining a GBL (i.e., normal self-generation for self-supply) was the 365 day period used to determine the customer's CBL (i.e., normal energy purchases) which at that time was 2005 for most customers.

²¹³ See generally, Lester Dyck Statement I, ¶¶ 57-59; BC Hydro's Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation, **R-116**; Bioenergy Call Phase I, Proponent Information Session, March 26, 2008 at 62, **R-117**.

proponents.²¹⁴ Representatives of the Claimant attended all of the information sessions and the GBL question and answer forum.²¹⁵

114. Mr. Dyck, the Key Accounts Manager responsible for the GBL determinations, explained during these presentations that only new or incremental self-generation would be eligible for the Call for Power and not “existing” electricity.²¹⁶ He also indicated that proposals to sell self-generated electricity would require a GBL based on historical generation data that reflected a 365-day annual period of operations.²¹⁷ Mr. Dyck explained that BC Hydro was aware that the operations of each pulp mill were unique and it did not want to adopt an overly prescriptive approach to GBL determinations.²¹⁸ He also emphasized the importance of proponents submitting reasonable and defensible technical information in support of the GBL.²¹⁹ BC Hydro also held several one-on-one meetings with each proponent over the course of the afternoon on March 26.²²⁰

²¹⁴ Phase I Bioenergy Call Proponent Workshop – Agenda, 26 March 2008, CAN529828, **R-527**.

²¹⁵ Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008, **R-173**. The email summarizes the question and answer session following the March 26, 2008 presentation. The email indicates that the Claimant asked the first question in the GBL question and answer session. See *Id.*, bates 064463, **R-173** (“**Question:** If I am not a BCH customer, do I still need a GBL? **Answer:** Yes. If you are making electricity today, we need to define an appropriate starting point / reference above which incremental power generation can be measured and allocated to an EPA. Further if you are not a BCH customer, BCH needs to be made aware of any existing tariff requirements or restrictions that may impact the measurement or delivery of energy to an EPA”)

²¹⁶ BC Hydro’s Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation, p. 22, **R-116**. (“The purpose of the GBL is to define incremental output that can be considered for a prospective energy sale”).

²¹⁷ BC Hydro’s Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation, p. 22, **R-116**. (“The initial customers “estimated GBLs” should reflect a 365 day annual period.”) Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008, **R-173**. (“For BCH customers, the starting point is the CBL establishment year, which for most customers is calendar 2005”)

²¹⁸ BC Hydro’s Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation, p. 22, **R-116**. (“The GBL may have to be adjusted for unique customer circumstances (existing LD contracts, EPAs, market sales, 1880/ad hoc purchases etc)”) Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008, **R-173**. (“... BCH did not wish to impose an overly prescriptive approach to GBL development that may not have considered every unique circumstance.”)>

²¹⁹ Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008, **R-173**. (“The critical requirement is to supply reasonable, defensible, technical information in support of the GBL. Each customer generator and mill operation is unique and has unique operational attributes. ... The bottom line is that you know your operations best. Help us to understand the unique

115. BC Hydro placed the presentations it made at the information sessions on its website for the Bioenergy Call.²²¹ BC Hydro officials then engaged in negotiations with each of the proponents as a GBL was a prerequisite to the submission of a proposal in context of the Bioenergy Call. The negotiations with Celgar are discussed in more detail below.

116. While BC Hydro received 20 proposals from 13 different proponents on June 10, 2008,²²² it was ultimately able to award no more than four EPAs for a total of 579 GWh/year of electricity procurement—roughly half of the 1,000 GWh/year it had intended to procure.²²³ The Claimant received the largest EPA in the Bioenergy Call which entitled Celgar to sell 238 GWh/year of firm energy, as compared to 201 GWh/year for Domtar, and 70 GWh/year for Canfor (Prince George).

117. On February 17, 2009, BC Hydro submitted an application to the BCUC for approval of these EPAs pursuant to section 71 of the *UCA* and attached a report on the Bioenergy Phase I Call explaining how the procurement of this electricity would assist BC Hydro meet the needs of its customers. The BCUC reviewed all of these EPAs and asked questions concerning BC Hydro's GBL methodology.²²⁴ The BCUC subsequently

operational conditions that are [*sic*] imbedded within your annual GBL, such that we can collectively review and understand any specific elements that may be open to refinement.”)

²²⁰ Phase I Bioenergy Call Proponent Workshop – Agenda, 26 March 2008, CAN529828, **R-527**.

²²¹ Lester Dyck Statement I, ¶ 59. See BC Hydro, Workshops & Presentations, online: <http://www.bchydro.com/energy-inbc/acquiring_power/closed_offerings/phase_1_rfp/proponent_sessions.html>.

²²² Lester Dyck Statement I, ¶ 53.

²²³ The successful proponents were: Celgar (Castlegar), PG Interior Waste to Energy Ltd., Canfor Pulp Ltd. Partnership (Prince George) and Domtar Pulp and Paper Products Inc. (Kamloops). BC Hydro Report on Bioenergy Phase I - RFP, **R-170**.

²²⁴ Letter from Joanna Sofield, Chief Regulatory Officer to Ms. Erica Hamilton, Commission Secretary, Re: British Columbia Utilities Commission (BCUC), British Columbia Hydro and Power Authority (BC Hydro), Bioenergy Call Phase I Electricity Purchase Agreements, March 27, 2009, BC Hydro Responses to BCUC Information Requests 1.6.1.-1.6.5. at bates 151373-151379, **R-547**.

approved these EPAs in Order E-8-09 as they were in the public interest with respect to both the need for and price of the electricity.²²⁵

C. The Claimant's Treatment in the Bioenergy Call for Power

118. On February 6, 2008, BC Hydro issued its RFP for the Bioenergy Call for Power Phase I.²²⁶ The Claimant submitted its Registration Form for the Bioenergy Call for Power a month later for two projects – the “Arbitrage” project (under the euphemistic pseudonym of the “Biomass Realization Project”) and the Green Energy Project.²²⁷ BC Hydro subsequently determined that the Green Energy Project would provide new and incremental electricity that was eligible for the Call for Power, but rejected the Arbitrage Project which consisted of electricity that Celgar had used for self-supply.²²⁸

1. The Claimant's False Assertions that BC Hydro Did Not Consider all of the Data and that Celgar Did Not Understand that the GBL would be Set to Reflect an Annual Period

119. As explained above, BC Hydro set GBLs by determining the amount of annual self-generated energy normally used by a customer to self-supply under current conditions without the prospect of an EPA or LDA.²²⁹ Mr. Merwin asserts in his most recent witness statement that he did not understand what the Claimant has labelled as the “current normal” standard.²³⁰ In particular, he complains that:

[T]he information that BC Hydro did provide concerning its GBL determination standards gave the impression that BC Hydro would

²²⁵ See BCUC, Order E-8-09, in the Matter of an Application by BC Hydro for Acceptance of Electricity Purchase Agreements – Bioenergy Call Phase I Request for Proposals, 31 July 2009, **R-308**.

²²⁶ Bioenergy Phase I – RFP, **R-25**.

²²⁷ Celgar, BC Hydro Bioenergy Call for Power (Phase I) – Registration Forms, 6 March 2008 (“Celgar Bioenergy Phase I Registration”), at bates MER00278896 (Celgar Green Energy Project), **R-123**.

²²⁸ Letter from BC Hydro RFP Administrator to Brian Merwin, Re: Zellstoff Celgar Limited Partnership (“Celgar”) – Biomass Realization Project, 2 May 2008, (“May 2, 2008 Letter Re: Celgar Biomass Realization Project”), **R-126**.

²²⁹ Canada's Counter Memorial, ¶ 99; and Lester Dyck Statement I, ¶ 44.

²³⁰ Brian Merwin Statement II, ¶ 15.

consider a number of years – what seemed like an average of three years of operational data – not simply one year of data or only ‘current’ data.”²³¹

Mr. Merwin also claims that he was “particularly shocked and disturbed when Mr. Dyck informed me that BC Hydro had only considered one year (2007, the year prior to our BioEnergy Phase I registration) of operational data in assigning Celgar’s GBL.”²³² These claims are not convincing for several reasons.

120. First, BC Hydro provided the Claimant with information that clearly indicated that the GBL would represent an annual 365-day period. BC Hydro’s Registration Form for the Bioenergy Call provided the following instructions to Celgar under the heading “Preliminary GBL Data”:

2. Provide the information requested in “Section A – Estimated GBL” as follows:

[...]

(d) In the column titled “Annual Energy Output”, insert the annual energy output (in GWh/year) for each Generator for the Proponent’s customer base line (“CBL”) development year (which, for most Proponents will be the 2005 operating year).

*(e) In the row titled “Estimated GBL”, insert the total of the Annual Energy Output column.*²³³

121. This clearly indicated to Celgar that the “Estimated GBL” would reflect a one year period, which for most proponents would be the 2005 calendar year. BC Hydro reiterated that the “estimated GBL” should reflect “a 365 day annual period” at its first information session on February 20, 2008.²³⁴ Similarly, BC Hydro explained in the context of a GBL question and answer period following the March 26, 2008 information

²³¹ Brian Merwin Statement II, ¶ 15.

²³² Brian Merwin Statement II, ¶ 16.

²³³ Celgar, BC Hydro Bioenergy Call for Power (Phase I) – Registration Forms, 6 March 2008, at bates MER00278899 (Celgar Green Energy Project), **R-123**.

²³⁴ BC Hydro’s Bioenergy Call; Kamloops, BC February 20, 2008, p. 22, **R-116**.

session that the GBL “starting point is the CBL establishment year,” which was “calendar 2005.”²³⁵

122. Mr. Merwin and his counsel attended both of the information sessions on February 20 and March 26, 2008.²³⁶ The Claimant complains that there was only one slide concerning GBLs in each of the presentations at these information sessions.²³⁷ Mr. Dyck and Mr. Scouras have both indicated that the concept of a GBL was explained in full during these presentations.²³⁸ Perhaps more tellingly, Mr. Merwin provides no evidence concerning these presentations.

123. On May 2, 2008, BC Hydro wrote to the Claimant to inform it that its Green Energy Project would be eligible for the Bioenergy Call but that its Arbitrage Project would not because it was for the sale of “existing” electricity that the Claimant was using to self-supply.²³⁹ Mr. Merwin wrote in BC Hydro a few days later to request that it reconsider its decision to reject the Arbitrage Project, and to submit additional data concerning its GBL.²⁴⁰

124. Mr. Dyck explains in his second witness statement that this letter shows that Mr. Merwin had a clear understanding that BC Hydro would set its GBL to reflect a one year

²³⁵ Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008, **R-173**. Lester Dyck Statement I, ¶¶ 57-58; Jim Scouras Statement I, ¶ 42. BC Hydro's Bioenergy Call; Kamloops, BC February 20, 2008, **R-116**.

²³⁶ BC Hydro, February 23, 2008 Bioenergy Call for Power Phase I Session Registrations, **R-118**; Email from Brian Merwin to BC Hydro RFP Administrator RE: Information Session, dated March 25, 2008, **R-119**; Email from Rod Talaifar (Sangra Moller, LLP) to BC Hydro RFP Administrator RE: May 28, 2008 Proponent Workshop (the “Workshohp” [sic]), dated May 15, 2008, **R-120**.

²³⁷ Claimant's Reply, ¶¶ 255-258.

²³⁸ Lester Dyck Statement I, ¶¶ 57-58; Jim Scouras Statement I, ¶ 42; Jim Scouras Statement II, ¶ 6.

²³⁹ Letter from BC Hydro RFP Administrator to Brian Merwin, Re: Zellstoff Celgar Limited Partnership (“Celgar”) – Biomass Realization Project, 2 May 2008, (“May 2, 2008 Letter Re: Celgar Biomass Realization Project”), **R-126**.

²⁴⁰ Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership (“Celgar”) – Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008 at 019775, **R-127**.

period.²⁴¹ In particular, Mr. Merwin proposed a GBL of 33 MW based on Celgar's generation data from 2006.²⁴² Mr. Merwin's strategy at this time was to select 33 MW based on this period because this would result in a GBL "as low as credible".²⁴³ Mr. Merwin claims now that it was his impression that BC Hydro would use a multi-year average, but did not once propose a baseline to BC Hydro using such a calculation.

125. Mr. Merwin also alleges that he was "shocked and disturbed" because only one year of operational data was considered in setting the GBL for Celgar. This is quite simply false. Mr. Dyck explains in his second witness statement that BC Hydro considered all of the data that it received from Celgar for the period from 2002-2007. He indicates that he decided to disregard the data from 2002-2004 which reflected a period when the pulp mill was in bankruptcy.²⁴⁴ He explains that this data would not reflect the Claimant's operational decisions or the equipment changes that it subsequently made to the pulp mill.²⁴⁵ Mr. Dyck also explains that he examined data from 2005 and 2006 but did not believe that these years reflected normal operations for the pulp mill in 2008 due to the extensive changes that were made during Project Blue Goose.²⁴⁶

126. Finally, Mr. Merwin explained to Mr. Dyck that Celgar's first full operating year after the operational changes associated with Project Blue Goose was 2007.²⁴⁷ On the

²⁴¹ Lester Dyck Statement II, ¶¶ 12-14.

²⁴² Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") – Biomass Realization Project and Celgar Green Energy Project, May 7, 2008, pp. 019772 and 019775, **R-127**.

²⁴³ Email from J. MacLaren to B. Merwin, Re: Phase I Request for Proposals: Notice to Customers of GBL, May 4, 2008, **R-534**.

²⁴⁴ Lester Dyck Statement II, ¶ 16.

²⁴⁵ Lester Dyck Statement II, ¶ 16.

²⁴⁶ Lester Dyck Statement II, ¶ 17.

²⁴⁷ Lester Dyck Statement II, ¶ 17. Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") – Biomass Realization Project and Celgar Green Energy Project, May 7, 2008, bates pp. 019772 and 019775, **R-127**. ("It should be noted that \$30 million [sic] dollars worth of capital upgrades we only [sic] operational for part of 2006 but all of 2007 ... 2007 reflects the full investments that Celgar made into generating incremental biomass steam output.")

basis of these representations, Mr. Dyck subsequently set the GBL using operational data from 2007. Mr. Merwin had represented to Mr. Dyck many times that the mill was electrically self-sufficient under normal operating conditions, and that the mill sometimes generated even more electricity than it needed.²⁴⁸ Mr. Dyck set Celgar's GBL at the level of the pulp mill's load in 2007 based on these representations.

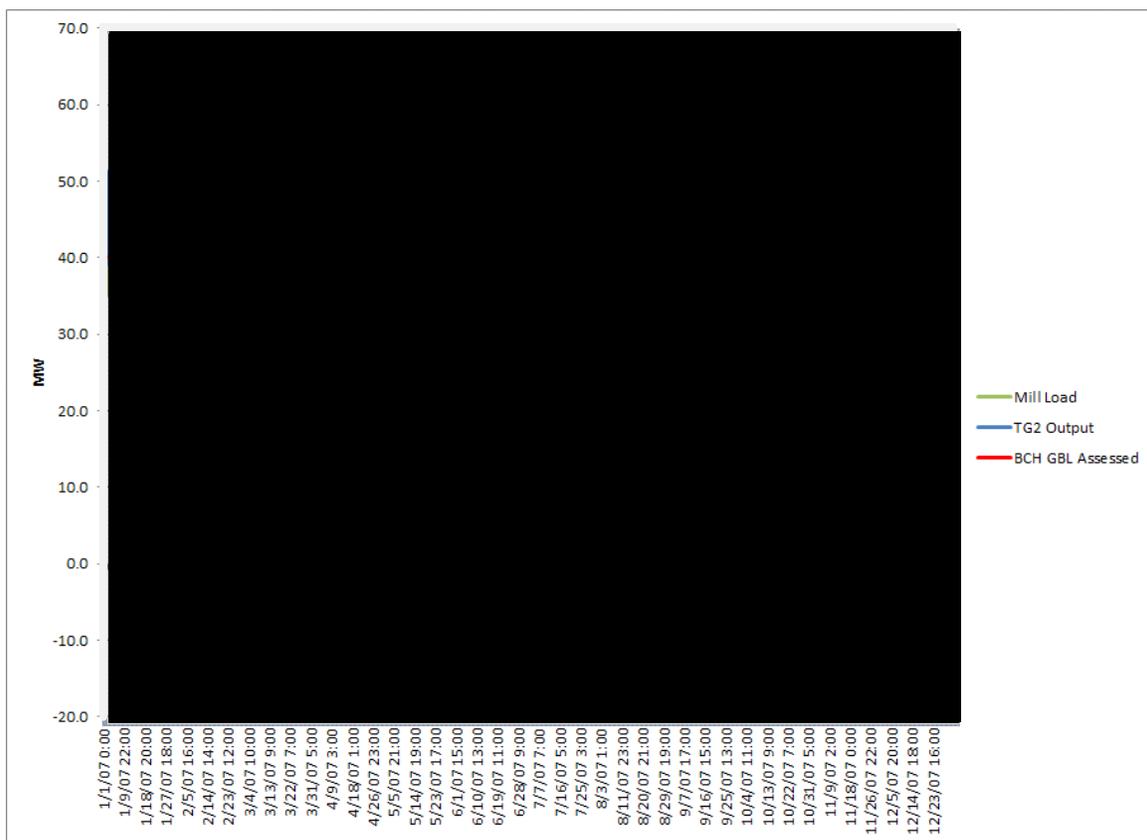
127. As shown below and discussed in greater detail in Pöyry's second expert report, Mr. Merwin accurately represented the mill's normal operations in 2007. The close correlation between Celgar's generation output (the blue line below) and its hourly mill load (the green line below) supports BC Hydro's decision to set Celgar's GBL at the level of its 2007 load.²⁴⁹

Figure 1: Celgar's 2007 TG2 Hourly Output vs. Mill Load and BCH GBL Assessed²⁵⁰

²⁴⁸ Lester Dyck Statement II, ¶¶ 19-29.

²⁴⁹ Pöyry Expert Report II, ¶¶ 51-64.

²⁵⁰ See Pöyry Expert Report II, Figure 6.



2. Mr. Merwin's Baseless Claim that He Could Not Describe Normal Operations at the Celgar Pulp Mill

128. Mr. Merwin does not deny that he told Mr. Dyck that “2007 represented normal operations for Celgar going forward.”²⁵¹ However, he complains that he did not understand what Mr. Dyck meant when he asked him to describe “normal operations” at the Celgar pulp mill.²⁵² He claims that if he had understood the meaning of “normal” he would have informed BC Hydro that:

[Celgar] did not have sufficient information on whether [its] 2007 operations were normal. [Celgar] had just installed new equipment and made process improvements as a result of Project Blue Goose, and [it] did not yet have sufficient experience to determine the reliability of the new plant

²⁵¹ Brian Merwin Statement II, ¶ 18.

²⁵² Lester Dyck Statement I, ¶¶ 81-82.

configuration, nor had [it] had sufficient time to evaluate whether problems might arise.²⁵³

129. This contention strains credulity. As Director of Strategic Initiatives, Mr. Merwin had to have had an understanding of what normal operations were at the Celgar pulp mill. Mr. Dyck had numerous conversations with Mr. Merwin to discuss Celgar's "normal operations".²⁵⁴ Mr. Merwin had spent a considerable amount of time becoming familiar with the energy production at Celgar. He was also directly supported by Mr. Jim McLaren, who would have had a thorough technical understanding of energy production at the pulp mill. Perhaps more importantly, Mr. Merwin's contention that Project Blue Goose was not fully reliable actually means that the GBL for 2007 was lower than it should have otherwise been in these circumstances.

130. Mr. Merwin's assertions are further undermined by his own submissions to BC Hydro concerning Celgar's GBL which indicate that:

Historically, under normal operating conditions Celgar's load was 38 MW to 39 MW. In 2007, Celgar's load under normal operating conditions was 43 MW, depending on whether Celgar's chipping plant is running this number could go as high as 45 MW. During less than ideal operating conditions the mill load would likely be a slightly lower number. As Celgar moves to a higher reliability, meaning running at target rates, there will be a higher frequency when Celgar's load is equal or greater than 43 MW.²⁵⁵

131. This letter indicates quite clearly that Mr. Merwin was well aware of what constituted normal operating conditions at Celgar in 2007. That 2007 reflected normal operations at the mill is also confirmed by subsequent years of generation at the mill, which demonstrate even higher levels of generation than 2007:

²⁵³ Brian Merwin Statement II, ¶ 19.

²⁵⁴ Lester Dyck Statement II, ¶ 19.

²⁵⁵ Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") - Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008, p. 4, **R-127**. [Emphasis Added]

Table 1: Summary of Total Generation Discrepancy²⁵⁶

	Generation		Daily Reports
	Reply Annex A	Monthly Statistics	
2005	300,192		
2006	290,413		
2007	350,641		
2008	374,359		
2009	359,897		
2010			

3. Celgar’s Negotiations with BC Hydro Concerning the Exclusivity Clause and the Side Letter Agreement

132. Every EPA that BC Hydro has signed with self-generators contains an exclusivity clause that restricts the sale of below-GBL electricity to third parties.²⁵⁷ The purpose of the clause is to provide certainty to BC Hydro that it will have the security of supply that it has contracted for with project proponents. As Mr. Scouras explains:

Without an exclusivity provision a proponent could elect to sell its electricity to a third party and not BC Hydro, even if the proponent would incur liquidated damages under the EPA. Such a scenario would result in BC Hydro not receiving the full benefit of the electricity under the EPA and would, thus, significantly undermine the firmness of the security of supply that BC Hydro is seeking to achieve with an EPA. The exclusivity provision provides greater certainty that BC Hydro will in fact receive the benefit of the electricity under the EPA and protects BC Hydro’s procurement of electricity.²⁵⁸

²⁵⁶ In reviewing Celgar’s monthly and daily operational statistics, Pöyry found that there were certain discrepancies in the data reported there, and the figures reported in the Claimant’s Reply Annex A. *See* Pöyry Expert Report II, ¶¶ 28-33.

²⁵⁷ Jim Scouras Statement II, ¶ 17, 20.

²⁵⁸ Jim Scouras Statement II, ¶ 9.

133. During the EPA negotiations with the Claimant, Mr. Merwin requested an amendment to the exclusivity provision that would allow the Claimant to sell below-GBL electricity to third parties. BC Hydro had a number of concerns with Mr. Merwin's the proposed amendment, including: (1) it would provide the Claimant with a right not being offered to any other proponent; (2) it could erode the procurement of incremental electricity from the Claimant under the EPA; (3) it could be construed as an implicit acceptance of harmful arbitrage; and (4) it could prejudice BC Hydro's position in front of the BCUC that FortisBC should not be allowed to purchase power from BC Hydro under the 1993 Power Purchase Agreement ("1993 PPA") for the purpose of allowing its customers to arbitrage that power.²⁵⁹

134. BC Hydro nonetheless wished to remain responsive to the interests of the Claimant, and the parties thus negotiated and signed a "Side Letter Agreement" that would operate in conjunction with the exclusivity provision in the EPA. The Side Letter Agreement establishes two essential principles. First, it states the exclusivity provision in the EPA is "without prejudice" to the right of Celgar

(i)...to take a position in any other pending or future regulatory proceeding before the BCUC, the effect of which if such position were to prevail in that proceeding, would be that (A) FortisBC may supply electricity to [Celgar] to serve the [Celgar's] Mill Load, in circumstances where [Celgar] sells self-generated electricity diverted from serving Mill Load, (B) [Celgar] may sell such self-generated electricity in those circumstances, and (C) section 7.4(b) of the EPA in its present form should have no force or effect.²⁶⁰

135. Second, the Side Letter Agreement states that

If the BCUC makes an order *in any pending or future regulatory proceeding* upholding the position described in paragraph (1)(i) above, then subject to the outcome of any reconsideration or appeal thereof, the Parties shall execute

²⁵⁹ Jim Scouras Statement II, ¶¶ 18-23.

²⁶⁰ Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, RE: Electricity Purchase Agreement, with Effective Date of January 27, 2009 ("EPA"), dated January 27, 2009, bates 026183-026184, ¶ 1, **R-138**. [Emphasis added]

and deliver an agreement amending the EPA to substitute the alternate section 7.4(b) for that section in the present EPA, which amendment shall be filed with the BCUC under section 71 of the UCA and shall be subject to acceptance by the BCUC.²⁶¹

136. In short, the Side Letter Agreement allows for an amendment to the exclusivity clause in the EPA should the BCUC agree that the Claimant should be allowed to sell its below-GBL electricity third parties. Mr. Scouras explains that

[N]o other pulp mill to date in any BC Hydro power procurement process (including the Bioenergy Call for Power Phase I) has been given the same preferential treatment. To the contrary, every mill that has signed an EPA with BC Hydro has been subject to the same exclusivity provision found in section 7.4 of the 2009 EPA with Celgar. No other EPA proponent has been offered a similar Side Letter Agreement with BC Hydro.²⁶²

137. In its Reply, the Claimant asserts that the “exclusivity provisions in Section 7.4(b) of Celgar’s 2009 EPA with BC Hydro directly prevent Celgar from selling any power it generates below its 2007 load, again, not to BC Hydro but to any third party.”²⁶³ The Claimant fails however to account for the Side Letter Agreement. In fact, the Side Letter Agreement is mentioned only once in a footnote in the Claimant’s Reply.²⁶⁴ In light of the Agreement, the Claimant’s assertion is factually untrue.

138. More importantly, the BCUC has agreed that Celgar should be allowed to “sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources,”²⁶⁵ a fact that will be further discussed below. In response

²⁶¹ Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, RE: Electricity Purchase Agreement, with Effective Date of January 27, 2009 (“EPA”), dated January 27, 2009, bates 026183-026184, **R-138**, ¶ 2. [Emphasis added]

²⁶² Jim Scouras Statement II, ¶ 33.

²⁶³ Claimant’s Reply, ¶ 34.

²⁶⁴ See Claimant’s Reply, fn. 699, where they acknowledge that “resolution of Celgar’s below-GBL sales” were left to the BCUC.

²⁶⁵ BCUC, Decision and Order G-188-11, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, November 14, 2011, p 49, **R-275**.

to this decision, Mr. Merwin wrote to BC Hydro on November 29, 2011, requesting “that BC Hydro enter into an amendment agreement effecting the changes to the EPA contemplated by the Letter Agreement.”²⁶⁶ However, while the parties were arranging to amend the exclusivity provision in the EPA, the Claimant initiated its NAFTA claim and has since not followed-up with its request.

D. The Claimant's Treatment at the BCUC

1. BCUC Order G-48-09

139. As Canada explained in its Counter-Memorial,²⁶⁷ the proceeding leading up to BCUC Order G-48-09 was initiated by BC Hydro in response to a set of two agreements between FortisBC and the City of Nelson. The BCUC determined that FortisBC could not purchase embedded cost power from BC Hydro under the 1993 Power Purchase Agreement (“1993 PPA”) for the purpose of allowing its customers (including the City of Nelson and Celgar) to arbitrage that power. The Order has no effect on FortisBC's ability to draw on its other resources to supply embedded cost power to its customers for the purpose of arbitraging that power.

140. The Claimant states that “BCUC Order G-48-09 imposes a net-of-load access standard on Celgar, by effectively preventing FortisBC from selling Celgar any embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity.”²⁶⁸ The Claimant's characterization is untrue. In the proceedings leading up to BCUC Order G-188-11, the Claimant argued that

Order G-48-09 provides that FortisBC will not sell electricity ‘purchased under’ the PPA to Celgar, while Celgar sells self-generation that is not in

²⁶⁶ Letter from Brian Merwin to BC Hydro, Re: Electricity Purchase Agreement (the “EPA”) between Zellstoff Celgar Limited Partnership (“Celgar”) and British Columbia Hydro and Power Authority (“BC Hydro”), December 6, 2011, p. 2, **R-485**, CAN003246.

²⁶⁷ Canada's Counter-Memorial, ¶¶ 251-255.

²⁶⁸ Claimant's Reply Memorial, ¶ 33.

excess of its load. It does not prohibit FortisBC from selling other energy to Celgar, while Celgar sells such self-generation.²⁶⁹

And the BCUC agreed:

Order G-48-09 protects the benefits of BC Hydro PPA Power for all customers of FortisBC. Order G-48-09 does not consider power from FortisBC's own generation or other non-BC Hydro PPA Power components of its resource stack.²⁷⁰

141. Thus, the Claimant cannot now possibly sustain an argument that Order G-48-09 prevented FortisBC from selling the Claimant embedded cost electricity from its own resource stack, even “while Celgar is selling electricity.” That is not what BCUC Order G-48-09 says and the Claimant was in fact provided this right in subsequent regulatory proceedings, as will be seen below.

2. Subsequent Proceedings Relating to a FortisBC-Celgar GBL

142. In proceedings following BCUC Order G-48-09, the BCUC encouraged the Claimant to negotiate a GBL with FortisBC that could be incorporated into a general service agreement.²⁷¹ As Mr. Merwin testifies:

[After Order G-48-09] Celgar consequently requested that FortisBC set a GBL for Celgar that was lower than the GBL BC Hydro had set. We thought

²⁶⁹ Letter from K.C. Moller, Re: Zellstoff Celgar Limited Partnership (“Celgar”) Complaint Regarding the Failure of FortisBC Inc. (“FortisBC”) and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges (the “Complaint”) – Project No. 3698636, dated September 1, 2011, p. 1, **R-483**. [Emphasis added.]

²⁷⁰ BCUC Order G-188-11 and Decision, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, 14 November 2011 p. 37, **R-275**. [Emphasis added.]

²⁷¹ BCUC Order G-188-11 and Decision, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, 14 November 2011, p. 28, **R-275**. This is consistent with the BCUC’s determination in BCUC Order G-156-10 in which the BCUC declined to set a GBL but noted that the parties were free to arrive at one on their own and submit it to the BCUC for approval. BCUC, Order G-156-10 and Decision, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 19 October 2010, p. 115, **R-228**.

that a FortisBC assigned GBL would serve two purposes: (1) liberate Celgar from the restrictive net-of-load standard; and (2) should the BCUC approve a FortisBC assigned GBL, such BCUC action could be used by Celgar to activate the terms of the side letter to its EPA with BC Hydro, to override the EPA's restrictions on its below-load sales to third parties.²⁷²

143. FortisBC and the Claimant were not, however, able to reach an agreement on a GBL. As Mr. Swanson explains:

[T]he BCUC has repeatedly encouraged the Claimant to negotiate a GBL with FortisBC. While FortisBC made reasonable attempts to negotiate a FortisBC GBL, the Claimant continued to take unreasonable positions alleging that it should have a GBL as low as 1.5 MW.²⁷³

144. In light of its failure to reach an agreement with FortisBC, the Claimant filed a complaint against FortisBC at the BCUC. It alleged that "FortisBC will not voluntarily negotiate an agreement with Celgar that results in a workable FortisBC GBL without appropriate direction from the [BCUC]".²⁷⁴ Contrary to the position taken in this arbitration, the Claimant stated that "[e]xtensive uncontested evidence has been placed before the [BCUC] relating to GBLs and methods utilized for establishing GBLs in the BC Hydro service area that should be sufficient to circumscribe a process for establishing...a FortisBC GBL."²⁷⁵ The Claimant thus requested the BCUC to apply BC Hydro's GBL methodology,²⁷⁶ recognizing that "it provides an effective means to prevent

²⁷² Brian Merwin Statement I, ¶ 120.

²⁷³ Dennis Swanson Statement II, ¶ 37.

²⁷⁴ Celgar, Final Submission in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 15 August, 2011, p. 21, **R-376**.

²⁷⁵ Celgar, Final Submission in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 15 August, 2011, p. 20, **R-376**.

²⁷⁶ Sangra Moller LLP on behalf of Zellstoff Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, p. 5, **R-264**.

arbitrage,²⁷⁷ “is not based on a set formula,”²⁷⁸ and should “be a negotiated amount giving consideration to the unique circumstances of the self-generating customer.”²⁷⁹

145. FortisBC did not object to the determination of a GBL for the Claimant,²⁸⁰ but argued that a GBL should not be set in a way that causes harm to other ratepayers.²⁸¹ FortisBC agreed that a GBL should be determined through a process similar to that used by BC Hydro,²⁸² and proposed a 40 MW GBL.²⁸³

146. However, rather than impose a GBL on the two disputing parties, the BCUC in Order G-188-11 made an altogether different determination, finding in favor of the Claimant that it should, as a matter of fact, be allowed to receive service from FortisBC to enable it to sell its self-generation to third parties:

[I]t is evident that Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power. Under the rates that the

²⁷⁷ Sangra Moller LLP on behalf of Zellstoff Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, at Appendix B-5, **R-264**.

²⁷⁸ Sangra Moller LLP on behalf of Zellstoff Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, p. 2, **R-264**.

²⁷⁹ Sangra Moller LLP on behalf of Zellstoff Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, at Appendix B-5, **R-264**.

²⁸⁰ FortisBC, Final Submission, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 22 August 2011, p. 4, **R-377**.

²⁸¹ FortisBC, Final Submission, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 22 August 2011, p. 26 **R-377**.

²⁸² FortisBC, Final Submission, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 22 August 2011, p. 33, **R-377**.

²⁸³ FortisBC, Final Submission, in the Matter of a Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, 22 August 2011, p. 34, **R-377**.

[BCUC] has directed FortisBC to implement, a FortisBC GBL should be not required.²⁸⁴

147. The BCUC thus agreed that the Claimant should have access to FortisBC power while selling its generation below the BC Hydro GBL, and directed FortisBC to establish a “rate” for that power “based on RS 31 but excluding BC Hydro PPA Power from its resource stack” and without setting any limits on the amount of access to that power.

148. Mr. Merwin proclaimed the BCUC’s decision to be “a major victory.” In a memorandum to the Mercer International Board of Directors, he confirmed that “Celgar is able to buy all of its power requirements from FortisBC and free to the [sic] sell the output of its generation to third parties.”²⁸⁵

149. In compliance with the BCUC’s request, FortisBC filed “Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power” (“NECP”) with the BCUC, in which it defined NECP as the “embedded cost of power excluding power purchased by FortisBC from the BC Hydro PPA.”²⁸⁶ (Canada will discuss the details of the NECP rate in the next section.) FortisBC also affirmed the principle in Order G-188-11:

²⁸⁴ BCUC, Decision and Order G-188-11, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, November 14, 2011, p. 49, **R-275** “The mere status of being a customer who self-generates should not preclude FortisBC from its obligation to serve that customer. Nor does it automatically exempt such customers from accessing some amount of non-PPA embedded cost power. It would be fair that Celgar receive fair treatment within the FortisBC service area vis-à-vis other industrial customers. Yet, self-generators that sell into power markets do have the potential to negatively impact other FortisBC customers by necessitating acquisitions by the utility of power from other sources in order to supply the power the self-generator elects to purchase from the utility while simultaneously selling into the markets. Therefore, the [BCUC] finds Celgar is entitled to some amount of FortisBC’s non-PPA embedded cost power when selling power. But it is unclear what that level should be. Therefore, the [BCUC] directs FortisBC to consult with all classes of its customers to determine guidelines for the level of non-PPA embedded cost power to which eligible self-generation customers should be entitled.” BCUC, Decision and Order G-188-11, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, November 14, 2011, p. 38, **R-275**.

²⁸⁵ Memorandum from Management to Mercer International Board of Directors, Re Update on Celgar’s Generator Baseline Issue, 7 December 2011, at MER00191043, **R-531**.

²⁸⁶ Letter from Dennis Swanson, Re: Commission Order G-188-11 in the Matter of Zellstoff Celgar Limited

[T]here will be power generated by Celgar, below the BC Hydro GBL of 40 MW, available for sale that will be replaced from FortisBC resources. The amount, whether Celgar chooses to self-supply all or no power to its mill, is immaterial in the face of proper pricing. [FortisBC] is of the opinion that the [BCUC] has established the principle that arbitrage of FortisBC non-PPA power is not prohibited out of hand.²⁸⁷

150. The Ministry of Energy and Mines was concerned with the principle established in Order G-188-11 and with FortisBC's submission, which would allow the Claimant to increase its purchases of embedded cost power for the purpose of arbitrage. On behalf of the Ministry, Les McLaren wrote:

The Ministry does not support arbitrage of FortisBC Embedded Cost Power (or NECP) by self-generators, just as it does not support arbitrage of BC Hydro embedded cost power... [T]he Ministry submits that arbitrage by self-generators has the potential to harm the interests of FortisBC's other customers, and precautions are necessary to avoid it. It is not clear why the [BCUC] has restricted arbitrage related to BC Hydro's embedded cost power delivered to FortisBC under the PPA, while potentially allowing self-generators in FortisBC's service territory to arbitrage against FortisBC's NECP.

[...]

FortisBC's compliance filing introduces another approach to self-generation which, if approved by the [BCUC], would mean that one set of principles governs sales of self-generation in FortisBC's service area and an entirely different set of principles governs sales of self-generation in BC Hydro's service area. The Ministry submits that the [BCUC] now has an opportunity to decide whether a set of consistent principles should apply throughout the province instead. The Ministry notes that BC Hydro has recently filed an Information Report with respect to Customer Generator Baselines, including its responses to the [BCUC's] questions about generator baselines set out in Letter No. L-106-09. It is hoped that this BC Hydro submission could help

Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, April 13, 2012 p. 1 **R-497**.

²⁸⁷ Letter from Dennis Swanson, Re: Commission Order G-188-11 in the Matter of Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, April 13, 2012, pp. 3 and 4, **R-497**.

inform a set of principles that apply consistently throughout British Columbia.²⁸⁸

151. In response to the Ministry's proposal to establish a uniform GBL policy across both utilities, FortisBC wrote to the BCUC stating that it "agrees with the key points of concern held by the Ministry, and concurs that its suggested regulatory framework provides a workable solution."²⁸⁹ To that end, using data from 2007-2009, FortisBC concluded that a "GBL of approximately 41 MW is appropriate for Celgar based on historical generation and energy consumption" and would mitigate arbitrage of FortisBC embedded cost power.²⁹⁰

152. The Claimant, however, resisted the applicability of a uniform GBL policy across the two utilities, even though it acknowledged that a FortisBC GBL "would be an acceptable approach to address issues of competitive disadvantage and unfairness as between customers within FortisBC's and BC Hydro's service areas."²⁹¹ It is remarkable that the Claimant made the following statements to the BCUC *after* it filed its NAFTA claim against the Government of Canada, where it now launches a complaint against the lack of a provincial-wide framework:

[T]he Ministry's recently-articulated desire for regulatory consistency should not be allowed to delay the current compliance proceedings... Order G-188-11 does not require Celgar and FortisBC to agree on a GBL. Accordingly, the BC Hydro approach to GBLs has no application to Celgar's right to receive

²⁸⁸ Ministry of Energy and Mines, Comments in the Matter of a Filing by FortisBC of Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), 22 June 2012, pp. 4 and 6, **R-49**.

²⁸⁹ Letter from Dennis Swanson to Erica Hamilton, Re: FortisBC Inc. Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11) – Reply Submissions, July 4, 2012, p.22, **R-266**.

²⁹⁰ Letter from Dennis Swanson to Erica Hamilton, Re: FortisBC Inc. Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11) – Reply Submissions, July 4, 2012, p. 25, **R-266**.

²⁹¹ Letter from KC Moller to Erica Hamilton, Re: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Project No. 3698675/Order G-54-12; Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), Aug 10, 2012, p. 5, **R-499**.

FortisBC ECP under Order G-188-11... Furthermore, customers in the FortisBC service area have long operated under different restrictions, opportunities, principles and programs.

[R]ecent [BCUC] Orders G-156-10 and G-188-11 have resulted in the recognition of certain rights afforded Celgar to utility service within the existing regulatory framework – without the need for a broader policy review. The Ministry and BC Hydro chose not to seek reconsideration of, or appeal of those Orders. They should not now be entitled to question or impede the implementation of those Decisions in these compliance proceedings on the premise that a broader Province-wide policy is now required, particularly as they have had years to promote such a policy and have failed to do so.

The Province's desire for consistent Province-wide policies governing self-generation while laudable, should not delay the current proceedings. The Province has demonstrated no urgency in establishing new policy.²⁹²

153. The Claimant obviously saw benefit to BCUC Order G-188-11 and regarded the GBL methodology as an impediment to that benefit. In light of the Claimant's opposition, the BCUC in Order G-202-12 chose not to adopt the GBL methodology, but instead reaffirmed that "entitlement to non-BC Hydro PPA embedded cost power by a self-generating customer may be as high as 100 percent of load as nominated by that customer."²⁹³ The Commission concluded:

A self-generator is equally entitled to having its load requirements serviced by FortisBC at embedded cost rates, except for BC Hydro PPA power which is specifically excluded by the PPA. A primary concern raised by [the Ministry] with FortisBC's proposal is how the entitlement would impact other FortisBC ratepayers.²⁹⁴

²⁹² Letter from KC Moller to Erica Hamilton, Re: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Project No. 3698675/Order G-54-12; Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), Aug 10, 2012, pp. 6 and 7, **R-499**.

²⁹³ BCUC, Decision and Order G-202-12, in the Matter of FortisBC Inc, Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 3, **R-265**. [Emphasis added.]

²⁹⁴ BCUC, Decision and Order G-202-12, in the Matter of FortisBC Inc, Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 9, **R-265**.

[The Ministry] submits that province-wide regulatory principles governing self-generation and mitigating arbitrage are required and suggests the [BCUC] adopt the GBL approach across the province. The [BCUC] has upheld a consistent regulatory principle, that self-generators should not arbitrage power to the detriment of other ratepayers, but has applied different mechanisms to achieve this protection in different circumstances.

GBLs exist between BC Hydro and its self-generating customers because they have been able to reach agreement on their GBLs. FortisBC and Celgar have been unable to reach such an agreement, notwithstanding the repeated encouragement by the [BCUC] to do so. There is currently no basis upon which the [BCUC] is able to force such an agreement or dictate what a GBL should be.²⁹⁵

154. In this arbitration the Claimant lambasts the BCUC for its alleged failure to “establish a binding rule governing self-generation applicable province-wide” and to “review and approve GBL guidelines.”²⁹⁶ In light of the above passages, these accusations have no merit because it was the Claimant who opposed the application of such policies in FortisBC territory. Moreover, the Claimant’s characterization of BCUC Order G-48-09 as “preventing FortisBC from selling Celgar any embedded cost electricity from Forts’ pre-existing resource stack while Celgar is selling electricity”²⁹⁷ is clearly false, as will be further demonstrated below.

3. Subsequent Proceedings Relating to the Claimant’s “Access” to FortisBC’s Embedded Cost Power

155. The Claimant continues to perpetuate the myth that BCUC Order G-48-09 “restricts Celgar’s access to embedded cost utility electricity.”²⁹⁸ As explained above, the Claimant’s interpretation of that Order conflicts with its statements before the BCUC²⁹⁹

²⁹⁵ BCUC, Decision and Order G-202-12, in the Matter of FortisBC Inc, Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 11, **R-265**.

²⁹⁶ Claimant’s Reply, ¶ 477.

²⁹⁷ Claimant’s Reply, ¶ 33.

²⁹⁸ Claimant’s Reply, ¶ 35.

²⁹⁹ Letter from KC Moller to Alana Gillis, Re: Zellstoff Celgar Limited Partnership (“Celgar”) Complaint

and completely ignores proceedings that followed BCUC Order G-48-09 and their outcome.

156. Before examining these proceedings, however, it must be emphasized that what the Claimant has successfully sought before the BCUC is *a right that no other mill in the Province holds*, which is the right to arbitrage *existing* self-generation, historically used for self-supply. In other words, what it has been granted is the right to stop self-supplying, purchase embedded cost power from its utility, and then sell its previously self-supplied electricity to a third party. No other mill in BC has such a right.

157. As explained above, in Order G-188-11, the BCUC agreed that “Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power.”³⁰⁰ This was confirmed by the BCUC, which stated in Order 202-12 that: “entitlement to non-BC Hydro PPA embedded cost power by a self-generating customer may be as high as 100 percent of load as nominated by that customer.”³⁰¹ The Claimant recognizes this “major victory”³⁰² in its Memorial:

In its G-202-12 Decision, the Commission concluded that Celgar was entitled to have FortisBC serve 100 percent of its load with embedded cost power, as long as that embedded cost power excluded BC Hydro PPA power. The type

Regarding FortisBC Inc. (“FortisBC”) and Celgar to complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges (the “Complaint”)- Project No. 3698636 , September 1, 2011, p. 1, **R-483**: “Order G-48-09 provides that FortisBC will not sell electricity ‘purchased under’ the PPA to Celgar, while Celgar sells self-generation that is not in excess of its load. It does not prohibit FortisBC from selling other energy to Celgar, while Celgar sells such self-generation.”

³⁰⁰ BCUC, Decision and Order G-188-11, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, November 14, 2011, p. 49, **R-275**.

³⁰¹ BCUC, Decision and Order G-202-12, in the Matter of FortisBC Inc, Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 3. **R-265**.

³⁰² Memo to Mercer International Board of Directors from Management, Re: Update on Celgar’s Generator Baseline Issue, dated December 7, 2011, p. 1, **R-531**.

of embedded cost power to which Celgar was entitled was termed “non-BC Hydro PPA embedded cost power” or “NECP.”³⁰³

158. In fact, it was the Claimant who *proposed* the concept of NECP to the BCUC in the proceedings leading up to G-188-11 that led to this result:

Order G-48-09 provides that FBC will not sell electricity ‘purchased under’ the PPA to Celgar, while Celgar sells SG that is not in excess of its load. It does not prohibit FBC from selling other energy to Celgar, while Celgar sells such self-generation. That is what Celgar proposes as a resolution to the current impasse. In order for the proposed matching purchase to have effect, the underlying premise must be that sales of energy to Celgar, matching the FBC purchases, would not be considered to be energy purchased from BCH under the PPA.³⁰⁴

159. The BCUC accepted the Claimant’s approach, which, in the Claimant’s own words “replac[ed] the ‘net of load’ criterion with a principled approach to determining utility service to a self-generator.”³⁰⁵

160. Mr. Swanson of FortisBC explains the NECP as follows:

FortisBC planned to source power for the NECP rate using all available resources with the exception of BC Hydro’s PPA power. These sources included surplus from FortisBC’s owned generation (e.g. hydro-electric generating plants), BC Hydro non-PPA power, and the market. The NECP rate would be the difference between two embedded cost calculations with a slightly different resource stack – one with BC Hydro PPA power and one without BC Hydro PPA power. In other words, the NECP would be calculated as the delta between the cost of the replacement electricity (all embedded cost resources excluding PPA power) and the cost of Rate

³⁰³ Claimant’s Memorial, ¶ 358.

³⁰⁴ Letter from KC Moller to Alana Gillis, Re: Zellstoff Celgar Limited Partnership (“Celgar”) Complaint Regarding FortisBC Inc. (“FortisBC”) and Celgar to complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges (the “Complaint”)- Project No. 3698636 , September 1, 2011, p. 1. **R-483**.

³⁰⁵ Letter from KC Moller to Erica Hamilton, Re: Zellstoff Celgar Limited Partnership (“Celgar”) – FortisBC Inc. Project No. 3698675/Order G-54-12; Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), Aug 10, 2012, p. 10, **R-499**.

Schedule 31 (all embedded cost resources including PPA power). If there was no delta, then no NECP rate would apply.³⁰⁶

161. The Claimant protests the NECP rate, which it argues would be a higher rate than “traditional embedded cost rates;”³⁰⁷ *i.e.*, the rate it is charged by FortisBC under Rate Schedule 31. The Claimant is, however, wrong to protest the NECP for two main reasons.

162. First, self-generators in BC Hydro territory are not permitted to engage in the type of arbitrage that the Claimant has been accorded by the BCUC. The BCUC has allowed the Claimant to nominate up to 100% of its load to be served by NECP. Self-generators in BC Hydro territory are prohibited from selling any self-generation historically used for self-supply.

163. Second, the NECP rate has never been and will likely never be higher than “traditional embedded cost rates.” As Mr. Swanson explains:

Since 2009, the cost of replacement power (*i.e.*, from owned surplus generation, BC Hydro (non PPA) power, and the market) has predominantly been lower than the cost of Rate Schedule 31 and is expected to remain lower into the future...

Moreover, a large hydroelectric infrastructure project called the Waneta Hydroelectric Expansion Project is expected to come online this Spring, and I anticipate that it will contribute significantly to FortisBC's capacity surplus. In this context, consider an example where FortisBC has surplus from its owned generation resources sufficient to meet the needs of a self-generating customer looking to sell its entire load, such as Celgar. In this scenario there would be no NECP rate because the cost of serving the load would not be higher than the cost of Rate Schedule 31. Thus, if the Mid-C market climbed above Rate Schedule 31, Celgar could stand to gain a very good return.³⁰⁸

164. In light of the above, it is difficult (if not impossible) to understand the Claimant's assertion that, since G-48-09, “FortisBC has refused to supply Celgar with *any* embedded

³⁰⁶ Dennis Swanson Statement II, ¶ 28.

³⁰⁷ Claimant's Memorial, ¶ 363; Claimant's Reply, ¶ 228, footnote 256.

³⁰⁸ Dennis Swanson Statement II, ¶¶ 33-34.

cost power from its existing resource stack while Celgar is selling its self-generated electricity, holding Celgar to a net-of-load standard.”³⁰⁹ The subsequent proceedings before the BCUC and FortisBC’s attempt to find a reasonable solution with its customer demonstrate that this statement is entirely untrue.

4. The Claimant’s Allegation of “Regulatory Indeterminacy” is a Product of its Own Making

165. The Claimant alleges that “the BCUC has subjected Celgar to a period of discrimination and regulatory uncertainty that began in 2009 and continues to this day. Since Order G-48-09 was issued in May 2009, Celgar has been unable to access embedded cost utility electricity below its 2007 load, and thus has been unable to sell any of its below-load electricity.”³¹⁰

166. In light of the above, this cannot possibly be true. Any “indeterminacy” the Claimant may feel is a product of its own making. Mr. Swanson, of the Claimant’s own utility, shares his own views:

It is my understanding that the Claimant alleges in this NAFTA case that the BCUC has “prevented” FortisBC from selling Celgar any embedded cost power for its below-load sales. This is wrong for two main reasons. First, the BCUC has repeatedly encouraged the Claimant to negotiate a GBL with FortisBC. While FortisBC made reasonable attempts to negotiate a FortisBC GBL, the Claimant continued to take unreasonable positions alleging that it should have a GBL as low as 1.5 MW. The Claimant’s failure to establish a GBL with FortisBC is not, in my view, the fault of the BCUC but of the Claimant’s own aggressive negotiation tactics.

Second, the BCUC has in fact granted the Claimant access to embedded cost power for its below load sales. The BCUC made this clear in Order G-188-11 and G-202-12. While the Claimant may have been concerned that the proposed NECP rate would be higher than what it refers to as “traditional embedded cost power,” I explain above why the Claimant’s concern is

³⁰⁹ Claimant’s Reply, ¶ 233.

³¹⁰ Claimant’s Memorial, ¶ 369.

unfounded. In this context, it is hard to comprehend how the BCUC has “prevented” the Claimant from accessing embedded cost power.³¹¹

E. BC Hydro's Treatment of Skookumchuck

1. BC Hydro's Treatment of Skookumchuck in the 1997 EPA Prior to the Existing Regulatory Framework

167. Following BC Hydro's 1994 RFP,³¹² BC Hydro negotiated an agreement to purchase [REDACTED] electricity generated by a new hog fuel-fired boiler and a new 14 MW turbine generator that would be built on the Skookumchuck mill's site. The project, named the Purcell Power Project, would operate as an Independent Power Producer, in parallel with the mill's original 15 MW turbine generator (“STG1”).³¹³ BC Hydro and Purcell Power Corporation signed the EPA on September 5, 1997 (“the 1997 EPA”).³¹⁴

168. The 1997 EPA provided for the sale of [REDACTED] 10.8 MW [REDACTED] to [REDACTED] BC Hydro at a firm energy price. [REDACTED] The EPA [REDACTED]

³¹¹ Dennis Swanson Statement II, ¶¶ 37-38. *See also*, Letter from K.C. Moller to Alana Gillis, Re: Zellstoff Celgar Limited Partnership (“Celgar”) Complaint Regarding the Failure of FortisBC Inc. (“FortisBC”) and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges (the “Complaint”) – Project No. 3698636, dated August 29, 2011, attaching Celgar's Reply Submissions, **R-571**. Letter from Corey Sinclair to Erica Hamilton, Re: FortisBC Inc. Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11) – Reply Submission, dated August 17, 2012, **R-500**; BCUC Order G-85-13, in the Matter of the Utilities Commission Act, R.S.B.C. 1996, Chapter 473 and an Application by FortisBC Inc., for Stepped and Stand-by Rates for Transmission Voltage Customers, May 24, 2013, **R-572**. Letter from K.C. Moller to Erica Hamilton, Re: FortisBC Inc. Application for Stepped and Standby Rates for Transmission Customers (the “Application”) and Zellstoff Celgar Limited Partnership (“Zellstoff Celgar”), dated August 22, 2013, attaching Zellstoff Celgar's evidence submission- internal document, **R-573**; Letter from K.C. Moller to Erica Hamilton, Re: FortisBC Inc. (“FortisBC”) Application for Stepped and Standby Rates for Transmission Voltage Customers – Non-Embedded Cost Power (NECP) Rate Rider, dated June 10, 2014, **R-574**.

³¹² *See* Canada's Counter-Memorial, ¶ 107.

³¹³ Christian Lague Statement, ¶¶ 9-11, 14.

³¹⁴ Electricity Purchase Agreement between Purcell Power Corp. and BC Hydro, 5 September 1997, **R-190**.

³¹⁵ Christian Lague Statement, ¶¶ 19, 33; Inter-office Memo from David G. Keir to Lester Dyck, Frank Lin, Sylvia von Minden, CBL Governance Team Re: Tembec Skookumchuck Pulp Operations -

also allowed [REDACTED]

[REDACTED] The project was designed in large part to replace the mill's emissions-heavy natural gas power boiler;³¹⁷ the 1997 EPA [REDACTED]

[REDACTED].³¹⁸ Because the 1997 EPA required that the

[REDACTED] 10.8 MWh/h [REDACTED]

[REDACTED]³¹⁹ This was consistent with BC Hydro's EPAs with IPPs at the time.³²⁰

169. In 1999, Tembec acquired the Skookumchuck mill, along with the 1997 EPA.³²¹ The 14 MW turbine generator foreseen by Purcell Power Corporation had not yet been purchased, and Tembec decided to purchase a single 43.5 MW turbine generator

CBL/GBL/EPA Analysis, dated April 8, 2009 at bates 037396, **R-189**.

³¹⁶ Electricity Purchase Agreement between Purcell Power Corp. and BC Hydro, 5 September 1997, s. 7 and Appendix 1 ("Price Schedule") at 016977 and 016997, **R-190**. *See also* Christian Lague Statement, ¶ 19.

³¹⁷ Christian Lague Statement, ¶ 10.

³¹⁸ Christian Lague Statement, ¶ 20. *See also* Electricity Purchase Agreement between Purcell Power Corp. and BC Hydro, 5 September 1997, s. 16.3 [REDACTED]

[REDACTED] and Appendix 2 (Emission Reductions Computation) at 016986 and 016998, **R-190**.

³¹⁹ Electricity Purchase Agreement between Purcell Power Corp. and BC Hydro, 5 September 1997, s. 15 and Figure 1 at 016986 and 017007, **R-190**.

³²⁰ *See also* Pöyry Expert Report II, ¶ 18 ("The Skookumchuck operation has been configured and operated more akin to a kraft pulp mill with a neighboring power plant operating as an independent power producer. This stands in stark contrast to Celgar's operations which are more integrated in nature to its recovery boiler.")

³²¹ The 1997 EPA was assigned from Purcell Power Corporation to Crestbrook Forest Industries, the previous owner of the Skookumchuck mill, on November 19, 1999. Tembec owned Crestbrook Forest Industries at that time. Tembec Industries and Crestbrook Forest Industries amalgamated on October 2, 2000. *See* Assumption Agreement between Purcell Power Corp., Crestbrook Forest Industries and British Columbia Hydro and Power Authority dated 19 November 1999, **R-548**; Letter from Bruce Burns to James Ko dated 29 September 2000, **R-549**.

("STG2") both to replace STG1 and to meet the delivery obligations of the 1997 EPA.³²² With the new mill configuration, Tembec also needed to negotiate a new Electricity Supply Agreement ("ESA") with BC Hydro to determine the terms and conditions under which BC Hydro would supply the mill with electricity. Through 1999 and 2000, Tembec and BC Hydro negotiated an accounting mechanism to govern Tembec's electricity sales under the 1997 EPA and its electricity purchases under the new ESA.³²³ The new ESA was ultimately signed on September 14, 2001, and included an Appendix that set out the mechanism for accounting under these two agreements.³²⁴

170. As Mr. Lague, the mill's Energy Manager explains, the mechanism divided Tembec's generation into four tranches:³²⁵

- Tranche 1: the [REDACTED] 10.8 MW the mill generated, which were deemed delivered to BC Hydro under the 1997 EPA. [REDACTED]
- Tranche 2: [REDACTED]³²⁶ [REDACTED]
- Tranche 3: [REDACTED]
- Tranche 4: [REDACTED]

³²² Christian Lague Statement, ¶ 15.

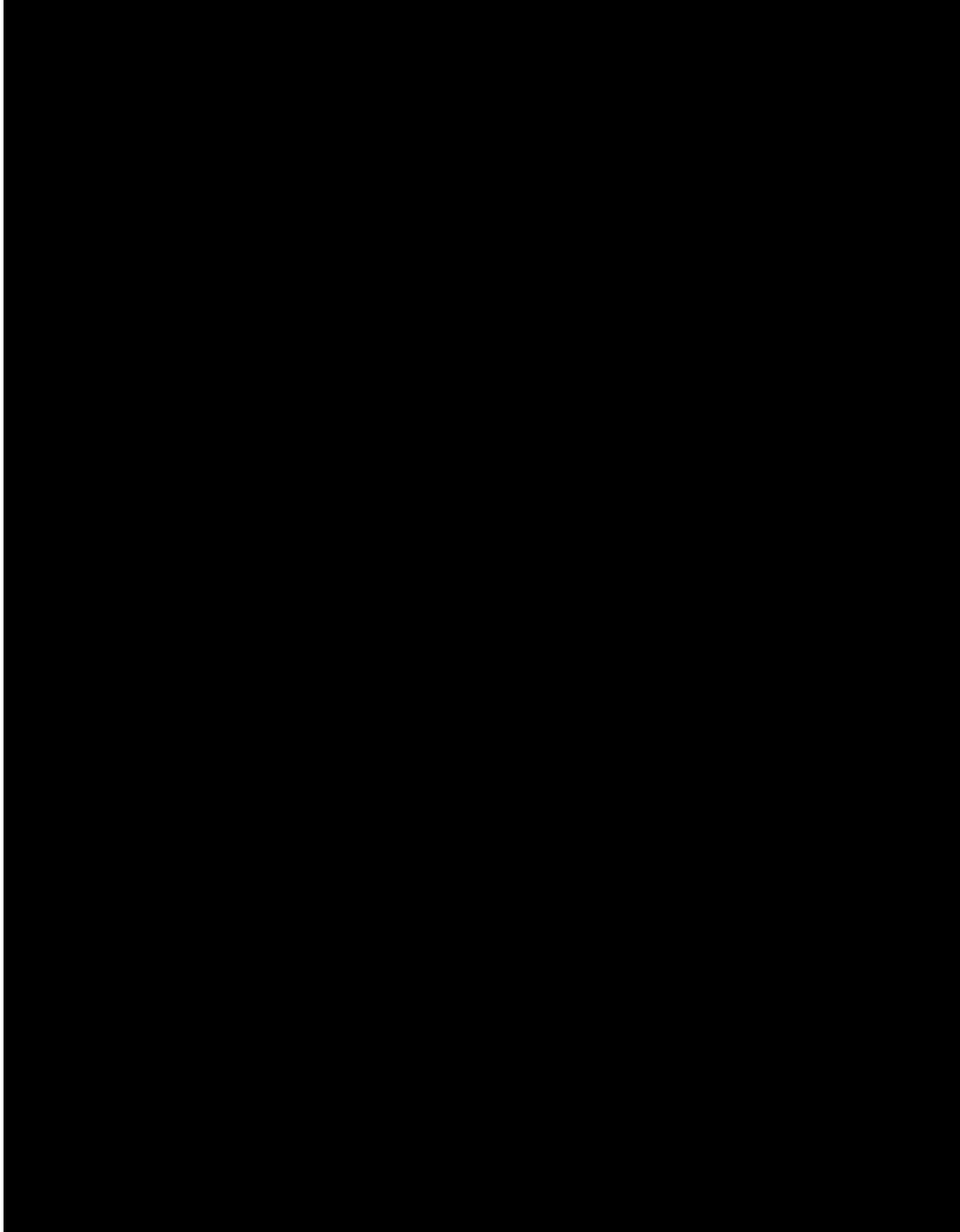
³²³ See Crestbrook Forest Industries Ltd. Minutes of Meeting, Crestbrook Forest Industries Ltd. (CFI) Cogeneration Project Meeting No. 5 dated 30 May 2000, **R-550**; Christian Lague Statement, ¶ 22.

³²⁴ Appendix to Electricity Supply Agreement between British Columbia Hydro and Power Authority and Tembec Industries Inc. ("Determination of Electricity Supplied and Taken Under RS 1821/1880"), 14 September 2001 at 30-31, **R-188**.

³²⁵ Christian Lague Statement, ¶¶ 23-25.

³²⁶ Assuming a mill load of [REDACTED] MW.

Figure 2: Generation Accounting Under Tembec's 1997 EPA³²⁷



171. [REDACTED] For
example, the [REDACTED] 10.8 MW [REDACTED]

³²⁷ Christian Lague Statement, ¶ 25.

[REDACTED]
[REDACTED]
[REDACTED]³²⁹ Running the boiler at this level [REDACTED]
[REDACTED]

172. The ESA included an agreement between the parties that Tembec would [REDACTED]
[REDACTED]³³⁰
[REDACTED]
[REDACTED]³³¹ Tembec reached COD under the 1997 EPA on September 14, 2001.

2. BC Hydro's Consideration of Skookumchuck in the 2009 EPA

173. In 2006, [REDACTED]
[REDACTED]³³²
[REDACTED]³³³ The mill was [REDACTED]
[REDACTED]
[REDACTED] Tembec nonetheless [REDACTED]
[REDACTED]
[REDACTED]³³⁴ Even with these incentives, however, Mr. Lague

³²⁸ Christian Lague Statement, ¶ 26.
³²⁹ Christian Lague Statement, ¶ 26.
³³⁰ Appendix to Electricity Supply Agreement between British Columbia Hydro and Power Authority and Tembec Industries Inc. ("Determination of Electricity Supplied and Taken Under RS 1821/1880"), 14 September 2001 at 31, **R-188**.
³³¹ Lester Dyck Statement I, ¶ 98; Inter-office Memo from David G. Keir to Lester Dyck, Frank Lin, Sylvia von Minden, CBL Governance Team Re: Tembec Skookumchuck Pulp Operations - CBL/GBL/EPA Analysis, dated April 8, 2009 at 037395-6, **R-189**.
³³² Christian Lague Statement, ¶ 33; Inter-office Memo from David G. Keir to Lester Dyck, Frank Lin, Sylvia von Minden, CBL Governance Team Re: Tembec Skookumchuck Pulp Operations - CBL/GBL/EPA Analysis, dated April 8, 2009 at 037396, **R-189**.
³³³ Christian Lague Statement, ¶ 33.
³³⁴ For example, BC Hydro's stepped rates, which came into effect in April 2006, [REDACTED]
[REDACTED]

testifies that it [REDACTED]

[REDACTED]³³⁵

174. With the onset of the financial crisis in 2008-9, several sawmills in B.C. curtailed their production, or shut down their operations completely. The availability of hog fuel therefore decreased significantly, and prices increased, intensifying Tembec's situation. Tembec's Canal Flats, Elko and Cranbrook sawmills, [REDACTED] [REDACTED] were also subject to curtailments.³³⁶ Where the Skookumchuck mill [REDACTED]

[REDACTED]³³⁷

[REDACTED]³³⁸

175. As Mr. Lague explains, [REDACTED]

[REDACTED]³³⁹

In 2006, the price of hog fuel delivered to the Skookumchuck mill averaged [REDACTED] By 2009, they had [REDACTED]³⁴⁰ In addition, the quality of hog fuel decreased significantly. As a result, Tembec [REDACTED]

[REDACTED] Christian Lague Statement, ¶ 33

³³⁵ Christian Lague Statement, ¶ 33.

³³⁶ See Letter from Marc Barrette to Frank Lin, 9 February 2009, **R-551**. These three plants were shut down for 8 weeks starting February 9, 2009.

³³⁷ Christian Lague Statement, ¶ 34.

³³⁸ Christian Lague Statement, ¶ 34.

³³⁹ Christian Lague Statement, ¶ 35.

³⁴⁰ Christian Lague Statement, ¶ 35, Figure 2: Price of Hog Fuel Delivered to the Skookumchuck Mill (2006-2012). See also Inter-office Memo from David G. Keir to Lester Dyck, Frank Lin, Sylvia von Minden, CBL Governance Team Re: Tembec Skookumchuck Pulp Operations - CBL/GBL/EPA Analysis, dated April 8, 2009 at 037396, **R-189**.

[REDACTED] These hog fuel supply conditions persisted until 2012.³⁴¹

176. Under these circumstances, Tembec advised BC Hydro [REDACTED] [REDACTED]³⁴² and began discussing options for renewing or replacing the agreement in early 2009. BC Hydro proposed that the parties negotiate a new EPA on the basis of terms and conditions similar to the Bioenergy Call for Power Phase I awards, including a GBL.³⁴³ As Mr. Dyck testifies, “this form of commercial arrangement better reflected the appropriate risk allocation, the regulatory environment since BCUC Order G-38-01, and relevant terms from a recent acquisition process.”³⁴⁴ Tembec agreed to these terms.

177. BC Hydro and Tembec therefore determined a GBL for the mill on the basis of what it would generate under normal operating conditions in the absence of the 1997 EPA and in the absence of the prospective 2009 EPA,³⁴⁵ *i.e.*, without the influence of any incentive. Without the 1997 EPA, [REDACTED]
[REDACTED]
[REDACTED]

178. In the GBL negotiations, Tembec took the position that, [REDACTED]
[REDACTED] sales agreement, [REDACTED]
[REDACTED]
[REDACTED]

³⁴¹ Christian Lague Statement, Figure 2 and ¶ 37.

³⁴² See Inter-office Memo from David G. Keir to Lester Dyck, Frank Lin, Sylvia von Minden, CBL Governance Team Re: Tembec Skookumchuck Pulp Operations - CBL/GBL/EPA Analysis, dated April 8, 2009 at 037395, **R-189**; BC Hydro and Tembec Electricity Purchase Agreement, 13 August 2009 at 017028, **R-198**.

³⁴³ Lester Dyck Statement I, ¶ 104.

³⁴⁴ Lester Dyck Statement I, ¶ 104.

³⁴⁵ Lester Dyck Statement I, ¶¶107, 106-109; Lester Dyck Statement II, ¶ 35.

[REDACTED]³⁴⁶ Tembec estimated that the mill would [REDACTED]

[REDACTED]

[REDACTED]³⁴⁷

179. BC Hydro accepted that, without the obligations of the 1997 EPA, [REDACTED]

[REDACTED]

[REDACTED]³⁴⁸ As such, under normal operating conditions, without electricity delivery obligations, the mill would [REDACTED]

[REDACTED]

[REDACTED] As Mr. Dyck puts it, [REDACTED]

[REDACTED]

[REDACTED]³⁴⁹

180. BC Hydro's engineering department ran [REDACTED] analysis similar to the one conducted by Mr. Lague at Tembec,³⁵⁰ and determined [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁵¹ BC Hydro proposed a GBL of 14 MWh/h (122.6 GWh/year),

³⁴⁶ Email from Christian Lague to Matt Steele re: Tembec Skookumchuck site GBL calculations, dated March 10, 2009 at 020997, **R-193**; Christian Lague Statement, ¶ 42; Lester Dyck Statement I, ¶ 108.

³⁴⁷ Email from Christian Lague to Matt Steele re: Tembec Skookumchuck site GBL calculations, dated March 10, 2009 at 020999, **R-193**.

³⁴⁸ See Lester Dyck Statement II, ¶ 35.

³⁴⁹ Lester Dyck Statement I, ¶ 109.

³⁵⁰ Lester Dyck Statement II, ¶ 43. As explained by Mr. Dyck, Mr. Norman Wild, an engineer at BC Hydro, was consulted early in the GBL negotiations to provide input into the determination of the GBL for Skookumchuck. Mr. Wild's [REDACTED] analyses for the Skookumchuck mill were lost in a file migration, and are not on the record of the proceeding.

³⁵¹ Lester Dyck Statement II, ¶ 45.

which Tembec accepted. The parties negotiated the remaining terms of the agreement on this basis.

181. BC Hydro and Tembec concluded the EPA on August 13, 2009.³⁵² Consistent with the Bioenergy Call for Power Phase I contracts, the EPA contained an exclusivity clause in which Tembec agreed not to sell energy it generated below its GBL, unless it was in excess of the mill's load.³⁵³

F. BC Hydro's Treatment of Howe Sound Pulp and Paper

1. BC Hydro's Negotiation of a Generation Threshold with Howe Sound Pulp and Paper in 2001

182. BC Hydro and Howe Sound had engaged in discussions concurrent with the BCUC regulatory process that led to Order G-38-01 regarding the sale of Howe Sound's idle generation. The parties determined that a "baseline" could be established using data from [REDACTED]

[REDACTED]³⁵⁴ Howe Sound had initially advocated before the BCUC that BC Hydro should permit it to sell all of its electricity above a 35 MW baseline.³⁵⁵ It also contemplated a [REDACTED] MW proposal, but ultimately settled on a [REDACTED] MW baseline that took into account [REDACTED]
[REDACTED]³⁵⁶

³⁵² BC Hydro and Tembec Electricity Purchase Agreement, 13 August 2009, **R-198**.

³⁵³ BC Hydro and Tembec Electricity Purchase Agreement, 13 August 2009, s. 7.4(a) at 017041, **R-198**.

³⁵⁴ Pierre Lamarche Statement I, ¶¶ 24-25; Pierre Lamarche Statement II, ¶¶ 2-3. [REDACTED]

[REDACTED] Pierre Lamarche Witness Statement I, ¶¶ 18-23.

³⁵⁵ See Letter from Brian Wallace, Bull, Housser and Tupper, on Behalf of Howe Sound Pulp and Paper to Robert Pellatt, Commission Secretary, Re: British Columbia Hydro and Power Authority ("BC Hydro") Sales to RS 1821 Customers with Self-Generating Capability, 27 February 2001, p. 2, bates 144040, **R-80**. Howe Sound's generation levels [REDACTED] Pierre Lamarche Statement II, ¶ 3.

³⁵⁶ Pierre Lamarche Statement I, ¶¶ 36-37; Pierre Lamarche Statement II, ¶ 4. The BC Hydro officials who were responsible for negotiating this baseline are, for the most part, retired or no longer available. The

183. BC Hydro and Howe Sound believed that the [REDACTED] MW baseline was conservative as it was based [REDACTED]

[REDACTED]³⁵⁷ Howe Sound [REDACTED]

[REDACTED]³⁵⁸ The conservative nature of the calculation meant that BC Hydro was willing to derive the baseline from a data set [REDACTED]

[REDACTED]³⁵⁹

184. On April 12, 2001, BC Hydro, Powerex and Howe Sound entered into a Consent and Enabling Agreement which permitted Howe Sound to sell electricity to Powerex that it self-generated above the [REDACTED] MW baseline.³⁶⁰ Howe Sound [REDACTED]

[REDACTED] Rather, Howe Sound [REDACTED]

[REDACTED]³⁶¹

remaining personnel do not have a clear recollection of how this baseline was set more than a decade afterwards. Nor did BC Hydro retain records that set out precisely how this baseline was established after such a long period of time. Mr. Lamarche had the clearest recollection of events as they related directly to the Howe Sound. Mr. Dyck also has some knowledge of these events through his previous discussions with personnel that have retired.

³⁵⁷ [REDACTED] Pierre Lamarche Statement II, ¶¶ 5-6.

³⁵⁸ See Pierre Lamarche Statement I, ¶¶ 18-23.

³⁵⁹ [REDACTED] *see* Pierre Lamarche Statement I, fn 6; Letter from Shawn Thomas to Russ Fulton, Re: British Columbia Hydro and Power Authority ("BC Hydro"), 16 March 201, **R-77**.

³⁶⁰ Consent and Electricity Purchase and Sale Agreement between HSPP, Powerex and BC Hydro, 12 April 2001, **R-85**; Purchase Transaction Enabling Agreement between Powerex Corp and Howe Sound, 12 April 2001, **R-84**.

³⁶¹ Benefit sharing s a sharing of sales revenue on a percentage basis, rather than compensation at a fixed price: Lester Dyck Statement I, ¶ 33, fn 21.

185. Howe Sound also [REDACTED]
[REDACTED]³⁶² [REDACTED]
[REDACTED]
[REDACTED]³⁶³

186. BC Hydro and Howe Sound [REDACTED] the Consent Agreement and Enabling Agreement [REDACTED]
[REDACTED]³⁶⁴ In doing so, BC Hydro officials [REDACTED]
[REDACTED]
[REDACTED]³⁶⁵ [REDACTED]
[REDACTED] 2001 because the circumstances that led to the [REDACTED] MW baseline had not changed: [REDACTED]
[REDACTED]³⁶⁶ As
Mr. Lamarche explains, natural gas prices did not [REDACTED]³⁶⁷

2. BC Hydro's Treatment of Howe Sound in the Integrated Power Offer

187. Howe Sound's power boiler [REDACTED]
[REDACTED]

³⁶² Pierre Lamarche Statement I, ¶ 38.

³⁶³ See Consent and Electricity Purchase and Sale Agreement between HSPP, Powerex and BC Hydro, 12 April 2001, s. 7 [REDACTED]
[REDACTED] at 021825, R-85.

³⁶⁴ See Pierre Lamarche Statement II, ¶ 7; Lester Dyck Statement I, ¶ 41. See also Pierre Lamarche Statement I, ¶ 40 (showing Howe Sound's annual sales to Powerex from 2001 to 2007).

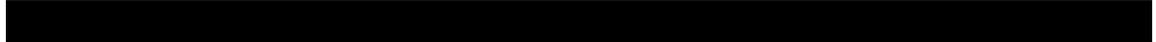
³⁶⁵ Lester Dyck Statement II, ¶ 54; Pierre Lamarche Statement II, ¶ 7. See also Letter from Pierre Lamarche to Lester Dyck, 17 March 2004, R-396.

³⁶⁶ Pierre Lamarche Statement II, ¶ 7.

³⁶⁷ Pierre Lamarche Statement II, ¶¶ 9-11.

³⁶⁸ Rather than let significant generation capacity sit idle, BC Hydro and Howe Sound negotiated an EPA in the context of BC Hydro's IPO.³⁶⁹

188. BC Hydro set out the terms on which it was willing to negotiate the EPA in its Letter of Intent of November 6, 2009.³⁷⁰ One of the terms was that a GBL be set for the mill to determine what was existing generation that BC Hydro could not purchase in the EPA, and what was incremental generation that BC Hydro could procure.³⁷¹ In order to establish the GBL, BC Hydro and Howe Sound reviewed the mill's historical generation data to find a 365-day period that reflected current normal operations.³⁷²

189. On reviewing the data, BC Hydro and Howe Sound 

³⁷³ 

³⁷⁴


³⁷⁵ 

³⁷⁶

³⁶⁸ Fred Fominoff Statement, ¶¶ 17-20. *See also* Canada's Counter-Memorial, ¶ 396.
³⁶⁹ *See* Canada's Counter-Memorial, ¶¶ 157-161.
³⁷⁰ Letter from BC Hydro Power Authority to Fred Fominoff, dated November 6, 2009, **R-63**. *See also* Fred Fominoff Statement, ¶ 30.
³⁷¹ Letter from BC Hydro Power Authority to Fred Fominoff, dated November 6, 2009, at p. 2, **R-63**.
³⁷² Lester Dyck Statement I, ¶ 127; Fred Fominoff Statement, ¶ 30.
³⁷³ Lester Dyck Statement II, ¶ 49; Lester Dyck Statement I, ¶ 127; Fred Fominoff Statement, ¶¶ 30-32.
³⁷⁴ Lester Dyck Statement I, ¶ 128; Fred Fominoff Statement, ¶¶ 31-32; Lester Dyck Statement II, ¶ 49.
³⁷⁵ Lester Dyck Statement I, ¶ 124; Fred Fominoff Statement, ¶¶ 15-20.
³⁷⁶ Lester Dyck Statement I, fn 136; Lester Dyck Statement II, ¶ 49.

190. The parties therefore agreed that [REDACTED] was the best available approach to estimating normal operations at the mill at the time of the EPA negotiations.³⁷⁷ Using data from [REDACTED] [REDACTED]³⁷⁸ BC Hydro and Howe Sound agreed to an annual GBL of [REDACTED] GWh/year, and negotiated the remaining terms of the agreement on that basis.

191. BC Hydro also required [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁷⁹ The parties subsequently negotiated a termination agreement, which was signed on September 7, 2010, [REDACTED]
[REDACTED]
[REDACTED]³⁸⁰

192. BC Hydro and Howe Sound concluded the EPA on September 7, 2010.³⁸¹ The EPA contained an exclusivity clause in which Howe Sound agreed not to sell any electricity below its GBL to a third party unless the mill's generation levels were greater than the mill load.³⁸² Howe Sound did not challenge the clause.³⁸³

³⁷⁷ Lester Dyck Statement II, ¶ 50.

³⁷⁸ [REDACTED]
[REDACTED] See Fred Fominoff Statement, ¶ 34, fn 17; Lester Dyck Statement I, ¶ 130.

³⁷⁹ Letter from BC Hydro Power Authority to Fred Fominoff, dated November 6, 2009, p. 4, **R-63**.

³⁸⁰ Termination Agreement, 7 September 2010, s. 3, **R-73**. See also Fred Fominoff Statement, ¶ 41.

³⁸¹ BC Hydro and Howe Sound Pulp and Paper Limited Partnership, Electricity Purchase Agreement, Integrated Power Offer, 7 September 2010, **R-62**.

³⁸² BC Hydro and Howe Sound Pulp and Paper Limited Partnership, Electricity Purchase Agreement, Integrated Power Offer, 7 September 2010, s. 8.4(b), at 016384, **R-62**.

³⁸³ Fred Fominoff Statement, ¶ 39.

G. The BCUC's Approval of a Baseline Negotiated with FortisBC, the City of Kelowna and Tolko (Riverside)

193. Up until 2000, the Tolko (Riverside) sawmill in Kelowna operated an old turbine generator with a limited nameplate capacity, which it used to supply its own load, typically at levels below 2 MW.³⁸⁴ For instance, the sawmill's average generation rate was 1.23 MWh in 1996, and 1.97 MWh in 1997.³⁸⁵ In 1998 and 1999, Tolko conducted a series of negotiations with its utility, the City of Kelowna, and West Kootenay Power, toward upgrading the mill's generation equipment, acquiring a second turbine generator, and producing incremental energy for exports to third parties.³⁸⁶

194. Before installing the new generator, Tolko had also undertaken a series of efficiency initiatives which would increase its generation levels and contribute to make electricity available for market sales.³⁸⁷ In 1999, Tolko and the City of Kelowna concluded a Memorandum of Agreement for the purpose of confirming the rate schedules applicable to Tolko until it increased "its current generation capability, creating surplus

³⁸⁴ Letter from Counsel for Riverside Forest Products Ltd. To the British Columbia Utilities Commission Re: Application by Riverside Forest Products Limited for an Order Pursuant to Section 88(3) of the *Utilities Commission Act*, May 29, 2001, **R-552**.

³⁸⁵ Letter agreement between the City of Kelowna and Riverside Forest Products Ltd, Re: Sale of Incremental Electric Energy by Riverside Forest Products Limited, August 21, 200, attached to the Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission, Re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, August 22, 2001, p. 5, **R-553**.

³⁸⁶ Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, BCUC Staff Information Request No. 1, July 5, 2001, attaching Riverside Forest Product's answers to the BCUC Staff Information Request No. 1, and supporting exhibits, p. 7, **R-554**.

³⁸⁷ Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, August 22, 2001, attaching Riverside Forest Product's answers to the BCUC Staff Information Request No. 2 and the letter agreement between the City of Kelowna and Riverside Forest Products Ltd re: Sale of Incremental Electric Energy by Riverside Forest Products Limited, August 21, 2001, pp. 9-13, **R-553**.

power”, in which case a new power contract would be entered into “so that the customer may obtain access to an electrical market to sell that surplus power”.³⁸⁸

195. Tolko's efficiency initiatives allowed it to commence third party sales of electricity in April 2000.³⁸⁹ The installation of the new turbine generator was completed in May 2000,³⁹⁰ and on August 21, 2001, Tolko and the City of Kelowna entered into a letter agreement pursuant to which Riverside would be allowed to sell energy above 2 MW in each hour to third parties for exports. The agreement was entered into on a trial basis, and was set to commence with Riverside Forest Products Ltd. Notifying the City of Kelowna that it was ready to commence selling incremental energy to third parties and continue for one year thereafter as a pilot project, subject to the parties subsequently negotiating a longer-term agreement.³⁹¹

196. While Tolko negotiated with its utility the terms of its projected third party sales before the BCUC issued Order No. G-38-01, Tolko nonetheless applied to the BCUC thereafter seeking the Commission's regulatory confirmation of the solution previously arrived at with the City of Kelowna. In fact, Tolko applied to the BCUC for an exemption of certain provisions of the *UCA* in May 2001, one month after the BCUC issued Order

³⁸⁸ Memorandum of Agreement between City of Kelowna and Riverside Forest Product, Ltd., February 25, 1999, at 1, attached (exhibit 2) to the Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, BCUC Staff Information Request No. 1, July 5, 2001, **R-554**.

³⁸⁹ Electricity generation and consumption chart and Output of Generation graph attached (exhibit 3) to the Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, BCUC Staff Information Request No. 1, July 5, 2001, **R-554**.

³⁹⁰ Letter from Counsel for Riverside Forest Products Ltd. To the British Columbia Utilities Commission Re: Application by Riverside Forest Products Limited for an Order Pursuant to Section 88(3) of the *Utilities Commission Act*, May 29, 2001. **R-552**.

³⁹¹ Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, August 22, 2001, attaching Riverside Forest Product's answers to the BCUC Staff Information Request No. 2 and the letter agreement between the City of Kelowna and Riverside Forest Products Ltd re: Sale of Incremental Electric Energy by Riverside Forest Products Limited, August 21, 2001, sections I(G) and II(9), pp. 10-11, **R-553**.

No. G-38-01. Increasing its generation capacity in order to enter into third party sales of electricity would bring Tolko within the definition of a regulated “public utility” in accordance with the *UCA*, such that the power sales agreements it would enter into would normally fall within the BCUC’s purview. Tolko therefore sought to be exempted from BCUC scrutiny and, in so doing, requested the Commission to find that sales above its historical self-generation level would be considered incremental and therefore eligible for third-party sales.³⁹² Tolko demonstrated to the BCUC that its average generation level during the period 1996-1999, absent its initiatives toward increasing self-generation for exports, amounted to 2 MW.³⁹³ Accordingly, the BCUC accorded an exemption to Tolko for third-party sales above this baseline.³⁹⁴

III. THE TRIBUNAL SHOULD NOT CONSIDER CLAIMS THAT ARE INADMISSIBLE OR THAT DO NOT FALL WITHIN ITS JURISDICTION

A. Concise Statement of Canada’s Position

197. Canada explained in its Counter-Memorial why the Claimant’s allegations concerning the negotiation and the setting of Celgar’s GBL need not be considered as these claims are both inadmissible and outside the jurisdiction of the Tribunal. In its Reply the Claimant asserted that these objections to the admissibility of its claims and the jurisdiction of the Tribunal “do not withstand even cursory scrutiny” and addressed them last.³⁹⁵ But in so doing, the Claimant provided little in the way of compelling argument as to why its GBL-related claims should not be rejected on for several reasons.

³⁹² Letter from Counsel for Riverside Forest Products Ltd. To the British Columbia Utilities Commission Re: Application by Riverside Forest Products Limited for an Order Pursuant to Section 88(3) of the *Utilities Commission Act*, May 29, 2001, **R-552**.

³⁹³ Information Response of Riverside Forest Products Limited to the BCUC Staff Information Request No. 2, August 22, 2001, Answer 4.0. pp. 4-6, attached to Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the *Utilities Commission Act*, August 22, 2001, **R-553**.

³⁹⁴ BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the *Utilities Commission Act*, November 1, 2001, p. 2, **R-20**.

³⁹⁵ Claimant’s Reply, ¶ 587.

198. First, as a contractual term of an EPA that has as its objective the procurement of electricity, Celgar's GBL and section 7.4 of the EPA fall squarely within the procurement exception in Article 1108(7)(a) and cannot breach either Article 1102 (National Treatment) or Article 1103 (Most Favoured Nation Treatment).

199. Second, as BC Hydro's negotiation of the GBL and section 7.4 was not an exercise of delegated governmental authority by a state enterprise, then pursuant to Article 1503(2) it is not a measure that falls within the jurisdiction of this Tribunal.

200. And finally, as BC Hydro and Celgar negotiated the GBL and section 7.4 almost four years before the Claimant submitted this claim to arbitration, its GBL-related claims are time-barred pursuant to Article 1116(2) and Article 1117(2).

201. In the following sections Canada responds to the Claimant's perfunctory claims concerning admissibility and jurisdiction, and explains why the Tribunal should find that these claims are either inadmissible or that it does not have jurisdiction to consider them.

B. NAFTA Articles 1102 and 1103 Do Not Apply to BC Hydro's Negotiation of Celgar's GBL and Section 7.4 by Virtue of the Procurement Exception in Article 1108(7)(a)

202. NAFTA Article 1108(7)(a) provides that the NAFTA Article 1102 (National Treatment) and Article 1103 (Most Favored Nation Treatment) do not apply to "procurement by a Party or a state enterprise." Canada explained in its Counter-Memorial why Celgar's GBL, a contractual term establishing the amount of electricity BC Hydro would purchase under its EPA with Celgar, falls squarely within the procurement exception of Article 1108(7)(a).³⁹⁶ The Claimant actually agrees with Canada; in its Reply the Claimant states that "Mercer agrees that if in fact that was all its

³⁹⁶ Canada's Counter-Memorial, ¶¶ 345-349.

GBL did—nothing more than defining BC Hydro's purchase obligation—such a measure would fall within the procurement exception."³⁹⁷

203. The Claimant asserts, however, that it is not claiming that BC Hydro was required to procure additional electricity:

While Celgar did offer BC Hydro its below-load electricity as one of two proposals presented in response to BC Hydro's Bioenergy Phase I Request for Proposals ("RFP"), BC Hydro explained that such energy was not eligible under the terms of the RFP, and *Mercer does not contend that BC Hydro nonetheless was legally obligated to buy it*. Mercer takes issue instead with the restriction BC Hydro placed on Celgar's sales of its below-GBL energy to *third parties*, effectuated through the GBL and related exclusivity provisions in Section 7.4(b) of the 2009 EPA.³⁹⁸

204. This is a misleading statement. The Claimant's entire NAFTA case is premised on a GBL that it believes is "too high"³⁹⁹ and that BC Hydro was required to procure more electricity from the Claimant under the EPA. The Claimant itself states that "the Tribunal's first task in assessing damages is to determine the GBL that Celgar should have received absent its less favourable, unfair, and inequitable treatment."⁴⁰⁰ It argues that "if Celgar's non-discriminatory GBL should have been lower, it is all but certain that BC Hydro would have done what it did in every other EPA with a BC self-generator, and purchased all above-GBL electricity on a firm basis."⁴⁰¹

205. Indeed, the majority of its Reply is directed at attacking BC Hydro's GBL methodology and how Celgar's GBL was set in comparison to other mills. The Claimant proffers eleven non-discriminatory alternative GBLs for the Tribunal to consider,⁴⁰² and

³⁹⁷ Claimant's Reply, ¶ 617 (emphasis added).

³⁹⁸ Claimant Reply, ¶¶ 36, 618, 622. [Emphasis added.]

³⁹⁹ Claimant Reply, ¶ 553.

⁴⁰⁰ Claimant Reply, ¶ 529.

⁴⁰¹ Claimant Reply, ¶ 554.

⁴⁰² Claimant Reply, ¶ 536.

then quantifies damages on the basis that BC Hydro procures all of the Claimant's electricity above each GBL. The Claimant concludes that Canada "has offered no reason why BC Hydro would not have purchased all electricity above a corrected Celgar GBL."⁴⁰³

206. It is difficult to imagine how these claims could possibly fall outside of the procurement exception of Article 1108(7)(a). The Claimant's attempt to evade the exception by characterizing the "crux"⁴⁰⁴ of its claim as an alleged prohibition on below-GBL sales and not sales "to BC Hydro or a Canadian state entity but to third parties,"⁴⁰⁵ is simply not convincing.

207. Moreover, the Claimant's assertion that the alleged restriction on below-GBL sales to third parties, effectuated through Section 7.4 of the EPA, is not "procurement-related"⁴⁰⁶ is also false.

208. First, Section 7.4 does not impose such a restriction in light of the Side Letter Agreement the Claimant signed with BC Hydro, which permits such sales with BCUC approval.⁴⁰⁷ The BCUC has granted this approval.⁴⁰⁸ Moreover, FortisBC has developed the NECP rate which would allow the Claimant to sell all of its below-load electricity.⁴⁰⁹

209. Second, even if there was such a restriction it is nonetheless an essential element to the procurement of electricity by BC Hydro. Mr. Scouras explains that allowing Celgar

⁴⁰³ Claimant Reply, ¶ 554.

⁴⁰⁴ Claimant Reply, ¶ 622.

⁴⁰⁵ Claimant Reply, ¶ 622.

⁴⁰⁶ Claimant Reply, ¶ 618.

⁴⁰⁷ Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, Re: Electricity Purchase Agreement, with Effective Date of January 27, 2009 ("EPA"), dated January 27, 2009, bates 026183-026184, **R-138**.

⁴⁰⁸ BCUC, Decision G-188-11, p. 49, **R-275**. BCUC, Order G-202-12, ¶¶ 2-3 and *Decision, in the Matter of FortisBC Inc., Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11)*, 27 December 2012, pp. 8 and 15, **R-265**.

⁴⁰⁹ Dennis Swanson Statement II, ¶¶ 27-36.

to engage in below-GBL third party sales, this “would result in BC Hydro not receiving the full benefit of the electricity under the EPA and would, thus, significantly undermine the firmness of the security of supply that BC Hydro is seeking to achieve with an EPA.” In this regard, the exclusivity provision of an EPA “provides greater certainty that BC Hydro will in fact receive the benefit of the electricity under the EPA and protects BC Hydro’s procurement of electricity.”⁴¹⁰ Accordingly, this measure cannot be challenged under NAFTA Articles 1102 or 1103 and the Claimant’s claims in this regard must be dismissed.

C. BC Hydro’s Negotiation of the GBL and Section 7.4(b) Was Not An Exercise of Delegated Governmental Authority and Cannot be the Subject of a Claim Under NAFTA Chapter Eleven

210. The obligation prescribed by Article 1503(2) and recourse to Chapter Eleven arbitration, are only permitted if a NAFTA Party has delegated a governmental authority to a state enterprise. Canada explained in its Counter-Memorial why BC Hydro, as a state enterprise,⁴¹¹ did not exercise “delegated governmental authority” when it negotiated and established Celgar’s GBL.⁴¹² In response the Claimant asserts that in issuing Order G-38-01 the BCUC provided BC Hydro “with wide discretion and thereby delegated governmental authority.”⁴¹³ As the “final arbiter and approver” of a GBL, BC Hydro is, in the Claimant’s eyes, “the responsible party exercising governmental authority.”⁴¹⁴ The Claimant also asserts that because Celgar could not make below-GBL sales to third parties, BC Hydro was “not acting in a *purely* commercial capacity,”⁴¹⁵

⁴¹⁰ Jim Scouras Statement II, ¶ 9.

⁴¹¹ The Claimant has not taken issue with Canada’s assertion, made in ¶ 321 of its Counter-Memorial, that BC Hydro is a “state enterprise” and not a “privately-owned” or federal “government” monopoly, and that this Tribunal need only consider the potential application of Article 1503(2) in this arbitration. Canada therefore confines its submission in this section to Article 1503(2).

⁴¹² Canada’s Counter-Memorial, ¶¶ 323-335.

⁴¹³ Claimant’s Reply, Part VII.A.1.

⁴¹⁴ Claimant’s Reply, ¶ 594.

⁴¹⁵ Claimant’s Reply, Part VII.2.

rendering its act an exercise of delegated governmental authority. None of these new arguments discharge the Claimant's burden of making out a claim under Article 1503(2).⁴¹⁶ Below, Canada explains why the Claimant's assertions have no bearing on an interpretation of Article 1503(2), and why they fail to establish that BC Hydro's negotiation of Celgar's GBL was an act of delegated government authority.

1. A State Enterprise Does Not Engage Article 1503(2) Merely Because It Has "Wide Discretion" or Because Its Acts Are Not "Purely Commercial"

211. In its Counter-Memorial Canada explained why activities of state enterprises having a commercial character rather than a governmental one are not captured by Article 1503(2).⁴¹⁷ This interpretation is consistent with the ordinary meaning of the words "governmental authority" when placed in their context. Moreover, a past NAFTA Tribunal that gave close consideration to Article 1503(2)—the *UPS* Tribunal—interpreted these words as having a "limited scope"⁴¹⁸ that does not apply to the rights and powers of state enterprises "to enter into contracts for purchase or sale and to arrange and manage their own commercial activities."⁴¹⁹

212. The Claimant's arguments in response are neither supported by the text of Article 1503(2) nor by basic rules of treaty interpretation. State enterprises engage in a wide range of activities, some governmental in nature and some commercial, and like other commercial actors in the free market they are free to conduct their business affairs. They are, however, subject to government regulation and their commercial activities often play essential key role in the proper functioning of the economy or society. Their activities

⁴¹⁶ The *UPS* Tribunal made clear that the Claimant bears the burden of demonstrating Article 1503(2) applies: "A claimant which wishes to invoke ... [Article 1503(2)] must establish that the ... state enterprise in question is exercising a "regulatory, administrative or other governmental authority that the Party has delegated to it." See *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL), Award on the Merits and Dissenting Opinion, 24 May 2007, (*UPS – Award*), ¶ 68, **RA-45**.

⁴¹⁷ Canada's Counter-Memorial, ¶¶ 321-326.

⁴¹⁸ *UPS – Award*, ¶ 75, **RA-45**.

⁴¹⁹ *UPS – Award*, ¶ 74, **RA-45**.

could accordingly be characterized as not being “purely commercial” in nature. But this kind of general characterization does not necessarily render the activities of state enterprises exercises of “delegated governmental authority” for the purposes of Article 1503(2).

213. First, the Claimant’s assertion that BCUC provided BC Hydro with “wide discretion and thereby delegated governmental authority”⁴²⁰ offers nothing more than a conclusion without analysis. By focusing only upon the wide latitude exercised by BC Hydro in its commercial dealings, the Claimant ignores the determination that has to be made under Article 1503(2), which as the *UPS* Tribunal explained, is “the scope of the expression ‘regulatory, administrative or other governmental authority that the Party has delegated to it.’”⁴²¹ There is nothing in the text of Article 1503(2), nor in the related context or object and purpose of the NAFTA, that warrants a conclusion that “wide discretion” exercised by a state enterprise equates to it exercising a delegated governmental authority under Article 1503(2).

214. Regarding the Claimant’s claim that BC Hydro was not acting in a “purely commercial capacity”⁴²² Canada never contended that it was, and in fact, the “purely commercial” requirement is of the Claimant’s making.⁴²³ Moreover, while the commercial nature of a state enterprise’s activities is certainly relevant to an interpretation of Article 1503(2), the provision does not require such activities to be “*purely* commercial” in order for them to be excluded from its scope. In *UPS* for example, the Claimant argued that a number of Canada Post’s activities violated NAFTA on the ground that “Canada Post always acts under governmental authority” and that

⁴²⁰ Claimant’s Reply, Part VII.A.1. See also ¶¶ 592-595.

⁴²¹ *UPS – Award*, ¶ 71, **RA-45**.

⁴²² In its Reply Memorial, the Claimant attributes to Canada the argument that “the establishment of a GBL is a purely commercial act.” See Claimant’s Reply, ¶ 597.

⁴²³ Claimant’s Memorial, ¶ 418.

“[n]one of its acts are sufficiently commercial to lose their governmental nature.”⁴²⁴ The Tribunal rejected this proposition, observing that while “Canada Post may be seen as part of the government system, broadly conceived”⁴²⁵ not all of its acts were exercises of delegated governmental authority. In *UPS* the types of acts that were not captured by Article 1503(2) included a state enterprise’s capacity to enter into purchase agreements and to manage its commercial affairs.”⁴²⁶

2. BC Hydro’s Negotiation of the GBL and Section 7.4(b) In Its Procurement of Electricity From Celgar Did Not Engage Article 1503(2)

215. Canada explained in its Counter-Memorial why BC Hydro’s negotiation of a GBL in its procurement of electricity from self-generators is a commercial act, not an exercise of delegated governmental authority.⁴²⁷ In a nutshell, GBLs and exclusivity provisions are negotiated terms of electricity purchase agreements, voluntarily entered into by BC Hydro and a self-generator. They are essential to the operation of an EPA, as without them BC Hydro would have no way of ensuring it achieves what it has set out to do—procure electricity. The negotiation of a GBL in an EPA prevents against the irrational outcome, described by BC Hydro’s Lester Dyck, of the utility actually paying for electricity that it has already supplied to a self-generator.⁴²⁸ No rational commercial actor would agree to such an outcome. The main purpose of the exclusivity provision is also to

⁴²⁴ *UPS – Award*, ¶ 71, **RA-45**.

⁴²⁵ *UPS – Award*, ¶ 57, **RA-45**.

⁴²⁶ *UPS – Award*, ¶ 74, **RA-45**.

⁴²⁷ Canada’s Counter-Memorial, ¶¶ 331-335. *See also* Lester Dyck Statement I, wherein Mr. Dyck explained in great detail the inherently commercial considerations that are taken into account in the negotiation of a GBL during the procurement process. With respect to BC Hydro’s application of the GBL concept subsequent to BCUC Order G-38-01 *see* ¶¶ 42-50. Regarding BC Hydro’s determination of GBLs in the BioEnergy Call for Power Phase 1, including the negotiation of Celgar’s GBL, *see* ¶¶ 51-91.

⁴²⁸ *See* Lester Dyck Statement I, ¶ 43.

provide certainty as to “the security of supply that is contracted for with project proponents.”⁴²⁹

216. In its Reply Memorial, the Claimant ignores the commercial objectives served by Celgar’s GBL and exclusivity provision and the inherently commercial process through which it was negotiated. The Claimant focuses on the fact that “neither BC Hydro nor anyone else in BC had set GBLs before Order G-38-01.”⁴³⁰ In the Claimant’s view, the issuance of Order G-38-01 was a delegation of governmental authority given the wide discretion it conferred on BC Hydro to apply the GBL principle.⁴³¹ The Claimant also asserts that BC Hydro was not acting in a “purely commercial capacity” in that it was only able to “require” a self-generator to self-supply before it can sell to BC Hydro or to third parties by virtue of a “legal authority” provided to it by the BCUC.⁴³² Finally, the Claimant notes that Canada has provided no evidence of private parties agreeing to GBL-like restrictions in their commercial dealings, and that Canada failed to rebut Mercer’s argument that such an agreement would violate Canadian competition law.⁴³³ Canada explains below why none of these assertions have any merit and must be rejected.

217. As a preliminary matter, Order G-38-01 must be placed in its appropriate context which is far different than the one complained of by the Claimant. The question for BC Hydro at the time of the G-38-01 proceeding was not the rules it should follow in procuring electricity from self-generators. It was rather the extent to which BC Hydro was obligated to serve self-generator customers that wanted to sell self-generated electricity to third parties. The GBL principle of Order G-38-01 provided guidance as to how such sales could be made possible from that perspective. The fact that “neither BC

⁴²⁹ Jim Scouras Statement II, ¶ 8.

⁴³⁰ Claimant’s Reply, ¶ 591.

⁴³¹ Claimant’s Reply, ¶¶ 592-595.

⁴³² Claimant’s Reply, ¶ 599.

⁴³³ Claimant’s Reply, ¶ 599.

Hydro nor anyone else in BC had set GBLs before Order G-38-01⁴³⁴ is not evidence of a delegation; it only shows that a new issue arose in British Columbia's electricity market that required the guidance of the BCUC. BC Hydro later adapted the GBL principle in an entirely different context some seven years later—the Bio Phase 1 Call for Power⁴³⁵—and it did so without specific instruction from the BCUC.

218. The discretion afforded to BC Hydro to develop and apply the GBL principle and to later apply it in the procurement process that followed the Bio Phase 1 Call for Power is not surprising. BC Hydro was the commercial actor best situated to gather, weigh and consider the financial data relating to a GBL, and to work out a GBL with a self-generator that would enable it to actually procure electricity from a self-generator.⁴³⁶ Moreover, BC Hydro hardly required a “conferral of discretion” in order for it to negotiate a GBL. Like any other commercial actor in the electricity marketplace, BC Hydro is free to do business as it sees fit, so long as it complies with applicable law and BCUC orders such as Order G-38-01.

219. In this regard, the Claimant confuses BC Hydro's legal obligation, as a regulated utility, to negotiate GBLs pursuant to the guidance of the BCUC, with a “legal authority to establish GBLs for its customers” which the Claimant alleges BC Hydro would not have had “absent government authorization.”⁴³⁷ Indeed, Mr. David Bursey, Canada's legal expert, explains that, at least as a matter of Canadian law, the BCUC's practice of

⁴³⁴ Claimant's Reply, ¶ 591.

⁴³⁵ Lester Dyck Statement I, ¶ 42.

⁴³⁶ See for example BC Hydro's analysis of Celgar's proposed Biomass Realization Project in the Power Acquisitions Bioenergy RFP-Phase 1 Briefing Note on Celgar, dated April 9, 2008 at bates 020509, **R-179**. (“If BC Hydro were to agree to the purchase of energy from the existing generator at the Celgar mill, then BC Hydro would essentially be paying Celgar for using energy it generates to serve its own load. Assuming Celgar's average annual mill load is 300 GWh, BC Hydro's [RS 3803] tariff rate is \$36/MWh and a contract firm energy price of \$85/MWh for the [*sic*] Celgar's generation output, the net cost to BC Hydro for this arrangement which results in no new energy supply, would be \$15 million per year.”).

⁴³⁷ Claimant's Reply, ¶ 600.

allowing BC Hydro to negotiate a GBL is not a delegation of statutory decision-making authority or other governmental authority.⁴³⁸

220. It is a fact of life that commercial actors have to follow countless rules mandated by government in their commercial dealings—even more so in a highly regulated environment like the electricity marketplace. The fact that BC Hydro negotiated a GBL in the course of the procurement process is only evidence that it followed such a rule and nothing more. It does not transform this step of the procurement process into an exercise of delegated governmental authority.

221. Finally, the Claimant's assertions that Canada has provided no evidence of private parties agreeing to GBL-like terms in their contracts, and no rebuttal to Mercer's argument that such an agreement would be contrary to Canadian competition law, are also both totally irrelevant to the determination that this Tribunal must make under Article 1503(2). That a GBL or exclusivity provision might not be mandated in a private commercial context does not make BC Hydro's negotiation of those terms any more of an exercise of delegated governmental authority for the purposes of Article 1503(2). Further, the issue of a NAFTA Party's adherence to principles governing competition law is addressed by another provision of NAFTA Chapter Fifteen, Article 1501, and is in fact not subject to any form of dispute settlement under the Agreement.⁴³⁹ The Claimant's

⁴³⁸ David Bursey Expert Report, ¶¶ 120-123.

⁴³⁹ NAFTA Article 1501(3). Moreover, the Claimant's allegation that the GBL provision in Celgar's EPA, is prohibited under Canadian competition law is meritless (Claimant's Reply, ¶419). From the outset, the Claimant's attempt to characterize *Elsey et. al. v J.G. Collins Insurance Agencies Ltd.* as "Canadian competition law" is a misnomer. In Canada, competition law is largely governed by the *Competition Act* (*Competition Act*, R.S.C. 1985, c. C-34, **R-555**), which is a federal law administered and enforced by the Competition Bureau (Competition Bureau, "Our Legislation" http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html; **R-556**). In contrast, the decision in *Elsey* concerned the validity of a restrictive covenant in an employment contract and made no reference to the *Competition Act* or any other acts administered or enforced by the Competition Bureau (*Elsey et. al. v. J.G. Collins Insurance Agencies Ltd.*, SCC (1978) 2 SCR 916, **C-151**). Furthermore, *Elsey* provides no support for the Claimant's assertion that there is a general prohibition on covenants in restraint of trade in commercial contracts. In determining that such a provision "is enforceable only if it is reasonable between the parties and with reference to the public interest", the Supreme Court of Canada stated that "[t]he validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment of the

“competition law” based arguments are thus misguided, and have no place in the determination that must be made here.

222. BC Hydro made clear from the outset that the negotiation of a GBL⁴⁴⁰ and exclusivity provision⁴⁴¹ would be an integral part of its EPA negotiations with Celgar. Without a GBL, the Agreement could not function. BC Hydro and Celgar entered into negotiations of their own accord, which they did, for example, with the exclusivity provision and Side Letter Agreement. Both were free to work out the terms of the Agreement. Both were free to leave the negotiations if they so desired. This freedom of choice in the parties' commercial dealings is antithetical to one being subjected to an exercise of delegated governmental authority at the hands of the other. The Claimant has failed to demonstrate that BC Hydro exercised a “delegated governmental authority” in negotiating the GBL and exclusivity provision and accordingly its complaint regarding the GBL is not one that can be submitted to NAFTA Chapter Eleven arbitration before this Tribunal.

D. The Claimant's Claim Related to Section 7.4 and BC Hydro's Setting of Celgar's GBL are Time-Barred under Articles 1116(2) and 1117(2)

223. NAFTA Articles 1116(2) and 1117(2) prohibit a claimant from bringing a claim more than three years after it *first* acquired knowledge of a breach and loss.⁴⁴² The word “first” means “earliest in occurrence, existence.”⁴⁴³ It identifies the beginning of a period or event; not the middle or end.

clause, the agreement within which it is found, and all of the surrounding circumstance” (*Ibid.*, at Part II). Courts will normally give effect to such a provision, if it is determined to be reasonable in the circumstances (*Ibid.*).

⁴⁴⁰ Lester Dyck Statement I, ¶¶ 56-59; and Jim Scouras Statement I, ¶¶ 40-44.

⁴⁴¹ Jim Scouras Statement II, ¶¶ 7-8, 11-13 and 16-27.

⁴⁴² North American Free Trade Agreement, U.S.-Can.-Mex., 17 December 1992, 32 ILM 289, 605 (1993), Arts. 1116(2), 1117(2), **C-1**.

⁴⁴³ *Shorter Oxford Dictionary*, 5th ed. (Oxford University Press, 2002), p. 965, **R-283**.

224. NAFTA Articles 1116(2) and 1117(2) do not require actual knowledge. The time bar will run equally from the first moment at which an investor “should have” known of a breach and loss. The Tribunal in *Grand River Enterprises v. United States* explained that knowledge will be “imputed to person [*sic*] if by exercise of reasonable care or diligence, the person would have known of that fact.”⁴⁴⁴

225. Furthermore, loss need not actually have been incurred for the time bar to run. What is required is *knowledge* of loss. An “immediate outlay of funds” is unnecessary as “damages or injury may be incurred even though the *amount* or *extent* may not become known until some future time.”⁴⁴⁵

226. The Claimant filed its NAFTA claim on April 30, 2012. The cut-off date pursuant to NAFTA Articles 1116(2) and 1117(2) is thus April 30, 2009. The Claimant’s GBL was established on May 30, 2008, well before the cut-off date. The Claimant also signed the EPA containing the GBL and exclusivity provision on January 27, 2009, also before the cut-off date. Accordingly, the Claimant’s allegations related to Celgar’s GBL are time-barred and the Tribunal lacks the jurisdiction to hear them.

227. In its Reply Memorial, the Claimant acknowledges that “the implications of the GBL and related restrictions were known to Mercer on [January 27, 2009]”⁴⁴⁶ but argues that the EPA, while signed on that date, did not “take effect” until approved by the BCUC on July 31, 2009.⁴⁴⁷ Thus, while the Claimant recognizes that it had the requisite *knowledge* of breach and loss prior to the cut-off date, that fact should be of no critical importance to Articles 1116(2) and 1117(2) because the EPA had not yet taken “effect.” The Claimant even suggests that the limitations period did not start to run until

⁴⁴⁴ *Grand River Enterprises Six Nations, Ltd. et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July, 2006, (“*Grand River - Jurisdiction*”) ¶ 59, **RA-17**.

⁴⁴⁵ *Grand River - Jurisdiction*, ¶ 77, **RA-17**. See also *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev - Award*”), ¶ 87, **RA-29**.

⁴⁴⁶ [Emphasis Added] Claimant’s Reply Memorial, ¶ 614.

⁴⁴⁷ Claimant’s Reply Memorial, ¶ 615.

September 27, 2010, which is the Commercial Operation Date (i.e. start date) of the EPA, because “the restrictions on sales to third parties did not take effect until” that date.⁴⁴⁸

228. NAFTA Articles 1116(2) and 1117(2) do not address the “effect” of measures, but a Claimant’s constructive knowledge of breach and loss. The Claimant’s reading of the provisions is not supported by the ordinary meaning of the text. Nor can the Claimant possibly deny that it had the requisite knowledge of breach and loss before the cut-off date because the Claimant signed the EPA, which included both the GBL and the exclusivity provision, with full volition.

229. In light of this the Claimant is forced to try other arguments such as that it could not have had requisite knowledge of breach and loss until Tembec’s GBL was incorporated into its 2009 EPA and Howe Sound’s GBL was incorporated into in its 2010 EPA.⁴⁴⁹ However, in its pleadings the Claimant insists on comparing its own regulatory treatment to the treatment that Tembec and Howe Sound received dating back to 1997.⁴⁵⁰ It is also clear that FortisBC raised the regulatory treatment Howe Sound had received in its discussions with the Claimant⁴⁵¹ and that the Claimant completed its own regulatory research⁴⁵² in the context of laying the groundwork for its so-called Arbitrage Project. The Claimant, therefore, knew, or ought to have known, of Tembec’s and Howe Sound’s earlier treatment before it received its own GBL from BC Hydro on May 30, 2008.⁴⁵³

⁴⁴⁸ Claimant’s Reply Memorial, ¶ 615.

⁴⁴⁹ Claimant’s Reply, ¶ 609.

⁴⁵⁰ Claimant’s Memorial, ¶¶ 517, 539, 547, 551.

⁴⁵¹ Dennis Swanson Statement II, ¶¶ 9-12.

⁴⁵² Dennis Swanson Statement II, ¶ 7; and Mercer International Group, Celgar Electricity Opportunities, July 2007, at 9-10, **R-278**. [REDACTED]

⁴⁵³ Letter from RFP Administrator (Bioenergy Call - Phase I) to Brian Merwin Re: Bioenergy Call (Phase I)– GBL, dated May 30, 2008, **R-181**.

230. In sum, the Claimant's allegations concerning the GBL and exclusivity provision are time-barred. It first knew of both the breach and loss that it complains before the cut-off date and the Tribunal has no jurisdiction to hear these claims.

IV. THE CLAIMANT HAS FAILED TO PROVE THAT CANADA HAS BREACHED ARTICLE 1102 OR 1103

A. Concise Statement of Canada's Position

231. The Claimant dedicates a lengthy 156 pages of its Reply Memorial⁴⁵⁴ to NAFTA Articles 1102 and 1103. The "Jackson Pollock" style of advocacy only complicates the issues. Canada, however, believes that these issues are relatively straightforward:

- (1) Did BC Hydro procure incremental electricity under BC's 2007 Energy Plan from Celgar, Howe Sound and Tembec in a discriminatory manner?
- (2) Did BC Hydro restrict the sale of below-GBL electricity (i.e. non-incremental electricity) to third parties in the EPAs it signed with Celgar, Howe Sound and Tembec in a discriminatory manner?
- (3) Did the BCUC restrict the Claimant's access to embedded cost power and, if so, did it do so in a discriminatory manner compared to Howe Sound and Tembec?

232. Outside of the Claimant's "hall of funhouse mirrors,"⁴⁵⁵ it is not only clear that the Claimant has been accorded identical treatment to Howe Sound and Tembec, but in some instances has been accorded *more* favorable treatment. For example, BC Hydro agreed to a Side Letter Agreement to allow the Claimant to sell its below-GBL electricity to third parties and the BCUC directed FortisBC to supply the Claimant with embedded cost power up to 100% of its load to facilitate those sales. No other mill in the Province has this right.

⁴⁵⁴ This is 66 more pages than the 90 pages the Claimant dedicates to NAFTA Articles 1102 and 1103 in its Memorial.

⁴⁵⁵ NERA Expert Report II, ¶ 36.

233. In its Reply, the Claimant attempts to hide these facts by mischaracterizing the measures at issue, ignoring relevant evidence, making irrelevant arguments, and attacking the policies underlying BC Hydro's procurement activities. The Claimant's efforts are without merit. As will be shown below: (1) BC Hydro accorded the same treatment to all mills when it procured electricity under BC's 2007 Energy Plan; (2) BC Hydro restricted the sale of below-GBL electricity to third parties in the same manner for every mill *except Celgar*, who faces no such restriction; and (3) unlike Howe Sound and Tembec, the BCUC has granted the Claimant access to embedded cost power below its GBL for the purpose of arbitrage.

234. Prior to engaging these three issues, Canada will first correct the Claimant's mischaracterization of the law with respect to NAFTA Articles 1102 and 1103 and the arguments Canada made in its Counter-Memorial.

B. The Claimant Misunderstands the Law under NAFTA Articles 1102 and 1103

235. The Claimant misunderstands the law under NAFTA Articles 1102 and 1103 in three fundamental respects: (1) it misapplies the three-part test; (2) it ignores the role of nationality; and (3) it argues that a non-discriminatory measure can nonetheless violate Articles 1102 and 1103 if it "fail[s] to serve any legitimate governmental objective that could not have been achieved by non-discriminatory means."⁴⁵⁶

1. The Claimant Misapplies the Three-Part Test under NAFTA Articles 1102 and 1103

236. The Claimant states that in order to make out a claim under either NAFTA Article 1102 or 1103 it need only prove "a *prima facie* violation" by establishing three essential elements: (1) Canada accorded treatment to its investment; (2) its investment is in like

⁴⁵⁶ Claimant's Reply, ¶ 183.

circumstances to other investments; and (3) its investment received less favorable treatment than those other investments.⁴⁵⁷

237. The Claimant is wrong in two fundamental respects. First, the Claimant must do more than prove “*prima facie*” the three elements of the test, which would improperly shift a large part of its evidentiary burden to Canada. It is axiomatic to state that the party alleging a breach of Articles 1102 and 1103 bears the burden of proof.⁴⁵⁸ The Claimant’s efforts to reverse the onus should be rejected.

238. Second, the Claimant posits that it need only prove that its “*investment is in like circumstances to other investments,*”⁴⁵⁹ without analyzing the circumstances underlying the treatment accorded to those investments. The Claimant’s approach contradicts the ordinary meaning of Article 1102, which states that each NAFTA Party “shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors...”⁴⁶⁰ The Claimant is required to do more than prove that two “investments” are in like circumstances; it must prove that the *treatment* accorded to those investments was also in like circumstances.

239. In disconnecting the subject of the treatment from the circumstances in which the treatment was accorded, the Claimant draws inapt comparisons that do not take into account all of the surrounding facts, including the character of the measure at issue.⁴⁶¹ This leads to bizarre results (as will be shown below), such as the Claimant’s comparison

⁴⁵⁷ Claimant’s Reply, ¶ 130; Claimant’s Memorial, ¶¶ 448, 484. Once it has shown a *prima facie* violation of Article 1102 or 1103, the Claimant posits that the burden shifts to Canada to demonstrate that the less favourable treatment is justified.

⁴⁵⁸ *UPS – Award*, ¶ 84, **RA-46**.

⁴⁵⁹ Claimant’s Reply, ¶ 130.

⁴⁶⁰ NAFTA Article 1102. Similarly, NAFTA Article 1103 states: “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party...” See e.g. *GAMI – Award*, ¶ 114; **RA-14**; *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot – Merits Award*”), ¶ 79, **RA-36**; *Cargill – Award*, ¶¶ 204-206, **RA-6**; *UPS – Award*, ¶¶ 101, 118, **RA-46**.

⁴⁶¹ *S.D. Myers – First Partial Award*, ¶ 250, **RA-38**; *Pope & Talbot – Award*, ¶ 76, **RA-36**.

of its treatment by BC Hydro under the 2007 Energy Plan to other BC Hydro contracts that predate that plan by more than a decade.

240. The Claimant's free-floating approach to "like circumstances" must therefore be rejected as it would open a floodgate of less favorable treatment claims without any regard to the circumstances under which treatment is accorded. Canada's approach properly assesses all of the circumstances underlying the treatment, as required by Articles 1102 and 1103, to determine whether the treatment at issue is properly compared and explained.⁴⁶²

2. Nationality is a Critical Factor under NAFTA Articles 1102 and 1103

241. The principle of National Treatment under Article 1102 and of Most-Favoured-Nation Treatment under Article 1103, is "an application of the general prohibition of discrimination based on nationality."⁴⁶³ "Nationality" is thus central to determining whether there has been a breach of these obligations.⁴⁶⁴

242. The Claimant alleges that nationality plays no role under Articles 1102 and 1103. It argues that it need only establish, *prima facie*, less favorable treatment and then the burden shifts to Canada to defend its actions. This is inaccurate. First, when any claimant alleges that a government is motivated by discriminatory intent, it is required to prove its

⁴⁶² See Canada's Counter-Memorial, ¶¶ 380-382. The *Cargill* tribunal noted that both the *GAMI* and *Pope & Talbot* tribunals determined "like circumstances" by reference to the rationale for each measure that was challenged. In both cases, the tribunals held that there was no breach of the national treatment obligation because the relevant comparators had not been accorded treatment in like circumstances. The *Cargill* tribunal proceeded to note that "it is possible that in respect of other, different measures, the mills in *GAMI* and the lumber producers in *Pope & Talbot* could have been found to be in 'like circumstances'." *Cargill - Award*, ¶ 206, **RA-6**. The *Parkerings* tribunal also adopted this approach: *Parkerings - Award*, **CA-12**, ¶¶ 376 *et seq.* See also *GAMI - Award*, **RA-14**; *Pope & Talbot - Award*, **RA-36**.

⁴⁶³ *ADM - Award*, **CA-3**, ¶¶ 193, 205.

⁴⁶⁴ *Pope & Talbot - Merits Award*, ¶ 103, **RA-36**; *Cargill - Award*, ¶ 220, **RA-6**; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 ("*Apotex - Award*"), ¶ 8.56, **RA-54**.

allegation.⁴⁶⁵ While this Claimant states that it has “not alleged any intent to discriminate,”⁴⁶⁶ its pleadings show otherwise.⁴⁶⁷

- BC Hydro “determined GBLs with virtually unfettered discretion, without public input, making up rules it did not disclose as it went along...This system design enables BC Hydro to discriminate, which should not be regarded as unintentional.”⁴⁶⁸
- “BC Hydro has unequal bargaining power,” which it exercised to favor mills with “political connections and importance.”⁴⁶⁹
- “BC Hydro had direct financial incentives to afford Howe Sound a more favourable GBL than Celgar.”⁴⁷⁰

⁴⁶⁵ See Claimant's Reply, ¶¶ 135-138.

⁴⁶⁶ Claimant's Reply, ¶ 139.

⁴⁶⁷ The Claimant's comment at ¶ 140 of its Reply misses Canada's point: the *Loewen* tribunal expressly stated that NAFTA Article 1102 requires less favourable treatment *by reason of the claimant's nationality*. The debated paragraph from the *Loewen* decision reads, in its entirety (emphasis added):

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party “treatment no less favorable than it accords in like circumstances to its own investors” or their investments. With respect to a state or province Article 1102(3) requires

“treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part.”

The effect of these provisions, as Respondent's expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct [sic] only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

In articulating the test of Article 1102 in reference to the specific facts of the case before it, the *Loewen* tribunal recognized not once, not twice, but three times, that the nationality of the foreign investor played a central role in assessing whether nationality-based discrimination can be found under Article 1102. *Loewen - Award*, ¶ 139, **RA-22**.

⁴⁶⁸ Claimant's Memorial, ¶¶ 663, 668.

⁴⁶⁹ Claimant's Memorial, ¶ 668.

-
- The Claimant was “singled out” for “unique and peculiar treatment,” subjecting it to “a different and harsher regulatory standard,” applying a “more restrictive regulatory method[] than other like entities,” and providing “no reasons for administering such differential treatment.”⁴⁷¹
 - “BC Hydro *simply chose* to exercise its discretion in ways less favourable to Celgar than it did with others.”⁴⁷²

243. The Claimant’s pleadings are replete with accusations of intent, directed primarily at BC Hydro who allegedly “chose” to treat the Claimant less favourably because other mills had “political connections” and it was able to exercise “unfettered discretion.” Although these arguments in themselves make little sense (commercially or otherwise), they are arguments of discriminatory intent, which the Claimant must support with evidence (it does not).

244. Second, the *absence* of evidence of discriminatory intent militates against a finding of nationality-based discrimination.⁴⁷³ The *S.D. Myers* tribunal recognized that, while protectionist intent is “not necessarily decisive on its own”, it is “important”.⁴⁷⁴ The absence of such intent is thus an equally important factor for the Tribunal to consider in determining whether the Claimant has suffered discrimination by reason of its nationality.

⁴⁷⁰ Claimant’s Memorial, ¶ 669.

⁴⁷¹ Claimant’s Memorial, ¶ 683.

⁴⁷² Claimant’s Reply, ¶ 291. [Emphasis added]

⁴⁷³ *Pope & Talbot – Merits Award*, ¶¶ 87, 93, 103, **RA-36**. Similarly, the tribunal in *Thunderbird* stated that Article 1102 “contemplates the case where a foreign investor is treated less favourably than a national investor. That case is to be proven by a foreign investor, and, additionally, the reason why there was a less favourable treatment.” *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006 (“*Thunderbird – Award*”), ¶ 177, **RA-42** (emphasis added). The *Loewen* tribunal also expressly stated that NAFTA Article 1102 requires less favourable treatment by reason of the claimant’s nationality: *Loewen – Award*, ¶ 139, **RA-22**. See also *Apotex – Award*, ¶ 8.56, **RA-54**; *Methanex – Award*, Part IV, Ch. B, ¶ 12, **RA-28**; *Cargill – Award*, ¶ 220, **RA-6**. In finding that Mexico had breached its obligations under Article 1102, the *Cargill* Tribunal explicitly noted “that the discrimination was based on nationality both in intent and effect.” *Cargill – Award*, ¶ 220, **RA-6**. See also *Corn Products – Decision on Responsibility*, ¶ 118, **CA-5**: “there is a close relationship between whether the State intentionally discriminated on grounds of nationality and the test of like circumstances.”

⁴⁷⁴ *S.D. Myers – Award*, ¶ 254, **RA-38**.

245. Third, evidence that other U.S. investors were accorded the same treatment as domestic or third Party investors is evidence against a finding of nationality-based discrimination. The Claimant does not deny that Domtar (a U.S. based company) was accorded identical treatment to Howe Sound and Tembec, but quips that “Canada does not acquire license to discriminate against some U.S. investors by treating one... American company favorably.”⁴⁷⁵ This identical treatment, however, provides further evidence that the measures the Claimant complains of have nothing to do with nationality-based discrimination.

246. Finally, where there is evidence that affirms rational government action and no evidence of any nationality-based preferences, then a claim under NAFTA Articles 1102 and 1103 must be dismissed.

3. An Allegedly Illegitimate Governmental Objective is Not an Independent Ground for Liability under Article 1102 or 1103

247. Canada agrees that an analysis of governmental policy objectives may be instructive when determining whether two investments were accorded treatment in like circumstances.⁴⁷⁶ For example, it may be appropriate to consider the government policies that provide the context for Tembec's 1997 EPA with the policies motivating BC Hydro's acquisition of resources under BC's 2007 Energy Plan to determine whether treatment accorded under the former is really “in like circumstances” with treatment accorded under the latter. Similarly, a measure that results in a difference in treatment that is explained by non-discriminatory reasons, including underlying factual circumstances or a rational government objective – to which international law generally

⁴⁷⁵ Claimant's Reply, ¶ 152.

⁴⁷⁶ See *Cargill - Award*, RA-6, ¶ 206 (“Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective.” The tribunal found in that case that there that there was no link between the alleged difference - a difference in economic circumstances - and the rationale and objective of the measure in question (¶ 209)). See also *GAMI - Award*, RA-14; *Pope & Talbot - Award*, RA-36.

extends a “high measure of deference”⁴⁷⁷ – will not amount to a breach of Articles 1102 or 1103.⁴⁷⁸

248. That is not, however, the Claimant’s approach to government policy under NAFTA Articles 1102 and 1103. The Claimant argues that even with a uniform non-discriminatory application of a measure to all investments, Canada nonetheless bears the onus of proving that the measure “bear[s] a reasonable nexus to rational government policies”⁴⁷⁹ and that the measure “could not be achieved by non-discriminatory means.”⁴⁸⁰ The Claimant states:

In sum, even if the Tribunal were to conclude that the challenged measures were not discriminatory because BC consistently applied a uniform access standard to all self-generators in the Province, the resulting discriminatory impact cannot be

⁴⁷⁷ See *S.D. Myers – Partial Award*, ¶ 263 **RA-38** (“...That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”)

⁴⁷⁸ *Pope & Talbot - Award*, **RA-36**, ¶ 78 (“Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.”); *GAMI - Award*, **RA-14**, ¶ 114 (“The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.”); *Cargill - Award*, ¶ 206, **RA-6** (“Thus, in both *GAMI* and *Pope & Talbot*, ‘like circumstances’ was determined by reference to the rationale for the measure that was being challenged. It was not a determination of ‘like circumstances’ in the abstract.”). See also *Parkerings - Award*, ¶ 371, **CA-12** (“The two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the treatment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State’s legitimate objective justifies such a different treatment in relation to the specificity of the investment.”); *UPS – Award*, ¶ 102, **RA-46** (listing the “principal factors [such as greater security, time-sensitivity, and the presence of contractual relationships] which demonstrate to the satisfaction of the Tribunal that Customs treatment of international mail is not “in like circumstances” with the treatment accorded to UPS”). *Corn Products – Decision on Responsibility*, ¶ 118, **CA-5** (the Tribunal “must be sensitive to the particular circumstances of each case...it is necessary to consider the entire factual and legal context”).

⁴⁷⁹ Claimant’s Reply, ¶ 162.

⁴⁸⁰ Claimant’s Reply, ¶ 210.

justified because BC's approach failed to serve any legitimate governmental objective that could not have been achieved by non-discriminatory means.⁴⁸¹

249. The Claimant grossly over-extends the role of Articles 1102 and 1103. If a measure has been found to be "not discriminatory" then there has been no breach of National Treatment or Most-Favoured Nation Treatment, and the analysis ends there.⁴⁸² The door does not open to a claimant to attack government policy as being "illegitimate" and proclaim its own views on what other non-discriminatory means the government might have chosen in its place to better match the Claimant's preferences.

250. Moreover, it is difficult to reconcile the Claimant's new approach to Articles 1102 and 1103 with its past statements that the "NAFTA does not require the Province to adopt any particular policy course;"⁴⁸³ or that the "NAFTA does not dictate any particular set of policy choices for the Province."⁴⁸⁴ Canada agrees. States have broad discretion in choosing when and how to regulate, and the standard for assessing a state's reasons for acting, or not acting, is not an exacting one.⁴⁸⁵ It is not the purview of Articles 1102 and 1103 to attack the legitimacy of a policy objective underlying a non-discriminatory

⁴⁸¹ Claimant's Reply, ¶ 183.

⁴⁸² See *Thunderbird - Award*, **RA-42**, ¶ 182 ("It thus appears from the facts of the case that SEGOB's policy and actions in enforcing the *Ley Federal de Juegos y Sorteos* were directed at both Mexican and non-Mexican gambling operations and that they were overall consistent. Accordingly, the Tribunal finds that Thunderbird has not established a breach of the 'National Treatment' standard under Article 1102 of the NAFTA."); *AES - Award*, **CA-2**, ¶ 10.3.50 ("The Tribunal thus concludes that neither its low capacity fees, nor its high energy fees suggest discrimination. Both were the logical result of a uniform methodology that was applied equally to all generators, based on their differing assets and operating cost structures."); *Electrabel - Award*, **RA-12**, ¶ 7.153-7.154 (though decided under the Energy Charter Treaty's non-impairment clause, the principle remains the same: consistent treatment that results in different outcomes does not constitute discrimination "...In short, all Generators were 'asked' to adjust their prices in similar terms; and the difference in their adjusted capacity fees reflected only the differences in profit level amongst different Generators. Accordingly, the Tribunal concludes that Electrabel's allegations have not met the burden of proof required for a measure to be discriminatory in its impairment of an investment under Article 10(1) ECT.")

⁴⁸³ Claimant's Memorial, ¶ 186.

⁴⁸⁴ Request for Arbitration, ¶ 41; Notice of Intent, ¶ 36.

⁴⁸⁵ See *S.D. Myers - Partial Award*, ¶ 263, **RA-38** ("... That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.")

measure. Nor is it the purview of this NAFTA tribunal to sit retrospectively in judgment against BC's procurement policies.⁴⁸⁶ In asking the Tribunal to do so, the Claimant fundamentally overreaches.

C. The GBL Setting Methodology Applied by BC Hydro To The Claimant Under The 2007 Energy Plan Was Consistent With NAFTA Articles 1102 and 1103

251. The Claimant argues that Celgar's GBL was set in a discriminatory manner, and that, had BC Hydro not exercised its discretion in a discriminatory manner, Celgar's GBL would be lower. The allegation, foreshadows, its claim for damages where the Claimant asserts that it is entitled to damages equivalent to the price BC Hydro would have paid to procure the electricity. The Claimant's GBL claim is thus that BC Hydro was required to procure more electricity from the Claimant under its EPA. As explained above, these claims are inadmissible under the Article 1108(7)(a) procurement exception. However, even if these claims are admissible, they nonetheless have no merit.

252. The Claimant launches a three-pronged attack against the GBL methodology BC Hydro employed pursuant to the 2007 Energy Plan when setting GBLs for the Celgar, Tembec and Howe Sound EPAs.

253. First, the Claimant argues that BC Hydro employed *no methodology* when it set GBLs, alleging instead that BC Hydro had unfettered discretion, which it exercised on an *ad hoc* and discriminatory basis.⁴⁸⁷

⁴⁸⁶ *Electrabel – Award*, ¶ 8.35, **RA-12**. (“Further, the Tribunal’s task is not here to sit retrospectively in judgment upon Hungary’s discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards Dunamenti at the relevant time.”); *GAMI - Award*, ¶ 114, **RA- 13**. The *GAMI* tribunal also recognized this principle and deferred to Mexico’s policy choices. *AES – Award*, ¶ 10.3.34, **CA-2**. *Pope & Talbot – Merits Award*, ¶ 93, 102, **RA-36**. The Tribunal in *S.D. Myers* also stressed that “the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders” applies within the NAFTA context. *S.D. Myers – First Partial Award*, ¶ 263, **RA-38**. See also *Compton (Chemtura) Corp. v. Government of Canada* (UNCITRAL), Award, 2 August 2010, ¶ 134, **RA-55**.

⁴⁸⁷ Claimant’s Reply, ¶ 513. The Claimant contrasts the wrongful act under this prong (*i.e.*, “the existence

254. Second, the Claimant argues that if BC Hydro *did* employ a GBL methodology that it applied it *inconsistently* to Celgar in comparison to Tembec and Howe Sound. Specifically, the Claimant alleges that BC Hydro improperly applied its GBL methodology to Celgar by: (1) using a formula for calculating load rather than self-generation applied to load; (2) using an inappropriate baseline year; and (3) failing to evaluate the “economics” of Celgar’s below-load self-generation.⁴⁸⁸

255. Finally, the Claimant argues that if BC Hydro *did* employ a GBL methodology when it set GBLs for Celgar, Tembec and Howe Sound, and that it did so *consistently*, it nonetheless resulted in a “discriminatory impact” that is inconsistent with Articles 1102 and 1103 because “BC’s approach failed to serve any legitimate governmental objective that could not have been achieved by non-discriminatory means.”⁴⁸⁹

256. The Claimant’s arguments have no merit. The evidence demonstrates that BC Hydro did in fact apply a consistent, principled GBL methodology when setting GBLs for its EPAs. The Claimant’s argument to the contrary is illogical in the light of the 2007 Energy Policy and BC Hydro’s commercial interest in procuring electricity. Moreover, whatever self-proclaimed “discriminatory impact” the Claimant may feel it has suffered, the procurement of incremental energy serves a legitimate governmental purpose.

257. To the extent the Tribunal concludes there were differences in treatment between the mills (e.g., the use of a 2007 baseline for Celgar rather than the [REDACTED] [REDACTED] used for Howe Sound), these differences relate to the specific *outcomes* of the application of the GBL methodology to each mill, and are explained by the unique

of differential impacts”) against the wrongful act in the other two prongs (*i.e.* the failure to apply an applicable standard), and contends that, in order to avoid a breach of Articles 1102 or 1103 in the *no methodology* scenario, BC Hydro was required to set a GBL for Celgar based on the best “Arbitrage Percentage” allocated to another mill: Claimant’s Reply, ¶¶ 212-213.

⁴⁸⁸ Claimant’s Reply, ¶¶ 362-405.

⁴⁸⁹ Claimant’s Reply, ¶ 183.

circumstances. As such, they do not amount to a violation of National Treatment or Most-Favoured Nation Treatment.

1. BC Hydro Applied a GBL Methodology that the Claimant Understood

258. As Canada explained in its Counter-Memorial, BC's 2007 Energy Plan reflected the Government's objectives of addressing climate change by relying increasingly on clean and renewable energy, and of making BC Hydro energy self-sufficient.⁴⁹⁰ BC Hydro accordingly set out to procure clean electricity from self-generators in the private sector to help increase its supply.

259. BC Hydro developed the parameters for the Bioenergy Call to *increase* its resources in accordance with the 2007 Energy Plan, in consultation with proponents, the Ministry of Energy, and the Ministry of Forests. It determined that only "incremental" generation would be eligible for the Bioenergy Call.⁴⁹¹ Projects including "existing" electricity would not increase BC Hydro's resource pool, and would, in effect, transfer money from BC Hydro to the Seller without receiving anything in return.

260. BC Hydro thus had to devise a method to delineate "existing" from "incremental" electricity. To that end, BC Hydro held internal consultations in early February 2008 to draw on expertise from several departments to develop an appropriate mechanism for setting GBLs.⁴⁹² BC Hydro relied on the principles of BCUC Order G-38-01 and built on the precedents that BC Hydro had completed for earlier procurement processes, including the 2002 Customer-Based Generation program.⁴⁹³ As set out above, the main guiding

⁴⁹⁰ Les MacLaren Statement I, ¶¶ 76-77; Les MacLaren Statement II, ¶¶ 4-6. Canada previously described the goals and objectives of the 2007 Energy Plan at ¶¶ 137-143 of Canada's Counter-Memorial.

⁴⁹¹ Jim Scouras Statement I, ¶ 37-38.

⁴⁹² Lester Dyck Statement I, ¶¶ 54-55. *See also* Email from David Keir to Alex Adams, Lester Dyck re: RE: BioEnergy Call | Use of GBL and its implication on CBL's, dated February 12, 2008, **R-171**.

⁴⁹³ *See* Lester Dyck Statement I, ¶¶ 54-55. *See also* Email from David Keir, to Lester Dyck *et al* re: RE: Review detailed design of GBL concept for interaction with TSR for customer and Power Smart program implications | Meeting Minutes, dated February 15, 2008, **R-172**.

principle was that a GBL “defines incremental/surplus/excess TG output that can be considered for a prospective energy sale.”⁴⁹⁴ Mr. Dyck explains the factors BC Hydro considered on a consistent basis when setting GBLs in order to define “incremental” energy:

To set an appropriate GBL for an EPA...with a self-generating customer, BC Hydro and the customer review the best available information at the time of the power procurement process, including the customer’s historical self-generation output, energy consumption data, and information relating to the customer’s unique manufacturing operations. The goal is to define the amount of annual self-generated energy normally used by the customer to self-supply under current conditions without the prospect of the currently negotiated EPA...When setting a GBL, BC Hydro also accounts for any existing contractual obligations the customer may have that might affect its historical self-generation output.⁴⁹⁵

261. In its Reply, the Claimant alleges that BC Hydro employed *no methodology* when it set GBLs for the different mills.⁴⁹⁶ It argues that the GBL setting process lacked “procedures of any kind, featuring instead *ad hoc* discretionary determinations,”⁴⁹⁷ and that BC Hydro had “unfettered discretion in establishing GBLs for individual self-generators,”⁴⁹⁸ and that it “simply chose to exercise its discretion in ways less favorable to Celgar than it did with others.”⁴⁹⁹ It alleges that “there were no rules.”⁵⁰⁰ Or, that if

⁴⁹⁴ See Email from David Keir, to Lester Dyck *et al* re: RE: Review detailed design of GBL concept for interaction with TSR for customer and Power Smart program implications | Meeting Minutes, dated February 15, 2008 at 026774, **R-172**.

⁴⁹⁵ Lester Dyck Statement I, ¶¶ 44-45. See also Email from David Keir, to Lester Dyck *et al* re: RE: Review detailed design of GBL concept for interaction with TSR for customer and Power Smart program implications | Meeting Minutes, dated February 15, 2008 at 026774, **R-172**.

⁴⁹⁶ Claimant’s Reply, ¶ 212 (“BC [Hydro] had no consistently applied ‘current normal’ standard, but instead it made a series of *ad hoc* discretionary determinations in which it treated Celgar less favorably than its comparators in setting Celgar’s self-supply obligation.”).

⁴⁹⁷ Claimant’s Reply, ¶ 212.

⁴⁹⁸ Claimant Reply, ¶ 467.

⁴⁹⁹ Claimant’s Reply, ¶ 291.

⁵⁰⁰ Claimant’s Reply, ¶ 513.

there were rules, that BC Hydro kept them “secret.”⁵⁰¹ The Claimant is mistaken on all counts.

262. First, to suggest that BC Hydro had “unfettered discretion” defies both evidence and logic. It is evident that BC Hydro was provided with a mandate to *increase* its resource pool with clean energy and initiated procurement processes to incentivize incremental electricity from self-generators. If there were no rules, then BC Hydro would have had absolute discretion to procure any electricity, even “existing” electricity and the entire concept of a GBL would be irrelevant. However, not only would the procurement of such electricity run afoul of the 2007 Energy Plan, it would also likely be rejected by the BCUC as contrary to public interest.⁵⁰²

263. Moreover, the Claimant’s argument ignores that the setting of GBLs involves two parties. As Mr. Bursey sets out in his expert report, “The agreed baselines were not arbitrary; they were negotiated”⁵⁰³ by sophisticated technical and commercial parties. In addition, as Mr. Bursey further observes, “If BC Hydro had sought to impose an arbitrary unilateral baseline, then the customer had recourse to the BCUC.”⁵⁰⁴

264. Second, the Claimant’s argument that BC Hydro “simply chose” to exercise its discretion in ways less favourable to Celgar flouts reason. BC Hydro issued the Bioenergy Call with the aim of procuring approximately 1,000 GWh/year of electricity⁵⁰⁵

⁵⁰¹ Claimant’s Reply, ¶ 524. The Claimant’s argument that BC Hydro kept the factors it considered “a secret” is nonsensical. Of what benefit would that be to BC Hydro? The Claimant cannot argue that BC Hydro wanted to maintain “unequal bargaining power”, because that would be an allegation that BC Hydro intentionally set out to discriminate against mills, a claim the Claimant bears the onus of proving and for which there is no evidence.

⁵⁰² See Les MacLaren Statement II, ¶¶ 9, 20. See also David Bursey Expert Report, ¶¶ 34 and 135(d)(ii)(c).

⁵⁰³ Bursey Expert Report, ¶ 77 (emphasis added). Mr. Bursey also opines that “It is good regulatory practice, and certainly the practice in British Columbia, for the BCUC to allow BC Hydro and its industrial customers the first opportunity to work out technical bilateral issues, like setting a customer GBL. Both parties have a sophisticated technical understanding of the power consumption at the industrial site.” Bursey Expert Report, ¶ 123.

⁵⁰⁴ David Bursey Expert Report, ¶ 78.

⁵⁰⁵ Bioenergy Phase I - RFP, R-25. See also Jim Scouras Statement I, ¶ 38.

and had a vested interest in meeting this target. However, BC Hydro could only procure *incremental* electricity, not *existing* electricity, and in the end, the Bioenergy Call resulted in only four EPAs that contributed only 579 GWh/year. BC Hydro thus did not meet its objective. In this context, the Claimant's argument that BC Hydro "simply chose" to set a discriminatory 40 MW GBL makes no sense. If the Claimant had additional incremental electricity to sell, BC Hydro would have been willing to procure it within the parameters of the Call.

265. Third, the evidence demonstrates that BC Hydro was anything but "secretive." Indeed, BC Hydro provided information to proponents concerning its GBL methodology in several different ways, including in the GBL Registration Form,⁵⁰⁶ information sessions and workshops,⁵⁰⁷ and in one-on-one meetings and phone calls with proponents.⁵⁰⁸ BC Hydro met with Celgar representatives on April 2, 2008 to discuss their proposed projects. At that meeting, Mr. Dyck offered to act as "Celgar's unofficial account manager, giving Celgar a direct channel to resolve and/or clarify issues" as the process continued to unfold.⁵⁰⁹ Mr. Merwin and Mr. Dyck subsequently had numerous

⁵⁰⁶ See Lester Dyck Statement I, ¶¶ 55-56; BC Hydro Bioenergy Call for Power – Phase I, Addendum I, 26 February 2008 at 5, **R-113**. See also Section II.A.3.b.

⁵⁰⁷ See Mr. Dyck explained that the "initial customers' 'estimated GBLs' should reflect a 365 day annual period", and that the 2005 CBL establishment would be the starting point for GBL discussions, but that adjustments might need to be made for a mill's unique circumstances – for example, "existing LD contracts, EPAs, market sales, 1880/adhoc purchases etc.": BC Hydro's Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation at 22, **R-116**; Bioenergy Call Phase I, Proponent Information Session, March 26, 2008 at 63, **R-117**; Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064463, **R-173**.

⁵⁰⁸ See Bioenergy Call Phase I, Proponent Information Session, March 26, 2008 at 63, **R-117**; Lester Dyck Statement II, ¶ 8. This was a logical way of understanding "the unique attributes of each customer situation." As BC Hydro understood, the mill operators "know [their] operations best. Help us to understand the unique operational conditions that are imbedded within your annual GBL, such that we can collectively review and understand any specific elements that may be open to refinement." See Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064463, **R-173**.

⁵⁰⁹ Memo from Adrian Hay to Brian Merwin, April 2nd RFP meeting with BC Hydro, 2 April 2008, MER00027734, **R-557**. See also Lester Dyck Statement I, ¶ 91.

phone calls to discuss operations at the mill, and to arrive at a GBL that represented normal operating conditions.⁵¹⁰

266. BC Hydro provided ample opportunity for proponents to seek clarification on any points that they were uncertain about.⁵¹¹ And the Claimant did seek clarification. For example, a Celgar representative asked BC Hydro at the GBL break out session on March 26, 2008 whether a GBL would be set for a non-BC Hydro customer. BC Hydro answered yes, and proceeded to explain the principles and factors BC Hydro would consider in setting such GBLs.⁵¹²

267. BC Hydro also made it clear in every instance that the GBL methodology was a flexible one that was designed to account for the unique operating circumstances of each mill, so as to reflect what BC Hydro could consider procuring from each under the terms of the RFP.⁵¹³ In stark contrast to the Claimant's current allegations about the insufficient objectivity of BC Hydro's GBL methodology,⁵¹⁴ the Claimant lauded BC Hydro's flexible approach before the BCUC, arguing that "GBLs are not to be determined by any

⁵¹⁰ Lester Dyck Statement I, ¶¶ 81-82; Lester Dyck Statement II, ¶¶ 9, 19-30.

⁵¹¹ For example, the GBL Registration Form provided proponents with the option to "attach additional pages" in order to add explanatory information: BC Hydro Bioenergy Call for Power – Phase I, Addendum I, 26 February 2008 at 5, **R-113**. The Claimant did not provide additional information. Moreover, the attendees at the GBL break-out session held the afternoon of March 26, 2008 discussed the fact that different operational changes affected generation levels differently, and factors such as changes in steam flows, product changes, and weather could affect generation levels: Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064464, **R-173**.

⁵¹² Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064463, **R-173**.

⁵¹³ See Lester Dyck Statement I, ¶¶ 55, 58; BC Hydro Bioenergy Call for Power – Phase I, Addendum I, 26 February 2008 at 5, **R-113**; BC Hydro's Bioenergy Call, Kamloops, BC, February 20, 2008 Presentation at 22, **R-116**; Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064463, **R-173**.

⁵¹⁴ Claimant's Reply, ¶ 283 ("BC Hydro employed "a high-level principle that requires more detailed, refined, substantive guidelines, before it is capable of serving as a standard that can be meaningfully and consistently applied."); ¶ 286 (The GBL methodology "is too general to ensure that similar conditions are treated by BC Hydro similarly.").

set formula”⁵¹⁵ and that a “GBL should be made in consideration of the unique customer circumstances.”⁵¹⁶

268. Fourth, contrary to its argument that “no applicant had a clear understanding of what data or argument to present to BC Hydro to obtain its lowest possible GBL, because no one knew what factors BC Hydro would consider,”⁵¹⁷ the Claimant did not seem to have any trouble in May 2008 devising a GBL that would be “as low as credible.”⁵¹⁸ If the Claimant did not believe that BC Hydro had a methodology for setting GBLs, it would presumably have proposed a GBL of zero. Instead, Celgar’s internal position was to “build a case” for a GBL of 33 MW,⁵¹⁹ which would “reflect conditions prior to Mercer’s energy investments.”⁵²⁰

269. Indeed, Celgar’s proposed GBL of 33 MW demonstrates its understanding of the factors BC Hydro considered to set GBLs. The proposal was made on the basis of a 365-day period, demonstrating its understanding that BC Hydro considered a 365-day period of normal generation.⁵²¹ Moreover, the Claimant clearly understood that a GBL should represent what a mill normally generates without an incentive. Celgar’s proposed GBL of

⁵¹⁵ Celgar, Evidence Submission, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 15 March 2010, pp. 2 and 3, **R-280**.

⁵¹⁶ Celgar, Response to BCUC Information Request No. 1, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 15 April 2010, Q 6.1, pp. 16-17, **R-372**.

⁵¹⁷ Claimant’s Reply, ¶ 272.

⁵¹⁸ Email from Jim McLaren to Brian Merwin re: Phase I Request for Proposals: Notice to Customers of GBL, 4 May 2008, MER00064460, **R-534**.

⁵¹⁹ Draft Letter from Brian Merwin to RFP Administrator, Re: Zellstoff Celgar Limited Partnership (“Celgar”) – Biomass Realization Project and Celgar Green Energy Project, 4 May 2008, (Jim McLaren track changes) at MER00064462, MER00064462, **R-534**. (“Brian – we want to build the case that the existing TG will be base loaded to match your defined historical GBL of 33 MW...” The letter also describes that “[O]ur existing generation has been serving an industrial load at our discretion”, at MER00064463.)]

⁵²⁰ Email from Jim McLaren to Brian Merwin re: Phase I Request for Proposals: Notice to Customers of GBL, 4 May 2008, MER00064460, **R-534**.

⁵²¹ As Mr. Dyck comments, “If, as [Mr. Merwin] now says, BC Hydro gave him the impression that it would use an average of three years’ data to set GBLs for proponents, I expect that Mr. Merwin would have proposed a GBL on that basis at the time.” Lester Dyck Statement II, ¶ 14.

33 MW was based on the total gross generation of the mill in 2006, adjusted for excess natural gas used to generate electricity in excess of the mill's needs.⁵²² As Mr. Dyck observes, this proposal "reflects Mr. Merwin's position of 'normal' operations for the mill during that time frame."⁵²³

270. Finally, to claim now that Celgar had no way of knowing what information to provide to BC Hydro is disingenuous. If, as he says now, Mr. Merwin really did not understand what BC Hydro meant by "normal operations" when he was negotiating the GBL for Celgar's EPA,⁵²⁴ he simply could have asked. Mr. Dyck made himself more than available to Mr. Merwin but, as Mr. Dyck recalls, "In all of my conversations with Mr. Merwin – and there were many of them during the GBL setting process – he never once raised any concerns about the meaning of 'normal' operations."⁵²⁵ Mr. Dyck believes that this is because Mr. Merwin "understood that the purpose and the principle of GBLs in the context of BC Hydro's Bio Phase I process is to identify the mill's 'normal' generation that BC Hydro will not incentivize in the EPA."⁵²⁶

⁵²² Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") - Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008, at 5, **R-127**. Canada notes that in 2007, Celgar's sales were not made by firing incremental natural gas. Rather, they were primarily the product of the mill's burning the increased levels of black liquor available following the Blue Goose improvements to pulp production. See Pöyry Expert Report II, ¶¶ 66-78.

⁵²³ See Lester Dyck Statement II, ¶ 12. Other internal communications further demonstrate that the Claimant understood that existing sales commitments would be considered by BC Hydro. See Email from Jim McLaren to Brian Merwin, Re: Sale of STG#2 and future STG# Electricity Output, 30 October 2007, **R-357** ("[c]reating an historical practice of selling 28 MW of output from STG#2 into the USA before entering the future BC Hydro call next spring has merit."); and Memo from Adrian Hay to Brian Merwin, April 2nd RFP meeting with BC Hydro, 2 April 2008, MER00027734, **R-557** ("From Celgar's perspective, the lack of existing power obligations means that its GBL is zero and so it should be able to sell all of its generation to BC Hydro.").

⁵²⁴ Brian Merwin Statement II, ¶¶ 15-19.

⁵²⁵ Lester Dyck Statement II, ¶ 21.

⁵²⁶ Lester Dyck Statement II, ¶ 10.

2. BC Hydro's GBL Methodology is Reasonably Related to Legitimate Policy Objectives

271. The Claimant in its Reply now argues that even if BC Hydro *did* employ a GBL methodology and even if it employed that methodology consistently to all mills, Canada nonetheless bears the onus of proving that the methodology has “a reasonable nexus to rational government policies”⁵²⁷ and that the aims of the policy “could not be achieved by non-discriminatory means.”⁵²⁸ The Claimant states:

[E]ven if the Tribunal were to conclude that the challenged measures were not discriminatory because BC consistently applied a uniform access standard to all self-generators in the Province, the resulting discriminatory impact cannot be justified because BC's approach failed to serve any legitimate governmental objective that could not have been achieved by non-discriminatory means.⁵²⁹

272. Canada has already explained it has the right to regulate matters within its own borders that its choices in this regard are owed a “high measure of deference,”⁵³⁰ and that it is not the purview of a NAFTA tribunal to second-guess the non-discriminatory policy choices of governments. Canada will nonetheless respond to the Claimant's allegation that BC Hydro's GBL methodology does not accord with legitimate government policy.

273. The Claimant articulates five criticisms. First, it argues that BC Hydro's GBL methodology negates the policy objectives of Order G-38-01 by “depart[ing] from the BCUC's historical usage standard.”⁵³¹ However, BC Hydro's procurement policies exist

⁵²⁷ Claimant's Reply, ¶ 162.

⁵²⁸ Claimant's Reply, ¶ 210.

⁵²⁹ Claimant's Reply, ¶ 183.

⁵³⁰ *S.D. Myers – Partial Award*, ¶ 263, **R-38**.

⁵³¹ Claimant's Reply, ¶¶ 310-314. The Claimant also fundamentally mischaracterizes Order G-38-01. *See* Section II.A.1; Bursey Expert Report, ¶¶ 75 (“BCUC Order G-38-01 was not intended to be a comprehensive review of the issues related to self-generators selling power while being supplied by utility service. It set a basic framework for the interested parties to attempt to develop this opportunity, with the BCUC retaining the authority to supervise the program and the resulting outcomes and then adapt its regulatory approach.”).

to meet different policy objectives than those raised by G-38-01.⁵³² As Mr. Dyck explains, the situation confronting the BCUC in the proceedings leading to Order G-38-01 “is not tied to procurement by BC Hydro at all.”⁵³³ Nor does BC Hydro’s GBL methodology in any event “negate” G-38-01, as both prevent harmful arbitrage at the expense of ratepayers.

274. Second, the Claimant alleges that the GBL methodology does not achieve its “incentivizing” objective, which could be achieved without restricting third party sales. The Claimant, however, consistently conflates BC Hydro’s GBL methodology with the exclusivity clause of its EPA with BC Hydro, which purportedly restricts the sale of below-GBL electricity to third parties. For example, the Claimant argues that BC Hydro’s GBL methodology was “completely inappropriate to determine the total amount of power a self-generator could sell *to a third party* argument, to implement the non-procurement related purpose of Order G-38-01.”⁵³⁴ Similarly, the Claimant argues that BC Hydro’s pursuit of “‘incentiviz[ing]’ ‘new or incremental’ generation and ‘idle’ generation, but not existing self-generation already on its system that did not require incentives”⁵³⁵ does not serve a legitimate purpose because BC Hydro could have incentivized incremental generation without restricting third party sales.⁵³⁶

⁵³² Claimant’s Reply, ¶ 313 (“Canada’s proffering of this ‘limiting BC Hydro incentives’ rationale proves that the ‘current normal’ standard differs from the ‘historical usage’ standard. Such a rationale was never even suggested at the time of Order G-38-01, and is nowhere embodied in that Order. Indeed, the ‘limiting BC Hydro incentives’ rationale is exclusively a BC Hydro procurement-related policy, and Order G-38-01 and the self-generator policy it embodies had nothing whatsoever to do with BC Hydro procurement much less limiting the volumes of biomass-based green energy BC Hydro would have to purchase from [*sic*] self-generators. The policy was developed originally to enable Howe Sound to sell its idle generation not to BC Hydro but into the California market.”)

⁵³³ Lester Dyck Statement II, ¶ 6.

⁵³⁴ Claimant’s Reply, ¶ 26 (emphasis in original).

⁵³⁵ Claimant’s Reply, ¶ 163.

⁵³⁶ Claimant’s Reply, ¶ 168; Fox-Penner Expert Report, ¶ 111 (“BC and BC Hydro could have subsidized new and incremental generation all they wanted, without restricting Celgar’s ability to sell its self-generated electricity. The restrictions thus cannot be justified by the incentivization policy alone.”).

275. As explained in Section II.C.4, BC Hydro did not, in fact, restrict the Claimant's ability to sell its below-GBL electricity, rendering the Claimant's criticism of this policy objective moot. However, even if the exclusivity provision in Celgar's EPA had restricted its ability to sell below-GBL electricity, such a restriction is reasonably related to the procurement of incremental generation as it provides BC Hydro with the certainty that it will receive the benefit of the EPA.⁵³⁷

276. Third, the Claimant argues that the policy goal of avoiding harmful arbitrage set out in Order G-38-01 is "motivated by BC Hydro protecting its profits/and or its rates at the expense of a more equitable and more economically efficient self-generator sales policy."⁵³⁸ This argument is, however, misplaced. The Claimant portends that the BCUC was confronted with, and decided on, "how to allocate the arbitrage profit that could be earned by selling electricity generated in BC at relatively low cost into higher-priced export or domestic markets."⁵³⁹ However, this is not how either the BCUC approached the issue it faced in G-38-01, or the manner in which BC Hydro pursues the cost-effective procurement of incremental generation. Therefore, as Dr. Rosenzweig describes, "arbitrage allocation" is "only a distraction from the true regulatory issue: the efficient procurement of incremental generation resources that does not result in harmful arbitrage,"⁵⁴⁰ and should be dismissed.

277. Fourth, the Claimant's argues that "the restrictions imposed upon Celgar cannot be justified by BC's goal of achieving energy security"⁵⁴¹ but ignores that BC Hydro did

⁵³⁷ Jim Scouras Statement II, ¶¶ 8-10.

⁵³⁸ Claimant's Reply, ¶ 173; Fox-Penner Expert Report, ¶ 40.

⁵³⁹ Claimant's Reply, ¶ 173; Fox-Penner Expert Report, ¶ 32.

⁵⁴⁰ NERA Expert Report II, ¶ 56 ("The allocation of arbitrage profits were not even an issue (directly or indirectly) before the BCUC, for the BC Government, or for BCH – this entire concept was devised by Dr. Fox-Penner. I am not aware of any BCUC proceeding (or BCH or BC document) that considers arbitrage from this perspective. As discussed, the objective and economics of BCH's process were to increase generation capacity cost effectively (at a cost less than BCH's other procurement options), in order to provide safe, reliable, and 'clean' power. ...")

⁵⁴¹ Claimant's Reply, ¶ 169; Fox-Penner, ¶ 112.

not restrict the Claimant's ability to sell below-GBL electricity to third parties. Moreover, the Claimant's argument ignores that the province is "neutral as to where a purchaser of Celgar's electricity resides. Whether the electricity remains in BC or is exported out of the province does not matter."⁵⁴²

278. Finally, the Claimant's argument that the GBL method is not legitimate policy because it "did not provide the greatest market access to the most efficient self-generators, but instead awarded benefits and more favorable treatment to self-generators with economically idle self-generation capacity, that, by definition, were less efficient,"⁵⁴³ misses the point. The policy objective of the 2007 Energy Plan and of BC Hydro's GBL methodology was not to "award benefits" to mills, but to procure incremental generation. Rather than increasing economic efficiency as an abstract principle, BC Hydro was procuring additional resources in a cost effective manner.⁵⁴⁴ In this light, BC Hydro's GBL methodology was reasonably related to its procurement of incremental electricity.⁵⁴⁵

279. For these reasons, the Claimant's attempt to critique legitimate provincial procurement policies has no merit.

⁵⁴² Les MacLaren Statement II, ¶ 16.

⁵⁴³ Claimant's Reply, ¶ 172

⁵⁴⁴ See Les MacLaren Statement II, ¶ 8. See also NERA Expert Report II, ¶¶ 61-72. Moreover, in pursuing this argument, the Claimant also ignores that "market economics already rewards greater mill efficiency via increased profits." NERA Expert Report II, ¶ 71.

⁵⁴⁵ See Canada's Counter-Memorial, ¶ 366 ("Thus, while the EPA is designed to incentivize generation that would otherwise not have been economically viable for the contracting mills, the GBL is the gauge for the economic efficiency of the incentive. A n incentive that is too low (*i.e.* a GBL that is too high) would fail to bring about the desired additional generation, while too great of an incentive (*i.e.* a GBL that is too low) would fail to protect ratepayers."). See also NERA Expert Report I, ¶ 49.

3. The Claimant Has Failed to Show Less Favourable Treatment

a) The “Below-Load Access Percentage” is an Inappropriate Measure of Less Favourable Treatment

280. Canada explained in its Counter-Memorial that the Claimant's “Below-Load Access Percentage” metric is an inappropriate measure of less favourable treatment because it ignores the economic, regulatory, and mill-specific circumstances that were integral and necessary considerations for the development and application of BC Hydro's GBL methodology.⁵⁴⁶

281. The Claimant's expert states that he invented the metric “to measure the effect [he was] interested in measuring,”⁵⁴⁷ as if he had already concluded the existence of less favourable treatment, then simply invented a metric to support his conclusion. The Claimant nonetheless persists with its view that the Below-Load Access Percentage has relevance, positing that “[i]t simply is a measurement tool for comparing one GBL to another.”⁵⁴⁸

282. BC Hydro does not, however, set GBLs to regulate “access” to embedded cost electricity, but to determine how much incremental generation it will procure. Adopting the Claimant's approach would “completely undermine the policy objectives of the 2007 Energy Plan, which was to increase the resource portfolio of BC Hydro at cost-effective prices, so as to meet new demand for electricity while ensuring that rate increases are as low as reasonable.”⁵⁴⁹

283. For example, the Claimant alleges that it should have a GBL reflective of Howe Sound's Below Load Access Percentage. Assuming Howe Sound has a Below-Load

⁵⁴⁶ Canada's Counter-Memorial, ¶¶ 362-366; NERA Expert Report I, ¶¶ 59-61.

⁵⁴⁷ Switlishoff II, ¶ 15

⁵⁴⁸ Claimant's Reply, ¶ 191.

⁵⁴⁹ Les MacLaren Statement II, ¶ 11.

Access Percentage of [REDACTED]⁵⁵⁰ the Claimant argues that, in order to avoid discrimination between the two mills, BC Hydro was required to set a GBL for Celgar that reflects that same percentage. As the Claimant posits, such a GBL would be [REDACTED] GWh/year.⁵⁵¹ However, none of the [REDACTED] GWh/year difference between Celgar's current 349 GWh/year GBL and this [REDACTED] GWh/year GBL would be new or incremental electricity. It would be "existing" electricity that the Claimant alleges BC Hydro ought to have procured contrary to the parameters of the Bioenergy Call for Power.

284. Adopting the Claimant's metric would undermine BC Hydro's procurement activities and would simply transfer wealth to mills. As Mr. MacLaren explains, "[t]he Claimant is in effect asking for a subsidy."⁵⁵²

285. Moreover, the Claimant has *more* access to embedded cost power than any other mill in the Province. The BCUC has directed FortisBC to allow the Claimant to have 100% access to FortisBC's embedded cost power while the Claimant sells to market.⁵⁵³ The Claimant Below-Load Access Percentage is, in fact, thus 100%, significantly higher than Howe Sound or Tembec under their current EPAs. Thus, under the Claimant's very own metric, it has not received *less* favourable treatment, but *more* favourable treatment than any other mill.

b) The Claimant Has Not Demonstrated the Absence of a Uniform Methodology

286. The Claimant argues that in order to prove the absence of a uniform GBL methodology, it need only show "that Celgar and *at least one* other comparator were

⁵⁵⁰ See, for example, Claimant's Memorial, ¶ 698.

⁵⁵¹ Claimant's Memorial, ¶ 698, fn 776.

⁵⁵² Les MacLaren Statement II, ¶ 13.

⁵⁵³ BCUC, Order G-202-12 and Decision, in the Matter of FortisBC Inc., Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, ¶ 3 of the Order, p. 3 of Decision, **R-265**.

treated inconsistently” under the GBL methodology.⁵⁵⁴ The Claimant thus contends that it can attack the entire procurement process employed by BC Hydro after the 2007 Energy Plan, which has resulted in GBLs for at least nine EPAs with various pulp and paper mills, by focusing on only three (Celgar, Tembec, and Howe Sound) and ignoring the rest. The Claimant is mistaken. If it wishes to prove that there was no uniform GBL methodology employed by BC Hydro, then it must provide an analysis of more than just a small sample of hand-picked mills.

287. At the Claimant's request, Canada produced thousands of documents relating to the GBLs set for a dozen pulp and paper facilities and sawmills that have EPAs with BC Hydro. The Claimant in turn confirms that it provided its experts with “full access to the document database provided by Canada.”⁵⁵⁵ Yet, none of its experts provides any analysis of the GBLs set for the other mills. Unlike the Claimant, Canada did have its expert review a large volume of documents relating to other mills, and they confirm that, in negotiating the GBL provisions in each EPA, BC Hydro consistently applied the same methodology.⁵⁵⁶

288. The Claimant resorts to baseless accusations that Canada's expert, Dr. Rosenzweig, is not “independent” but “simply reviewed what BC Hydro told him BC Hydro did, based on data BC Hydro selected for his review, and then blessed the analysis he was provided as reasonable.”⁵⁵⁷ As Dr. Rosenzweig explains, however, for each of the twelve mills he analyzed, his review included at least the following steps:

- I reviewed historical data for each mill, including historical generation, load, purchase and sales.

⁵⁵⁴ Claimant's Reply, ¶¶ 212; 160, fn. 179.

⁵⁵⁵ Claimant's Reply, ¶ 320.

⁵⁵⁶ See NERA Expert Report II, ¶¶ 37-39; NERA Expert Report I, ¶¶ 52-56, Appendix 2.

⁵⁵⁷ Claimant's Reply, ¶ 301.

-
- I reviewed each mill's EPA or ... LDA with BCH (each of the 12 mills I reviewed signed such an agreement during the 2009 to 2011 period). I reviewed GBL, firm sales, or load displacement levels, including shaping (by season, month, or hour) as well as whether these levels were adjusted based on outages. I reviewed price terms and penalty terms as well as non-price terms such as what triggered the beginning of firm energy sales under an EPA (often this was tied to a new or refurbished generation resource coming on-line).
 - I reviewed electricity-generation related contracts that the various mills had entered into before their EPAs and LDAs referenced in the previous bullet point. I assessed the effect of these contracts on the mills generation and on their GBL determination, considering the potentially different effects of whether or not the agreement was canceled before the effective date of the new EPA/LDA. If a contract was canceled, I assessed the terms of the cancelation from an economic-regulatory perspective.⁵⁵⁸

289. Similarly, the Claimant accuses Canada's other expert, Mr. Stockard, of being "guided by BC Hydro", and limited by BC Hydro's data sources.⁵⁵⁹ But Mr. Stockard, too, reviewed over 1,500 documents in the preparation of his reports.⁵⁶⁰ As Mr. Stockard explains:

Not coincidentally, the majority of documents I requested and reviewed were provided by Canada. These documents encompassed material they had collected in the course of their document collection process as well as material filed by the Claimant as part of its Memorial and subsequently its Reply. These documents contained a wide range of information, including governmental policy directives, contractual agreements, technical discussions, business and process data, and internal and external communications between BC Hydro and the owners of the facilities currently being reviewed, spanning more than 15 years in some instances. In addition to these materials, Canada also provided witness statements for me to review to understand some of the key individuals' actions supporting the GBL determination process for context.

...

⁵⁵⁸ See NERA Expert Report II, ¶¶ 38-40 for the other elements of Dr. Rosenzweig's review.

⁵⁵⁹ Claimant's Reply, ¶ 320.

⁵⁶⁰ Pöyry Expert Report II, ¶ 25.

I have also utilized Poyry's internal database generated from publicly available information to review the general configuration of these facilities and to understand major design differences between the mills.⁵⁶¹

290. The serious allegations the Claimant makes concerning the independence of Canada's experts is inappropriate. This is especially so when the Claimant has retained experts with which it has a close business relationship⁵⁶² and has not had these experts undertake their own analysis. Indeed, the Claimant's unfounded allegations in this respect do not rebut the conclusions reached by Canada's experts that BC Hydro had a GBL methodology and that it applied the methodology consistently.

c) BC Hydro Consistently Applied its GBL Methodology

291. The Claimant argues that if BC Hydro in fact had a GBL methodology, then it made an error when applying that methodology to Celgar and the less favourable treatment is "the failure to apply to Celgar the standard [BC Hydro] applied to everyone else."⁵⁶³ The Claimant alleges that BC Hydro departed from its GBL methodology "by (1) using load rather than generation-to-load as the basis for the GBL, (2) using 2007 and not 2006 as a baseline year, and (3) not considering Celgar's financial losses as a basis for concluding that historical generation levels would not reflect current conditions going forward."⁵⁶⁴

292. The Claimant was not treated less favourably than other mills because BC Hydro applied its GBL methodology consistently to everyone, including Celgar. BC Hydro worked with Celgar, as with Tembec and Howe Sound, to determine the amount of

⁵⁶¹ Pöyry Expert Report II, ¶ 26.

⁵⁶² Switlishoff Expert Report I, ¶¶ 13-14. Mr. Switlishoff has billed at least [REDACTED] to Celgar over the course of a few years.

⁵⁶³ Claimant's Reply, ¶ 211.

⁵⁶⁴ Claimant's Reply, ¶ 405.

energy the mills normally generated for self-supply, on an annual basis, as of the time of the procurement process, in the absence of the prospective EPA.⁵⁶⁵

293. BC Hydro and Celgar exchanged numerous letters, emails, and phone calls in the period preceding May 30, 2008, when the GBL was set for the Celgar mill.⁵⁶⁶ Similarly, BC Hydro communicated regularly with personnel at the Tembec⁵⁶⁷ and Howe Sound⁵⁶⁸ mills prior to the GBLs being set for their mills. In each case, BC Hydro sought input from those who knew the mill's operations best to determine what was "normal" for each of those operations.⁵⁶⁹ As Mr. Fominoff, the General Manager, Fibre & Energy at Howe Sound testifies, "BC Hydro wanted to know what Howe Sound generates in a normal operating year, so that it could determine what electricity would be incremental and thus eligible for purchase."⁵⁷⁰

294. For each of Celgar, Tembec and Howe Sound, BC Hydro considered historical data sets in order to identify what was "normal" for the mill at the time of the procurement process. For Celgar's 2009 EPA, BC Hydro considered operational data from 2002 to 2007, as submitted by Celgar.⁵⁷¹ For Tembec's 2009 EPA, BC Hydro

⁵⁶⁵ See Canada's Counter-Memorial, ¶ 366; Lester Dyck Statement I, ¶¶ 44-45; Lester Dyck Statement II, ¶¶ 3-5.

⁵⁶⁶ See Lester Dyck Statement I, ¶¶ 68-83; Lester Dyck Statement II, ¶¶ 19, 21; Merwin Statement I, ¶¶ 81, 82, 85-88; Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") – Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008, **R-127**.

⁵⁶⁷ See Email from Chris Lague to Matt Steele re: Tembec Skookumchuck site GBL calculations, dated March 10, 2009, **R-193**; Email exchange between Chris Lague and Norman Wild, dated 23 March to 25 March 2009, **R-526**.

⁵⁶⁸ See Lester Dyck Statement I, ¶¶ 126, 127-131; Fred Fominoff Statement, ¶¶ 25-26, 30-37; email from Scott Janzen to Fred Fominoff re: GBL, dated June 24, 2010, **R-70**; Howe Sound Pulp and Paper LP, Generation Baseline Calculations, 1 August 2006 to 31 July 2009, **R-66**.

⁵⁶⁹ See Email from David Keir to Lester Dyck re: Summary of GBL Discussion – 26 March 2008, dated March 27, 2008 at 064463, **R-173**.

⁵⁷⁰ Fred Fominoff Statement, ¶ 30.

⁵⁷¹ Lester Dyck Statement II, ¶¶ 15-16 ("I reviewed the broader range of data submitted by Celgar – from 2002 until 2007..."); Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") – Biomass Realization Project and Celgar Green Energy Project, dated May

considered historical data from [REDACTED] as submitted by Tembec.⁵⁷² For Howe Sound's 2010 EPA, BC Hydro considered historical generation data from [REDACTED], as submitted by Howe Sound.⁵⁷³ In addition, BC Hydro relied on statements made by mill personnel about the mills' operations going forward to ensure that the GBL was set at an appropriate level.⁵⁷⁴

295. The mill's actual gross generation data was the starting point for each of these pulp mills. Adjustments were then made to arrive at a GBL that the parties agreed reflected how much the mill would normally generate for self-supply on an annual basis. In some cases, few or no adjustments needed to be made to the mill's actual gross generation data. Celgar, for example, represented that it was self-sufficient under normal operating conditions;⁵⁷⁵ it also represented that its load was expected to grow, and its generation levels would grow to meet it.⁵⁷⁶ Under these circumstances, the mill's gross

7, 2008 at 019774, **R-127**.

⁵⁷² Christian Lague Statement, ¶ 44; Email from Chris Lague to Matt Steele re: Tembec Skookumchuck site GBL calculations, dated March 10, 2009 at 021003, **R-193**. [REDACTED]

[REDACTED] see Lester Dyck Statement I, ¶¶ 108-109; Lester Dyck Statement II, ¶¶ 46-47.

⁵⁷³ Lester Dyck Statement II, ¶ 49; Fred Fominoff Statement, ¶¶ 33-34; Howe Sound Pulp and Paper LP, Generation Baseline Calculations, 1 August 2006 – 31 July 2009, **R-66**.

⁵⁷⁴ Lester Dyck Statement II, ¶¶ 16 (“Rather than considering ‘only one year’ as Mr. Merwin contends, I reviewed the broader range of data submitted by Celgar -- from 2002 until 2007, in addition to statements Mr. Merwin made about the mill’s projections for future performance”), 35 (“As I explained in my first witness statement, the expected generation at the Skookumchuck mill in the absence of the 1997 EPA (or any incentive agreement) was the basis for setting the GBL for the 2009 EPA.”), 49 (“Unlike with Celgar, [REDACTED]

⁵⁷⁵ Lester Dyck Statement II, ¶ 19 (“To clarify what I was trying to determine, I asked Mr. Merwin specifically whether, in normal circumstances, the mill was completely self-sufficient. His answer was yes.”) See also Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership (“Celgar”) – Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008 at 019777, **R-127**.

⁵⁷⁶ Lester Dyck Statement II, ¶¶ 25 (“Mr. Merwin did not convey that the mill would decrease steam production without the sales contracts. Quite the opposite – Mr. Merwin described that, as a result of the Blue Goose improvements, the mill would be producing even more steam than it had in the past, using primarily black liquor in its recovery boiler, which was a by-product of increased pulp production.”), 29 (“Mr. Merwin again never mentioned that Celgar might have questions about the reliability of Blue Goose.

generation output in 2007, which was 351 GWh/year, was adjusted slightly down to the level of its load (349 GWh/year). No other adjustments were necessary, as the parties agreed this mode of operation represented normal for the mill.⁵⁷⁷

296. In Howe Sound's case, however, [REDACTED]
[REDACTED]⁵⁷⁸ The parties were thus required [REDACTED]
[REDACTED] For
its part, Tembec's [REDACTED]
[REDACTED]⁵⁷⁹ BC Hydro and Tembec were also required [REDACTED]
[REDACTED]
[REDACTED]

297. The point remains that even though gross generation was not appropriate as the ending point in each case, it was the starting point in each case. That BC Hydro arrived at different end points for different mills to reflect their unique operations does not amount to less favourable treatment. To the extent that there were differences in the adjustments made, the differences are the result of the unique factual circumstances of each mill's operations, and will be addressed in the "like circumstances" section below.

298. Moreover, BC Hydro determined "normal" levels of generation for self-supply using the best available information at the time of the procurement process. As the GBL is meant to define how much energy BC Hydro will consider purchasing in an EPA, BC Hydro necessarily assesses what is existing and what is incremental energy at that

To the contrary, he boasted about the efficiency improvements, and communicated to us that the mill's load would grow, and its generation would grow to match it.").

⁵⁷⁷ Lester Dyck Statement II, ¶ 17 ("In follow-up conversations, Mr. Merwin confirmed that 2007 represented normal operations for Celgar going forward.")

⁵⁷⁸ Lester Dyck Statement II, ¶¶ 49-50. *See also* Pöyry Expert Report II, ¶¶ 109-110.

⁵⁷⁹ Lester Dyck Statement I, ¶ 106; Christian Lague Statement, ¶ 42 [REDACTED]

[REDACTED] *See also* Pöyry Expert Report II, ¶ 98 [REDACTED]
[REDACTED] the reality of Skookumchuck's operations would necessarily change.").

time.⁵⁸⁰ After reviewing the historical generation data submitted by Celgar, BC Hydro used 2007 data as the basis for that mill's GBL. This was the most recent complete year of operations at the time of the GBL negotiations in 2008, and the data did not contain anomalies.⁵⁸¹ Similarly, BC Hydro used Tembec's [REDACTED] data to set the GBL for that mill.⁵⁸² [REDACTED]

[REDACTED]

[REDACTED] BC Hydro and Howe Sound [REDACTED]

[REDACTED] This difference, again, does not constitute evidence of less favourable treatment, but of different factual circumstances leading to a different outcome under the consistent application of a uniform methodology.

299. Finally, BC Hydro does not directly consider any mill's "economic and financial" circumstances to set GBLs. Mr. Dyck explains that "[t]he recent historical generation data of the mill already reflects that mill's weighing of economic and financial factors in operating decisions."⁵⁸³ This approach was the same for all mills. The Claimant greatly exaggerates the role of [REDACTED]

[REDACTED]

⁵⁸⁰ Lester Dyck Statement II, ¶¶ 4-5 ("For the purposes of its EPAs, BC Hydro reviews the most recent historical data with a self-generating counterparty in order to agree on what normal operations are for the counterparty at that time.")

⁵⁸¹ While Celgar pointed out what it considered to be "abnormalities" in its operational data in its May 2007 presentation to FortisBC, such information was not conveyed to BC Hydro in either its April 2007 presentation (which contained many similar elements to the presentation given to FortisBC a month later) or in any communications during the GBL discussions in April and May 2008: Pöyry Expert Report II, ¶ 45. *See also* Mercer International Group, FortisBC Meeting, May 2007, MER00277673, **R-558**; Mercer International Group, BC Hydro RFEOI Meeting, April 2007, **R-352**.

⁵⁸² Lester Dyck Statement I, ¶ 107; Christian Lague Statement, ¶ 44; Pöyry Expert Report I, ¶¶ 131-132.

⁵⁸³ Lester Dyck Statement II, ¶ 30.

4. The Different Results of BC Hydro's Consistent Application of its GBL Methodology Are Explained by the Unique Circumstances of Each Mill

301. Canada maintains that the GBL methodology was consistently applied to all nine pulp mills that have an EPA and GBL with BC Hydro, and illustrated by the examples above. In the event the Tribunal finds that there has been a difference in treatment between Celgar and another mill, Canada contends that the differences are explained not by reason of Celgar's nationality, but by the unique factual circumstances of each mill.

a) Howe Sound (Port Mellon)'s 2010 EPA

302. The Claimant acknowledges that BC Hydro consistently applied its GBL methodology to Howe Sound in the context of its 2010 EPA.⁵⁸⁹ The Claimant applauds BC Hydro's [REDACTED] for Howe Sound, but contests the [REDACTED]⁵⁹⁰ For Howe Sound.

303. The Claimant misunderstands that, [REDACTED]
[REDACTED]
[REDACTED]⁵⁹¹ In those circumstances, [REDACTED]
[REDACTED] BC Hydro and Howe Sound thus worked together to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁵⁹²

⁵⁸⁹ Claimant's Reply, ¶ 462. Incidentally, the Claimant has also determined that Howe Sound has received the most favourable treatment of the comparator mills, according to its Below-Load Access Percentage of [REDACTED]

⁵⁹⁰ Claimant's Reply, ¶ 463.

⁵⁹¹ Lester Dyck Statement I, ¶¶ 127-9; Fred Fominoff Statement I, ¶¶ 32-34. *See also* Pöyry Expert Report II, ¶¶ 109-110.

⁵⁹² Lester Dyck Statement II, ¶ 51. *See also* Fred Fominoff Statement, ¶ 33.

304. These circumstances stand in stark contrast to Celgar's situation. BC Hydro looked at all of the data submitted by Celgar, and followed up with several meetings and phone calls to confirm what were normal operations at the Celgar mill. As Mr. Dyck testifies, and the documents corroborate, Celgar agreed that 2007 was representative of normal operations at that time.⁵⁹³ The treatment accorded to each of these mills was thus not comparable. Indeed, the reason for [REDACTED] for Howe Sound and one year for Celgar is that [REDACTED] for Howe Sound, whereas the parties agreed that one year – 2007 – was normal for Celgar.⁵⁹⁴

305. The Claimant further argues that BC Hydro [REDACTED] [REDACTED] but did not do the same for Celgar.⁵⁹⁵ Instead, the Claimant argues that BC Hydro subtracted Celgar's sales to NorthPoint and FortisBC, but then added back in its purchases from FortisBC to arrive at the mill's load.⁵⁹⁶ The Claimant asserts that its sales to NorthPoint and FortisBC were no different [REDACTED] [REDACTED]

306. The adjustments made for [REDACTED] and Celgar's sales to NorthPoint and FortisBC are the result of the different operational realities of both mills with respect to their sales. In the case of Howe Sound, [REDACTED] [REDACTED]⁵⁹⁷ In the case of Celgar, the mill was

⁵⁹³ Lester Dyck Statement I, ¶ 86; Lester Dyck Statement II, ¶ 17; Letter from Brian Merwin to BC Hydro RFP Administrator, re: Zellstoff Celgar Limited Partnership ("Celgar") - Biomass Realization Project and Celgar Green Energy Project, dated May 7, 2008, p. 7, R-127 (showing "Celgar Operation 2007" diagram that "represents how Celgar typically operates after Mercer capital investments." This diagram shows a 2007 "March" mill load of 43 MW, generation levels for the same of 48 MW, and exports of 5 MW.)

⁵⁹⁴ Lester Dyck Statement II, ¶ 52 ("[Mr. Switliff] then asks why BC Hydro did [REDACTED] [REDACTED] The answer is simple: the mills' generation realities were different.")

⁵⁹⁵ See Claimant's Reply, ¶¶ 363, 369.

⁵⁹⁶ Claimant's Reply, ¶ 367.

⁵⁹⁷ Pierre Lamarche Statement II, ¶ 7; Lester Dyck Statement II, fn 38 ("The electricity Celgar sold to FortisBC and NorthPoint was at all times net of mill load. This is in contrast to the below load sales by Howe Sound to Powerex. Moreover, in Howe Sound's case, the mill was burning extra natural gas specifically to make the sales. Without the opportunity of a sale at the price available under the agreement,

generate 327 GWh/year when operating normally is if the mill was intentionally under-utilizing its generation capacity by venting steam and wasting thermal energy.”⁶⁰³

308. Moreover, the Claimant's own internal documents show that the mill was not running the power boiler to generate surplus electricity, but to provide operational benefits.⁶⁰⁴ As Pöyry explains in its second expert report, Celgar's power boiler provided several operational benefits to the mill that demonstrate that Celgar would have operated it without sales contracts. For example, the power boiler supported steam demand for pulp production and addressed recovery boiler upsets so as not to affect pulp production, as well as acted as a cost-effective way to dispose of hog fuel (which it was producing on-site), and of other waste matters.⁶⁰⁵

309. In addition, if what the Claimant now says is true, the [REDACTED] [REDACTED] would make a *de minimis* difference in the mill's electricity generation because the power boiler contributes minimal steam to the operation in comparison to the steam produced by burning black liquor in the recovery boiler. Specifically, the energy content of Celgar's steam production in 2007 was attributed to: ~94% black liquor, [REDACTED] hog fuel, and [REDACTED] natural gas.⁶⁰⁶

⁶⁰³ Lester Dyck Statement II, ¶ 27.

⁶⁰⁴ See e.g. See e.g. Email from Jim McLaren to Brian Merwin, Draft Jan 2006 to March 2007 Energy Review, 23 March 2007, MER00036310, **R-560** ([REDACTED]); Energy Cost Path to \$25/A Dt then \$0/A Dt, 23 March 2007, MER00036311, **R-561** ([REDACTED]); Energy Coordinator's July, 2007 Report to Al Hitzroth, 3 August 2007, MER00091267, **R-562** ([REDACTED])

⁶⁰⁵ Pöyry Expert Report II, ¶¶ 81-86.

⁶⁰⁶ Pöyry Expert Report II, ¶ 69, Table 3: Fuel Consumption for Steam Summary.

310. Finally, the Claimant's arguments on this point fundamentally misunderstand the principle of BC Hydro's GBL methodology. As BC Hydro has stated before the BCUC, "the GBL is not calculated from a formula."⁶⁰⁷ The Claimant itself has advocated for this approach before the BCUC.⁶⁰⁸ Rather, BC Hydro seeks to determine with the proponent what the self-generator normally generates for self-supply. Celgar was normally operating to self-supply the entirety of the mill's electrical needs, and the evidence strongly suggests that it would not have changed its operations in any meaningful way without the FortisBC or NorthPoint contracts.

311. Indeed, Celgar was frequently venting excess steam in 2007, an indication that it was producing more steam than was necessary to meet its pulping needs under normal circumstances.⁶⁰⁹ As Pöyry explains, after Blue Goose, "Celgar's steam generation capability surpassed its process steam consumption."⁶¹⁰ The main drivers of the mill's generation were not the sales to NorthPoint or FortisBC – those sales involved dumping electricity that the mill could not support onto the grid – but an increase in pulp production, more reliable pulp production,⁶¹¹ and the reduction of energy costs.⁶¹² Similar

⁶⁰⁷ Letter from Joanna Sofield, Chief Regulatory Officer to Ms. Erica Hamilton, Commission Secretary, Re British Columbia Utilities Commission (BCUC) British Columbia Hydro and Power Authority (BC Hydro) March 27, 2009, BC Hydro Response to BCUC Information Requests No. 1.6.1-1.6.4 at 151373, **R-547**.

⁶⁰⁸ See Celgar, Evidence Submission, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 15 March 2010, pp. 2 and 3, **R-280**; Celgar, Response to BCUC Information Request No. 1, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 15 April 2010, Q 6.1, pp. 16-17, **R-372**.

⁶⁰⁹ See Pöyry Expert Report II, ¶ 88 ([REDACTED])

⁶¹⁰ Pöyry Expert Report II, ¶ 88 ("Following the completion of Blue Goose, Celgar substantially improved pulp production in 2007, which increased the amount of black liquor generated in 2007. Celgar disposed of its black liquor by burning it in the recovery boiler, resulting in a higher level of steam generation based on black liquor. ... Blue Goose also led to a reduction of Celgar's process steam demand, which resulted in increasing amounts of steam being vented by the pulp mill.")

⁶¹¹ Increased pulp production would result in more black liquor production, which could then be burned to produce more steam to generate more electricity. Similarly, more reliable pulp production would result in more black liquor being available more consistently.

⁶¹² See Pöyry Expert Report II, ¶ 88.

operational realities were not present at the Howe Sound mill, [REDACTED]
[REDACTED]⁶¹³ The reason for adjusting
[REDACTED]
[REDACTED] is therefore not the nationality of either mill.
Rather, it is the different operational realities that render comparison of treatment on this point inapt. The Claimant has therefore failed to show a breach of Articles 1102 or 1103.

b) Tembec (Skookumchuck)'s 2009 EPA

312. As set out above, BC Hydro started its GBL assessment for both Celgar and Tembec with each mill's actual gross generation data, and then made adjustments for each as required. The primary reason for the different adjustments made for Celgar and Skookumchuck is not the nationality of their owners, but the existence of Tembec's 1997 EPA and the absence of a similar agreement for Celgar.

313. The Claimant argues that BC Hydro had no reason to [REDACTED]
[REDACTED]
[REDACTED]⁶¹⁴ particularly when BC Hydro used actual generation data for Celgar. In short, the Claimant argues that (1) the 1997 EPA did

⁶¹³ Lester Dyck Statement II, fn 38; Pierre Lamarche Statement I, ¶ 39; Pierre Lamarche Statement II, ¶ 7. Mr. Merwin also states now that, without the FortisBC and NorthPoint sales contracts, the mill would have [REDACTED]: Brian Merwin Statement II, ¶ 28. Not only does this contradict what Mr. Merwin stated in his first witness statement ("A minimal amount of natural gas is needed in the Mill to keep certain equipment operational (much like the function of a pilot light on a home kitchen stove), and to supplement the generation of electricity when the Mill experiences operational upsets. Since 2003, the Mill's natural gas consumption has been limited to this type of provisional usage." Brian Merwin Statement I, ¶ 27), but Canada's expert Pöyry compared the electricity sales prices Celgar received under its contracts against the cost of natural gas in 2007, and found that Celgar was not firing discretionary natural gas to generate substantial additional electricity in 2007. Specifically, Pöyry concludes that "it would not have made economic sense to burn discretionary natural gas to make sales to FortisBC at any point in time in 2007" (¶ 11) and that Celgar had supportive pricing and transmission access for only 1,199 MWh of electricity sales to NorthPoint, which represents 5% of its total sales in 2007 (¶ 12). However, the weighted average fuel mix for those days when Celgar sold to NorthPoint indicated that "only 1.5% of the fuel used in both boilers would have been generated by firing natural gas" (¶ 13). See Pöyry Expert Report II, ¶¶ 66-78.

⁶¹⁴ Claimant's Reply, ¶¶ 418.

not incentivize Skookumchuck to generate [REDACTED]⁶¹⁵ and (2) conditions impacting hog fuel prices led to “rampant speculation” on the part of BC Hydro [REDACTED]⁶¹⁶

314. The Claimant fundamentally misunderstands the nature of the [REDACTED] and its effect on Tembec's operations. For example, the Claimant contends that, without the [REDACTED] obligations, Skookumchuck [REDACTED] [REDACTED] However, this is a simplistic view of complex operating decisions. [REDACTED]
[REDACTED]
[REDACTED]

315. The 1997 EPA required that [REDACTED] [REDACTED] As Mr. Lague explains, [REDACTED] [REDACTED]⁶¹⁷ In this sense, the Skookumchuck operation was [REDACTED] [REDACTED]⁶¹⁸ This stands in contrast to Celgar, whose hog boiler contributed a mere [REDACTED] of the mill's steam supply, and was used in 2007 to support the mill's pulp production process.⁶¹⁹

⁶¹⁵ See Claimant's Reply, ¶¶ 420-431. (“Regardless of any incentive the 1997 EPA provided to Tembec for generating [REDACTED] 10.8 MW tranche of electricity that BC Hydro purchased, the 1997 EPA provided no marginal incentive to Tembec for any generation after that used by Tembec to meet its own load. Accordingly, the fact that Tembec [REDACTED] [REDACTED] ¶ 30)

⁶¹⁶ Claimant's Reply, ¶¶ 432-461.

⁶¹⁷ Christian Lague Statement, ¶ 50. See also Christian Lague Statement, ¶¶ 20, 26 (“...the 1997 EPA required hog fuel to be the primary fuel source for electricity generated to meet the Tranche 1 obligations.”)

⁶¹⁸ Pöyry Expert Report II, ¶ 18.

⁶¹⁹ Of those [REDACTED], only [REDACTED] was produced by burning hog fuel; the other [REDACTED] was produced by burning natural gas. See Pöyry Expert Report II, Table 3: Fuel Consumption for Steam Summary. In contrast, Celgar's recovery boiler, which is inextricably tied to its pulp production, contributed 95% of the mill's steam production in 2007. See also Pöyry Expert Report II, ¶ 82 (“...Celgar indicated in numerous

316. This also explains why, without the delivery obligation of the 1997 EPA, Tembec [REDACTED] [REDACTED] Instead, and much more like Celgar, it would operate its recovery boiler to produce steam for the mill's process. Rather than being a [REDACTED] [REDACTED] as the Claimant contends, Mr. Lague explains that "[i]n reality, nothing could be farther from hypothetical":

[REDACTED]

317. Tembec represented to BC Hydro [REDACTED]⁶²¹

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶²² As Mr. Lague explains, the power project [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

communications in 2007 that the power boiler was used that year to support steam demand for pulp production, to address recovery boiler upsets so as not to affect pulp production, to minimize firing of natural gas in the recovery boiler, and to serve as a back-up for the incineration of concentrated non-condensable gases (required by environmental permits) when other processes were down." [footnotes omitted]).

⁶²⁰ Christian Lague Statement, ¶ 50.
⁶²¹ Christian Lague Statement, ¶ 40.
⁶²² Christian Lague Statement, ¶¶ 33-40.

[REDACTED]
[REDACTED]
[REDACTED]⁶²³ Mr. Dyck and his GBL team at BC Hydro were not specifically concerned about the underlying reasons for this operational decision, only that they had informed the ultimate decision to operate [REDACTED]
[REDACTED]⁶²⁴

318. The Claimant points to Tembec's generation patterns following [REDACTED]
[REDACTED] event in February 2009 to argue that the 1997 EPA did not provide the incentive that BC Hydro claimed and that, [REDACTED]
Tembec was generated [REDACTED]⁶²⁵ However, the Claimant ignores the fact that, [REDACTED] the mill remained bound by the terms of the 1997 EPA and the 2001 ESA, [REDACTED]
[REDACTED]
[REDACTED]⁶²⁶ BC Hydro and Tembec had begun discussions regarding a new EPA, and both parties agreed that [REDACTED]
[REDACTED]⁶²⁷
[REDACTED]
[REDACTED]⁶²⁸

⁶²³ Christian Lague Statement, ¶¶ 33-40.

⁶²⁴ See Lester Dyck Statement II, ¶ 30.

⁶²⁵ Claimant's Reply, ¶¶ 449-450. See also Claimant's Reply, ¶ 454 ("In every single month leading up to the temporary idling and after – months in which hog fuel prices were high – Tembec actually had generated far more than 14 MW – usually more than double that amount.")

⁶²⁶ Christian Lague Statement, ¶ 52.

⁶²⁷ Christian Lague Statement, ¶ 52; Lester Dyck Statement II, ¶ 35. The 2009 EPA also contained provisions to [REDACTED]
[REDACTED] see Christian Lague Statement, ¶ 55; Lester Dyck Statement I, fn 123; Justification Report, Tembec EPA Replacement for Incremental Energy Sales from Purcell Power Plant at bates 152597-8, **R-192**.

⁶²⁸ Lester Dyck Statement II, ¶ 35; Christian Lague Statement, ¶ 52. In addition, Skookumchuck ran a test period in the summer of 2009 to prove to BC Hydro that it could deliver the firm energy contemplated for

319. Finally, the Claimant takes issue with certain assumptions [REDACTED] used by Tembec and BC Hydro to determine [REDACTED] [REDACTED] Specifically, the Claimant decries the omission of the [REDACTED] [REDACTED] used by Tembec, a fact it alleges led to an EPA "incentive" for Tembec's existing generation.⁶²⁹

320. However, [REDACTED] the Claimant argues was so unfairly left out was [REDACTED] [REDACTED] BC Hydro assumed that Tembec had the [REDACTED] [REDACTED] [REDACTED] Rather than ignoring the reality of [REDACTED] at the mill, [REDACTED] BC Hydro maintained that this [REDACTED] [REDACTED] BC Hydro's engineering group ran its own steam analysis, and arrived at an electricity generation level, [REDACTED] [REDACTED] >⁶³² BC Hydro agreed that the new EPA should not re-incentivize the existing generating equipment.

delivery in the 2009 EPA on an hourly basis: *see* Christian Lague Statement, ¶ 52.

⁶²⁹ Claimant's Reply, ¶ 444 [REDACTED]

⁶³⁰ Lester Dyck Statement II, ¶ 45.

⁶³¹ Lester Dyck Statement II, ¶¶ 46-47 ("I agree with Mr. Switliff that the appropriate GBL for the Tembec 2009 EPA needs to be based on the equipment that was installed and operating at Skookumchuck under normal operating conditions at the time of EPA negotiation. [REDACTED]

[REDACTED] *See also* Christian Lague Statement, ¶¶ 43-45, 47 ("BC Hydro [REDACTED]

⁶³² Lester Dyck Statement II, ¶ 43.

321. The Claimant's accusations that "Canada and its witnesses ignore completely the terms of Tembec's 1997 EPA, purporting to justify BC Hydro's actions based on supposed preexisting 'incentives' that simply do not exist"⁶³³ are therefore entirely baseless. The evidence demonstrates that Tembec's [REDACTED] [REDACTED] As Pöyry points [REDACTED] [REDACTED] the reality of Skookumchuck's operations would necessarily change."⁶³⁴

322. With an accurate understanding of the facts, the case is clear: Tembec and Celgar had fundamentally different circumstances. Tembec had a pre-existing agreement [REDACTED] [REDACTED] While Celgar had agreements for short-term, discretionary sales, under normal circumstances it was still operating without an external incentive to meet the requirements of its load. Viewed in another light, without the NorthPoint and FortisBC agreements, the conditions that informed Celgar's decision to meet its load with its self-generation remained largely unchanged. This is in contrast to Tembec, [REDACTED]

323. The facts thus demonstrate that the difference in GBL outcome for Celgar and Tembec is the result of different operating realities, not of Mercer's American nationality or Tembec's Canadian (at the relevant time) nationality. As such, it does not constitute a breach of NAFTA Chapter 11's National Treatment or MFN Treatment obligations.

D. The Claimant has Failed to Show that the Other Instances of GBL-Related Treatment it Identifies are Inconsistent with NAFTA Articles 1102 and 1103

324. The Claimant inappropriately compares the GBL in its 2009 EPA with three instances of treatment outside the context of BC Hydro's procurement of electricity under the 2007 Energy Plan: Tembec's 1997 EPA; Howe Sound's 2001 Consent Agreement;

⁶³³ Claimant's Reply, ¶ 422. See also Claimant's Reply, ¶¶ 420-432.

⁶³⁴ Pöyry Expert Report II, ¶ 98.

and Tolko (Kelowna)'s 2001 exemption order from the BCUC in Order G-113-01. Where, as here, there are identical instances of treatment (*i.e.* contracts with GBLs concluded through BC Hydro's procurement processes conducted in accordance with the 2007 Energy Plan), the Tribunal should not use these less identical instances of treatment for the purposes of assessing whether there has been a breach of Article 1102 or 1103.⁶³⁵

325. Should the Tribunal nonetheless decide that these instances of treatment are appropriate for comparison, Canada maintains that none of them constitutes a breach of Article 1102 or 1103.

1. Tembec (Skookumchuck)'s 1997 EPA

326. The Claimant contends that Tembec received more favourable treatment in its 1997 EPA because it did not have a GBL, and because Tembec was allowed to sell to BC Hydro while purchasing all of its electricity needs at embedded cost rates.⁶³⁶ The Claimant's argument, however, ignores the commercial reality of Skookumchuck's operations under the agreement.

327. Rather than arbitrating all of its self-generated electricity, [REDACTED] [REDACTED] In fact, in order to make any sales beyond the [REDACTED] 10.8 MW to BC Hydro, [REDACTED] [REDACTED]⁶³⁷ The Claimant seems to recognize this, spending pages

⁶³⁵ *Methanex Corporation v. United States of America* (UNCITRAL) Award on Jurisdiction and Merits, 3 August 2005 ("*Methanex – Award*"), Part IV, Ch. B, ¶ 17 ("[I]t would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."), **RA-28**. The Claimant agrees: Claimant's Memorial, ¶ 450 ("Within the range of comparators that may be in 'like' circumstances, the Tribunal must utilize the most appropriate comparators available.")

⁶³⁶ Claimant's Reply, ¶¶ 322-323.

⁶³⁷ See Christian Lague Statement, ¶ 25 [REDACTED] [REDACTED]"); Appendix to Electricity Supply Agreement between British Columbia Hydro and Power Authority and Tembec Industries Inc. ("Determination of Electricity Supplied and Taken Under RS 1821/1880"), 14 September 2001 at 30-31, **R-188**.

describing the manner in which Tembec operated in the years and months leading to the 2009 EPA,⁶³⁸ but without attributing these operational decisions [REDACTED]

328. As Mr. Lague explains, “[t]he [1997] EPA and the [2001] ESA are tied together, and cannot operate separately.”⁶³⁹ While different factors affected generation in each

[REDACTED] For example, [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]⁶⁴⁰ [REDACTED]
[REDACTED]
[REDACTED]⁶⁴¹ [REDACTED]

[REDACTED] As Mr. Lague explains, there were other factors [REDACTED]
[REDACTED]

[REDACTED]⁶⁴² However, these factors were considered [REDACTED]
[REDACTED]

329. The evidence thus demonstrates that Tembec’s arrangement under its 1997 EPA and 2001 ESA did not result in Tembec arbitraging the 10.8 MW of electricity it sold to BC Hydro, despite the fact that the agreement did not have a GBL. Instead, Tembec was

[REDACTED]
[REDACTED]
[REDACTED]

⁶³⁸ See, e.g., Claimant’s Reply, ¶¶ 407-461.

⁶³⁹ Christian Lague Statement, ¶ 23.

⁶⁴⁰ Christian Lague Statement, ¶ 26.

⁶⁴¹ Christian Lague Statement, ¶¶ 26-27.

⁶⁴² See Christian Lague Statement, ¶¶ 26-32.

330. Finally, the 1997 EPA was concluded prior to BCUC Order G-38-01 and prior to the introduction of the concept of a GBL in BC Hydro's procurement processes in 2002. Moreover, the 1997 EPA was awarded as part of an RFP for Independent Power Producers, and the project was developed as such.⁶⁴³ When Tembec acquired the Skookumchuck mill and the Purcell Power Project in 1999, it acquired an already-concluded agreement. Contrary to the Claimant's suggestion that "BC Hydro permitted an agreement plainly inconsistent with Order G-38-01 to be assigned and implemented after the date of that Order, including by concluding necessary supplemental agreements, like the ESA, well after the date of Order G-38-01,"⁶⁴⁴ Tembec and BC Hydro were discussing the accounting provisions of the 1997 EPA and the 2001 ESA in 1999 and 2000, when Tembec was "making and implementing its capital investment decisions."⁶⁴⁵ Indeed, the project had already been implemented by the time G-38-01 was issued.⁶⁴⁶

331. The Claimant has therefore failed to demonstrate that the treatment accorded to Tembec in the 1997 EPA amounts to a breach of NAFTA Article 1102 or 1103.

⁶⁴³ Christian Lague Statement, ¶¶ 10-12, 21 ("BC Hydro had agreed to purchase [REDACTED]

[REDACTED] See also Pöyry Expert Report II, ¶¶ 18 ("The Skookumchuck operation has been configured and operated more akin [REDACTED]), 91-92.

⁶⁴⁴ Claimant's Reply, ¶ 329.

⁶⁴⁵ Christian Lague Statement, ¶ 22. See also Crestbrook Forest Industries Ltd. Minutes of Meeting, Crestbrook Forest Industries Ltd. (CFI) Cogeneration Project Meeting No. 5 dated 30 May 2000, **R-254**.

⁶⁴⁶ See Christian Lague Statement, ¶¶ 16-17 ("The first part of the project, the hog boiler conversion, was completed in 2000. ... STG2 was installed in February 2001.")

2. Howe Sound's 2001 Consent Agreement

332. The Claimant contends that Celgar received less favourable treatment in the setting of its 2009 GBL than Howe Sound received in the setting of its [REDACTED] MW threshold in 2001. Specifically, the Claimant argues that BC Hydro did not apply its "current normal" standard to set the threshold for Howe Sound in 2001.⁶⁴⁷ The Claimant's arguments are misplaced for two reasons.

333. First, the Claimant inappropriately attempts to impose a standard developed for the purposes of BC Hydro's long-term procurement of electricity to a threshold defining BC Hydro's obligation to serve a customer wishing to sell electricity to third parties. As described above, these two activities set out to achieve different objectives.

334. Second, and more importantly, the Claimant ignores the fact that the [REDACTED] MW threshold for Howe Sound was set using [REDACTED]
[REDACTED]⁶⁴⁸ If Celgar's GBL was set using the same quality of data, its GBL would be even higher. Given that the Claimant's entire case centers on having a lower GBL, it is difficult to see how Howe Sound's [REDACTED] MW threshold constitutes less favourable treatment.

335. The Claimant's argument that BC Hydro did not revisit the threshold in [REDACTED]
[REDACTED] in which the Consent Agreement was renewed, thus demonstrating that BC Hydro treated Howe Sound more favourably than Celgar, must also be rejected. As set out in Section II.E, and in the testimony of Mr. Lamarche⁶⁴⁹ and of Mr. Dyck,⁶⁵⁰ BC Hydro and

⁶⁴⁷ See Claimant's Reply, ¶¶ 336-340.

⁶⁴⁸ Pierre Lamarche Statement II, ¶ 4 ("As I previously testified, to arrive at [REDACTED] MW, Howe Sound used [REDACTED]

[REDACTED]), fn 6 ("To reproduce the precise calculations we made at the time would require [REDACTED]
[REDACTED] As this was almost fifteen years ago, the mill no longer has this detailed information available.")

⁶⁴⁹ Pierre Lamarche Statement II, ¶¶ 7.

Howe Sound indeed revisited the GBL [REDACTED] in which the Consent Agreement was renewed. In every year, the circumstances underlying the rationale for the [REDACTED] MW threshold had not changed -- [REDACTED]

[REDACTED]⁶⁵¹

336. This is equally true of [REDACTED]

[REDACTED]⁶⁵² As Mr. Lamarche explains, the [REDACTED]

[REDACTED]⁶⁵³ [REDACTED]

[REDACTED]⁶⁵⁴ Thus, there is no merit to the Claimant's arguments in this regard.

337. Finally, Howe Sound's [REDACTED] MW threshold is not less favourable treatment because Howe Sound could not [REDACTED]

[REDACTED] In contrast, Celgar's ability to sell its below-GBL electricity is not restricted by a similar threshold. The BCUC has articulated that Celgar can sell the entire output of TG2. How this could constitute less favourable treatment is perplexing.

⁶⁵⁰ Lester Dyck Statement II, ¶¶ 54-57.

⁶⁵¹ Pierre Lamarche Statement II, ¶ 7.

⁶⁵² The Claimant suggests that, when the Consent Agreement [REDACTED] there would have been "every reason to believe that it would have been economical for Howe Sound to resume burning natural gas and generating electricity at pre-2000 levels, without the incentive of its market price arrangement with Powerex." Claimant's Reply, ¶ 342.

⁶⁵³ Pierre Lamarche Statement II, ¶¶ 9-11.

⁶⁵⁴ Pierre Lamarche Statement II, ¶ 11.

338. Therefore the Claimant has failed to demonstrate that the treatment accorded to Howe Sound in its 2001 Consent Agreement, and subsequent renewals, amounts to a breach of NAFTA Article 1102 or 1103.

3. Tolko Kelowna's 2001 Exemption Order

339. The Claimant mischaracterizes Canada's Counter-Memorial arguments with respect to Tolko (Kelowna).⁶⁵⁵ Canada does not argue that BC Hydro's contracted GBL methodology should have been applied to Tolko (Kelowna). Indeed, the Claimant's suggestion in this regard reflects its incorrect approach to like circumstances. Rather, Canada contends that Tolko's Kelowna sawmill offered a more appropriate comparison for the purposes of assessing the treatment accorded to self-generators in FortisBC's service territory, specifically under BCUC Order G-48-09. In that context, as Canada set out in its Counter-Memorial, Tolko is treated identically to Celgar.⁶⁵⁶

340. In any event, the Claimant's arguments with respect to Tolko's threshold for third-party sales are misplaced. The Claimant argues that Tolko's 2001 threshold was set more consistently with BCUC Order G-38-01 than Celgar's 2009 GBL (and all other BC Hydro procurement GBLs) because it "did not include the incremental generation that resulted from Tolko's installation of a new 10 MW steam turbine in April 2000."⁶⁵⁷

341. The Claimant ignores that, unlike Celgar's 2009 GBL, Tolko's threshold was not negotiated for the purposes of BC Hydro procuring incremental electricity pursuant to the 2007 Energy Plan. Rather, it was a solution negotiated between Tolko and its utility, the City of Kelowna, for the purposes of allowing Tolko to sell incremental power to third parties.

⁶⁵⁵ Claimant's Reply, ¶ 151 ("As in its Memorial, Mercer contends that the Tolko Kelowna sawmill is not an appropriate comparator, because it does not operate in the same business sector as Celgar. Given Canada's insistence, Mercer nonetheless welcomes an analysis of the treatment afforded to Tolko, and presents its analysis below.")

⁶⁵⁶ Canada's Counter-Memorial, ¶ 450.

⁶⁵⁷ Claimant's Reply, ¶ 353.

342. Again unlike Celgar and its Blue Goose Project, Tolko initiated these negotiations with the City of Kelowna and West Kootenay Power prior to investing in increased self-generation capability.⁶⁵⁸ Tolko specifically contemplated increasing its generation capability for the purpose of selling electricity to third parties,⁶⁵⁹ and relied on the opportunity of market sales when making the investment. Tolko and the City of Kelowna had reached an agreement on the conditions under which Tolko could sell incremental electricity in 1998 and 1999,⁶⁶⁰ and Tolko simply applied to the BCUC in 2001 to seek the Commission's regulatory confirmation of the already-concluded solution in light of Order G-38-01. The BCUC's acceptance of the negotiated solution is consistent with the "flexible case-by-case approach to determine customer baselines" it adopted in Order G-38-01.⁶⁶¹

343. The Claimant has failed to demonstrate that the treatment accorded to Tolko (Riverside) in its 2001 threshold amounts to a breach of NAFTA Article 1102 or 1103.

⁶⁵⁸ Memorandum of Agreement between City of Kelowna and Riverside Forest Product, Ltd., February 25, 1999, at 1, attached (exhibit 2) to the Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, BCUC Staff Information Request No. 1, July 5, 2001, **R-563**.

⁶⁵⁹ Information Response of Riverside Forest Products Limited to the BCUC Staff Information Request No. 2, August 22, 2001, Answer 4.0. at 4-6, attached to Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, August 22, 2001, **R-553**.

⁶⁶⁰ See Memorandum of Agreement between City of Kelowna and Riverside Forest Product, Ltd., February 25, 1999, at 1, attached (exhibit 2) to the Letter from Counsel for Riverside Forest Products Ltd. to the British Columbia Utilities Commission re: Riverside Forest Product Limited, Application for Exemption of Certain Provisions of the Utilities Commission Act, BCUC Staff Information Request No. 1, July 5, 2001, **R-563**.

⁶⁶¹ See Burse Expert Report, ¶ 78.

E. The Claimant Has Failed to Prove that the Restriction on Third-Party Sales in Section 7.4(b) of its EPA with BC Hydro is Inconsistent with NAFTA Articles 1102 or 1103

344. In its Reply, the Claimant argues that, “unlike other BC pulp mills,”⁶⁶² BC Hydro has “forced” Celgar to self-supply through section 7.4(b) of its EPA,⁶⁶³ which it alleges “preclude[s] Celgar from selling its below-GBL self-generated electricity not only to BC Hydro but also to any third-party.”⁶⁶⁴ The Claimant states that BC Hydro “had no authority to set a self-supply obligation for Celgar,”⁶⁶⁵ and that the provision even “provides the basis for Mercer’s claim.”⁶⁶⁶

345. The Claimant does not, however, address section 7.4(b) under NAFTA Articles 1102 or 1103. It makes no claim relating to section 7.4(b) provision directly, which can only mean that the Claimant’s allegations against that provision are no more than bluster. Even if the Claimant were to attempt a claim against section 7.4(b) under NAFTA Articles 1102 or 1103, that claim would fail. As the Claimant acknowledges in its Reply: “BC Hydro typically...includes exclusivity provisions that preclude sales to third-parties.”⁶⁶⁷ The Claimant then proceeds to cite EPAs between BC Hydro and Howe Sound,⁶⁶⁸ Tembec,⁶⁶⁹ Canfor,⁶⁷⁰ Cariboo Pulp,⁶⁷¹ Domtar,⁶⁷² Catalyst,⁶⁷³ and Nanaimo.⁶⁷⁴

⁶⁶² Claimant’s Reply, ¶ 1.

⁶⁶³ The Claimant argues at ¶ 216 of its Reply that “BCUC Order G-48-09 effectively precludes Celgar from obtaining any energy from FortisBC while Celgar is selling self-generated electricity below its load, and the GBL-related provision in Celgar’s 2009 EPA with BC Hydro preclude Celgar from selling that energy below its 2007 load to any third party. In combination, these measures strand Celgar’s below-GBL self-generated electricity, effectively requiring the mill to use that electricity to self-supply the first 349 GWh/year of its own load.” In light of Celgar’s Side Letter Agreement (discussed in this section), and of the fact that Celgar is allowed to purchase embedded cost electricity from FortisBC while it is selling electricity through the NECP rate rider (discussed in the next section), the Claimant’s argument that BC “took from Celgar services which it paid others [like Howe Sound and Canfor] to provide” holds no water, and must be rejected.

⁶⁶⁴ Claimant’s Reply, ¶ 358.

⁶⁶⁵ Claimant’s Reply, ¶ 381.

⁶⁶⁶ Claimant’s Reply, ¶ 618.

⁶⁶⁷ Claimant’s Reply, ¶ 554.

⁶⁶⁸ BC Hydro and HSPP, Electricity Purchase Agreement, Integrated Power Offer (7 September 2010), §

As Mr. Scouras confirms, “every mill that has signed an EPA with BC Hydro has been subject to the same exclusivity provision found in section 7.4 of the 2009 EPA with Celgar.”⁶⁷⁵

346. Perhaps more fundamentally, the Claimant has in fact been accorded *more* favourable treatment than these other mills because BC Hydro signed a Side Letter Agreement that permits the Claimant to sell its below-GBL electricity to third parties with BCUC approval. According to Mr. Scouras, “no other pulp mill to date in any BC Hydro power procurement process (including the Bioenergy Call for Power Phase I) has been given the same preferential treatment.”⁶⁷⁶ Surprisingly, the Claimant mentions the Side Letter Agreement only once in a footnote in its Reply Memorial.⁶⁷⁷ It is unclear why the Claimant would omit this important agreement from discussion in its claim.

347. In light of the side letter agreement the Claimant’s argument that is being “forced” by BC Hydro to self-supply is completely false.

8.4(b), **C-23**.

⁶⁶⁹ BC Hydro and Tembec Electricity Purchase Agreement (13 August 2009), § 7.4(a), **C-145**.

⁶⁷⁰ Electricity Purchase Agreement between BC Hydro and Canfor Pulp Limited Partnership (4 February 2009), § 7.4(b), **C-239**

⁶⁷¹ BC Hydro and Cariboo Pulp and Paper Company Electricity Purchase Agreement (13 December 2010), § 7.4(b), **C-277**.

⁶⁷² BC Hydro and Domtar Pulp and Paper Products Inc., Electricity Purchase Agreement, Bioenergy Call for Power – Phase I (27 January 2009), § 7.4(b), **R-136**.

⁶⁷³ BC Hydro and Catalyst Paper Electricity Purchase Agreement (18 February 2011), § 7.4(b), **C-279**.

⁶⁷⁴ BC Hydro and Nanaimo Forest Products Ltd. Electricity Purchase Agreement (7 December 2011), § 7.4(b), **C-280**

⁶⁷⁵ Jim Scouras Statement II, ¶ 33.

⁶⁷⁶ Jim Scouras Statement II, ¶ 33.

⁶⁷⁷ See Claimant’s Reply, fn. 699, where they acknowledge that “resolution of Celgar’s below-GBL sales” were left to the BCUC.

F. The Claimant Has Failed to Prove that BCUC Order G-48-09 is Inconsistent with NAFTA Articles 1102 or 1103

348. As Canada explained in its Counter-Memorial, BCUC Order G-48-09 has no effect on FortisBC's ability to draw on its other resources to supply electricity to its self-generating customers.⁶⁷⁸ This is confirmed in subsequent BCUC proceedings. In its Reply, the Claimant contends that the BCUC "*intended to impose a net-of-load restriction on the self-generator's access to embedded cost power generally, and not simply with respect to FortisBC's purchases of PPA power from BC Hydro.*"⁶⁷⁹ The Claimant's divination of the BCUC's intent is irrelevant in light of subsequent BCUC proceedings, which the Claimant fails to address.

349. For example, in the G-188-11 proceedings the BCUC determined that "Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power."⁶⁸⁰ To that end, it stated that, "Celgar is entitled to some amount of FortisBC non-PPA embedded cost power when selling power"⁶⁸¹ and directed FortisBC "to consult with all classes of its customers to determine guidelines for the level of entitlement to non-BC Hydro PPA embedded cost power."⁶⁸²

350. The BCUC thus permitted the Claimant to sell its below-GBL electricity while purchasing FortisBC's embedded cost power, contrary to the Claimant's assertion above. In fact, Mr. Merwin proclaimed this to be "a major victory"⁶⁸³ to the Mercer International Board of Directors.

⁶⁷⁸ Canada's Counter-Memorial, ¶ 435.

⁶⁷⁹ Claimant's Reply, ¶ 230. [Emphasis added]

⁶⁸⁰ BCUC, Decision and Order G-188-11, November 14, 2011, Reasons for Decision, p. 49, **R-275**.

⁶⁸¹ BCUC Order G-188-11, ¶ 7, **R-44**.

⁶⁸² BCUC Order G-188-11, ¶ 8, **R-44**.

⁶⁸³ Memorandum to Mercer International Board of Directors, December 7, 2011, **R-531**.

351. Mr. Merwin's testimony that the BCUC was "denying Celgar *all* access to embedded cost utility power while Celgar is selling its self-generated electricity"⁶⁸⁴ is thus patently false. As the BCUC later confirmed, "[t]he entitlement to non-BC Hydro PPA embedded cost power by [Celgar] may be as high as 100 percent of load as nominated by [Celgar.]"⁶⁸⁵

352. The Claimant alleges that it has been accorded less favourable treatment by the BCUC when compared to G-38-01, which applies to self-generators in BC Hydro territory. This is false. The Claimant has received *more* favourable treatment than self-generators in BC Hydro territory, who have *no* ability to sell any below-GBL electricity to third parties.

353. The Claimant tries to discredit the more favourable treatment by complaining that the "non-BC Hydro PPA embedded cost power" they are entitled to purchase from FortisBC is not "*traditional* embedded cost electricity."⁶⁸⁶ In other words, the Claimant alleges that the Non-PPA Embedded Cost Power ("NECP") rate that FortisBC designed after BCUC Order G-188-11 is more expensive than the rate under FortisBC's Rate Schedule 31. This argument is irrelevant because neither Howe Sound nor Tembec have *any* right to sell below-GBL electricity. Nevertheless, the argument is also false, as explained by Mr. Swanson from FortisBC:

Since 2009, the cost of replacement power (*i.e.*, from owned surplus generation, BC Hydro (non PPA) power, and the market) has predominantly been lower than the cost of Rate Schedule 31 and is expected to remain lower into the future...

Moreover, a large hydroelectric infrastructure project called the Waneta Hydroelectric Expansion Project is expected to come online this Spring, and I anticipate that it will contribute significantly to FortisBC's capacity surplus. In this context, consider an example where FortisBC has surplus from its

⁶⁸⁴ Merwin Statement I, ¶ 121.

⁶⁸⁵ BCUC Decision and Order G-202-12, December 27, 2012, Decision, p. 3, **R-265**.

⁶⁸⁶ Claimant's Reply, ¶ 228. [Emphasis added.]

owned generation resources sufficient to meet the needs of a self-generating customer looking to sell its entire load, such as Celgar. In this scenario there would be no NECP rate because the cost of serving the load would not be higher than the cost of Rate Schedule 31. Thus, if the Mid-C market climbed above Rate Schedule 31, Celgar could stand to gain a very good return.⁶⁸⁷

354. The Claimant's argument that Order G-48-09 accorded it less favourable treatment is also at odds with its confession that Order cause it no damages: "Mercer does not claim additional or separate damages resulting from Order G-48-09's net-of-load restriction, because, as Canada correctly contends, the Seller Consumed Energy Adjustment would [REDACTED]

[REDACTED]⁶⁸⁸

355. Finally, for the sake of completion, the Claimant fails to respond to Canada's argument that the BCUC had no regard for the nationality of the Claimant when it issued Order G-48-09 or in any of the other subsequent proceedings. As Canada stated:

The Claimant alleges that the BCUC's regulatory treatment of FortisBC's access to Rate Schedule 3808 energy in Order G-48-09 has resulted in de facto nationality-based discrimination. The most relevant comparator in such a case would be other self-generators in the FortisBC service area to determine whether the BCUC Order G-48-09 has somehow caused such discrimination. The fact that the outcome for each of FortisBC's self-generating customers, including Tolko (Kelowna) and Nelson, is identical to the outcome for the Claimant demonstrates that no such de facto nationality-based discrimination occurred.⁶⁸⁹

356. The Claimant offers no rebuttal to this argument, which only further discredits its claim that the BCUC violated NAFTA Articles 1102 and 1103. It is a serious matter to question the integrity, impartiality and independence of the regulatory commission and its members. The Claimant has failed to provide any foundation for its baseless accusations.

⁶⁸⁷ Dennis Swanson Statement II, ¶¶ 33-34.

⁶⁸⁸ Claimant's Reply, ¶ 205.

⁶⁸⁹ Canada's Counter-Memorial, ¶ 452.

V. THE CLAIMANT HAS FAILED TO DEMONSTRATE A VIOLATION OF ARTICLE 1105 – THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT

A. Concise Statement of Canada's Position

357. Canada's Counter-Memorial explained why the Claimant has failed to discharge its burden of proving that Canada has breached NAFTA Article 1105(1). In its Reply, the Claimant engages in a lengthy but needless discourse regarding how the Article 1105(1) standard has evolved from the *Neer* decision,⁶⁹⁰ and how tribunals may turn to relevant jurisprudence to inform their understanding of customary international law;⁶⁹¹ Canada put neither of these points in issue in its Counter-Memorial. The Claimant then criticizes virtually every aspect of the GBL negotiating process but it never really discharges its burden of demonstrating that the conduct of which it complains violated rules of customary international law in contravention of Article 1105(1).

358. In fact, the Claimant's Reply is nothing more than a repackaging of arguments, made in its Counter-Memorial, that Canada violated Article 1105(1) through "four pillars" of conduct that breached the minimum standard of treatment – namely conduct that was "arbitrary", "discriminatory", "non-transparent", and "idiosyncratic, unfair, or unjust".⁶⁹² The Claimant still fails to properly apply the legal standard applicable under Article 1105(1), or to demonstrate the kind of treatment of Celgar that might be found to have breached the minimum standard of treatment. In the sections that follow, Canada briefly reminds the Tribunal of the principles governing the legal standard under Article 1105(1), and then explains why none of the measures that the Claimant complains of come close to having violated Canada's obligation under Article 1105(1).

⁶⁹⁰ Claimant's Reply, ¶¶ 480-485.

⁶⁹¹ Claimant's Reply, ¶¶ 486-497.

⁶⁹² Claimant's Reply, ¶¶ 503-527.

B. Principles Governing a Claim under NAFTA Article 1105(1)

1. The Claimant Bears the Burden of Proving the Rules of the Customary International Law Minimum Standard of Treatment It Alleges Have Been Breached

359. As Canada explained in its Counter-Memorial, it is a well-established principle of customary international law that the Party alleging the existence of a rule of customary international law bears the burden of proving it.⁶⁹³ As stipulated by Article 38(1)(b) of the Statute of the International Court of Justice, the “proof” required to establish a customary norm of international law is evidence of (i) state practice, and (ii) *opinio juris*.⁶⁹⁴ NAFTA tribunals have also consistently affirmed that, where the claimant asserts an evolution of the minimum standard of treatment under customary international law, it is the claimant’s burden to prove that its proposed rule constitutes custom according to the two-step test described above.⁶⁹⁵ Without evidence going to each of these requirements, no custom of international law can be established. It is not a question of proving “what the law is,” as the Claimant contends,⁶⁹⁶ but the facts necessary to

⁶⁹³ Canada’s Counter-Memorial, ¶¶ 462-470.

⁶⁹⁴ *International Court of Justice*, Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 [1945], Article 38(1)(b), online: United Nations, Office of Legal Affairs <http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf>, **RA-41**. This principle was repeatedly affirmed in judgments of the International Court of Justice. For example, in *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, ¶ 44 **RA-56** (“two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, ¶ 55 **RA-57** (“In particular... the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinion juris*”).

⁶⁹⁵ *Glamis - Award*, ¶¶ 600-603, **RA-15**; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“ADF – Award”), ¶ 185, **RA-1**; *Cargill, Inc. v. United Mexican States*, (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009 (“*Cargill – Award*”), ¶¶ 271- 274, **RA-6**; *United Parcel Service v. Government of Canada*, (UNCITRAL) Award on Jurisdiction, 22 November 2002 (“*UPS – Award on Jurisdiction*”) ¶ 84-86, **RA-58**.

⁶⁹⁶ Claimant’s Reply, ¶ 497.

establish a custom that forms a binding part of international law. This burden rests with the party relying on a purported rule of customary international law.⁶⁹⁷

360. The Claimant tries to avoid its burden by suggesting that it is the Tribunal, and not the Claimant, that bears the burden of establishing that a proposed rule is a custom of international law,⁶⁹⁸ and it cites the *GAMI v. Mexico* and *Teco v. Guatemala* cases in support.⁶⁹⁹ Neither award, however, substantiates the Claimant's view. The passage cited from *GAMI* concerns the relevant timeframe within which a tribunal should consider the application of a domestic measure.⁷⁰⁰ It does not discuss customary international law. The passage cited from *Teco* sets out the framework of the legal analysis attendant upon a minimum-standard-of-treatment claim under the CAFTA-DR⁷⁰¹ and does not address the issue of burdens at all. In fact, the Claimant in *Teco* clearly understood that it bore the burden to "demonstrate" a custom of international law.⁷⁰² It spent nine pages of its Memorial attempting to discharge that burden, not denying it.⁷⁰³

⁶⁹⁷ *Glamis – Award*, ¶ 601, **RA-15**; *Cargill - Award*, ¶ 273, **RA-6**; Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Frederick, U.S.A.: Kluwer Law International, 2013) at 91, **RA-59**; Haeri Hussein, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law" (2011) 27:1 *Arbitration International* 27 at 41-42, **RA-60**. In its Reply, the Claimant states that Canada's reliance on *The Case Concerning Rights and Nationals of Morocco*, **RA-9**, is "disturbing" because that decision applies only to the burden of establishing "local custom." (Claimant Reply Memorial, fn.575). The Claimant does not, however, explain why a different burden should apply for local custom than custom at the international level. The Claimant also alleges that Canada misuses the decision in *ADF*, which apparently does not impose burden of proof on a party alleging the existence of a customary norm (Claimant Reply Memorial, fn. 575). The Claimant misreads the Award in *ADF*, which is very clear: "The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here." *ADF – Award*, ¶ 185, **RA-1**.

⁶⁹⁸ Claimant's Reply, ¶ 497.

⁶⁹⁹ Claimant's Reply, ¶ 497, footnote 574.

⁷⁰⁰ *GAMI – Award*, ¶¶ 92, 94, **RA-14**.

⁷⁰¹ *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, (ICSID Case No. ARB/10/17), Award, 19 December 2013 ("*Teco – Award*"), ¶ 447-454, **RA-61**.

⁷⁰² *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, (ICSID Case No. ARB/10/23), Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Admissibility, 24 May 2012, ¶ 231, **RA-62**.

⁷⁰³ *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, (ICSID Case No. ARB/10/23),

361. In sum, just as it is incumbent upon claimants to prove the requisite facts of an alleged breach, so too is it incumbent upon claimants alleging a violation of the customary international law minimum standard of treatment to show that the rule on which they rely is in fact a rule of customary international law for the protection of aliens. In the absence of this inherent burden, there would be no meaningful limitation on the content of the minimum standard of treatment under Article 1105(1).

2. Arbitral Case Law Does Not Create Custom

362. In its Reply, the Claimant argues that international tribunals should be able to “turn to relevant jurisprudence to inform [their] understanding of the specific parameters of customary international law.”⁷⁰⁴ Canada agrees. However, this does not absolve a Claimant alleging a breach of a rule of customary international law from having to adduce positive evidence that its proposed rule is both (i) the subject of a concordant practice among a substantial number of states, and (ii) that it is followed by those states out of a sense of legal obligation.⁷⁰⁵ The sources of evidence upon which a claimant can rely to establish concordant state practice include “treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes [government] pleadings.”⁷⁰⁶

Claimant's Memorial, 23 September 2011, ¶ 229-244, **RA-63**.

⁷⁰⁴ Claimant's Reply, ¶ 489.

⁷⁰⁵ *Glamis - Award*, ¶ 602, **RA-15**; *Cargill - Award*, ¶ 274, **RA-6**; Lauterpacht, Sir Hersch, *The Development of International Law by the International Court* (London: Stevens, 1958) at 20, **RA-21**. The Claimant's interpretation of Lauterpacht (Claimant's Reply, ¶ 490) reveals its confusion about the sources of international law. International custom and decisions of international courts are two different sources of international law. When Lauterpacht writes that “[d]ecisions of international courts are not a source of international law in that sense”, he is referring to his previous paragraph where he described how municipal courts can create international custom through a multitude of uniform and authoritative decisions. Therefore, international courts are not a source of international law “in that sense”, as, regardless of the number of concordant decisions they write, their decisions will never amount to customary international law. Thus, Canada agrees that Lauterpacht stands for the proposition that international court decisions constitute a source of international law, but they are not a source of *customary international law*. It is customary international law which is at issue under NAFTA article 1105, not international law simpliciter.

⁷⁰⁶ *Glamis - Award*, ¶ 603, **RA-15**. The Tribunal in *Cargill* rejected the notion that even widespread adoption of “free and equitable treatment” clauses in bilateral investment treaties was sufficient to meet this

363. The Claimant proffers no such evidence in connection with the “four pillars” it invokes in this case. It suggests that it need only cite arbitral awards from investment tribunals to establish “custom.” But as Canada explained in its Counter-Memorial, arbitral awards do not create “custom.”⁷⁰⁷ Arbitral awards are the product of independent adjudication of international disputes and not state practice. As the *Glamis* Tribunal held, discussions of custom in arbitral awards can provide helpful “illustrations of customary international law if they involve an examination of customary international law.”⁷⁰⁸ However, “[a]rbitral awards ... do not constitute State practice and thus cannot create or prove customary international law.”⁷⁰⁹ Only states can engage in those actions which, if followed out of *opinio juris sive necessitatis* and in concert with enough other states, coalesce into binding custom.

3. The Threshold for Establishing a Breach of Article 1105(1) is High

364. Finally, given the nature of the conduct required to breach the minimum standard, and the deference that tribunals must accord to domestic authorities in considering such a claim, the threshold for a violation of the minimum standard of treatment is high. Canada summarized in its Counter-Memorial how successive NAFTA Tribunals have consistently recognized both the high threshold required for a breach of the minimum

burden: “the Tribunal does not believe it prudent to accord significant weight to even widespread adoption of such clauses.” See *Cargill – Award*, ¶ 276, **RA-6**.

⁷⁰⁷ Canada Counter-Memorial, ¶¶ 464-465.

⁷⁰⁸ *Glamis - Award*, ¶ 605, **RA-15**. See also *International Law Commission*, “Second report on identification of customary international law”, May 22, 2014, United Nations Document A/CN.4/672, available online at: http://legal.un.org/ilc/documentation/english/a_cn4_672.pdf, p. 31, **R-64** (“While the decisions of international courts and tribunals as to the existence of rules of customary international law and their formulation are not ‘practice’, such decisions serve an important role as ‘subsidiary means for the determination of rules of law’. The pronouncements of the ICJ in particular may carry great weight.”) [Emphasis added, references omitted]

⁷⁰⁹ *Glamis - Award*, ¶ 605, **RA-15**. See also *Cargill - Award*, ¶ 277, **RA-6** and *Railroad Development Corporation v. Republic of Guatemala*, (ICSID Case No. ARB/07/23), Award, 29 June 2012, ¶ 217, **RA-65**.

standard of treatment, and the high level of deference to be afforded to domestic authorities in considering a claim under Article 1105(1).⁷¹⁰

365. In its Reply, the Claimant simply seizes upon the descriptors employed by these NAFTA Tribunals in explaining the type of conduct that might breach the minimum standard, and matches them up with the “four pillars” of its claim; the Claimant notes “the recognition in all of these cases of the four pillars around which investment tribunals have coalesced to articulate the minimum standard of treatment – namely, conduct that is “arbitrary,” “discriminatory,” “non-transparent” and “idiosyncratic unfair or unjust” and blithely concludes, “the jurisprudence cited by Canada proves Mercer’s case.”⁷¹¹

366. But proving a breach of Article 1105(1) requires more of the Claimant than the simple matching exercise in which it has engaged here. In addition to establishing the existence of the alleged rule of customary international law at issue in its claim, the Claimant must demonstrate that the conduct of which it complains breached the rule by rising to the threshold required under Article 1105(1). Merely affixing labels to the conduct in issue is not enough to demonstrate a breach. The Claimant must show that in light of all of the relevant surrounding facts, the conduct falls below accepted international standards. And in assessing whether such standards have been breached, a tribunal must be mindful of the deference to be afforded to domestic authorities in the conduct of their affairs. To accept anything less—to find a State liable for exercising its powers in a manner merely *perceived* as being unfair or inequitable—would ultimately cripple governments from being able to govern altogether.⁷¹²

⁷¹⁰ Canada's Counter-Memorial, ¶¶ 457-461.

⁷¹¹ Claimant's Reply, ¶ 503.

⁷¹² *Glamis – Award*, ¶ 804, **RA-15** (“governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.”).

367. With the fundamental principles governing a claim under Article 1105(1) in mind, Canada now explains why the Claimant has failed to establish that Canada violated the minimum standard of treatment.

C. The Claimant Has not Established That Any of the Complained of Measures Rise to the Level Required to Breach Article 1105(1)

368. As Canada understands it, the Claimant appears to be claiming that Canada violated Article 1105(1) for the following reasons: *First*, that BC Hydro was “discriminatory,” “non-transparent,” “arbitrary,” and “grossly unfair, unjust or idiosyncratic” in the GBL negotiation process with Celgar;⁷¹³ *second*, that the GBL regime was “unstable” and hence failed to provide a “stable regulatory environment”;⁷¹⁴ and, *third*, that the BCUC failed to exercise any regulatory oversight over BC Hydro and issued discriminatory, unfair and arbitrary Orders affecting Celgar.⁷¹⁵

369. None of the BC Hydro measures that the Claimant challenges cross the threshold required for this Tribunal to find a breach of Article 1105. Canada explains why immediately below. Canada then turns to the alleged failure of the GBL regime in British Columbia to provide a stable regulatory environment, and the allegation regarding the acts and omissions of the BCUC. Neither of these allegations withstands even minimal scrutiny under Article 1105(1) and they must accordingly be rejected.

⁷¹³ Claimant's Reply, ¶¶ 507-524.

⁷¹⁴ Claimant's Reply, ¶¶ 504-506.

⁷¹⁵ Claimant's Reply, ¶¶ 525-527.

1. The Acts of BC Hydro Did not Breach Article 1105(1)

**a) The Claimant Fails to Establish that BC Hydro
“Discriminated” Against the Celgar Mill Contrary to the
Customary International Law Minimum Standard of
Treatment**

370. In its Reply the Claimant alleges that Canada breached Article 1105(1), given BC Hydro's “discriminatory” restrictions on Celgar's access to embedded cost power and sales of below-load self-generated electricity.⁷¹⁶ But it fails to demonstrate that the customary international law minimum standard of treatment includes a general prohibition on “discrimination” against foreign investors. In fact, it makes no effort to establish the existence of a customary norm pertaining to discrimination, and it relies entirely on the same arguments that it makes in its claim under NAFTA Articles 1102 and 1103—in one short sentence it states that “Mercer covered the discrimination pillar of the minimum standard of treatment [under Articles 1102 and 1103] above.”⁷¹⁷ A claimant must do more than merely assert its own subjective interpretation of customary norms under the minimum standard of treatment, and then make a claim on that basis. If the Claimant's argument were to succeed here, then NAFTA Articles 1102 and 1103 (and arguably every other “National Treatment” provision in any bilateral investment treaty) would be rendered meaningless. So to would the exceptions to those provision listed under Article 1108.

371. The Claimant also ignores the fact that NAFTA tribunals have consistently found that Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments.⁷¹⁸ For example, the *Glamis* Tribunal concluded

⁷¹⁶ Claimant's Reply, ¶ 507.

⁷¹⁷ Claimant's Reply, ¶ 507.

⁷¹⁸ Canada's Counter-Memorial, ¶¶ 467-468. See also *Grand River - Award*, ¶ 208, **RA-16** (“The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law.”). The tribunal in *Methanex* also made clear that, in the absence of a treaty rule to the contrary, customary international law allows States to differentiate in it treatment of nationals and aliens (*Methanex – Award*, Part IV, Ch C, ¶ 25, **RA-28**).

that “nationality-based discrimination... falls under the purview of Article 1102,” and not Article 1105.⁷¹⁹ The Tribunal in *Methanex* reached the same conclusion, finding that “the plain and natural meaning of the text of Article 1105 does not support the contention that the minimum standard of treatment precludes governmental differentiations as between nationals and aliens.”⁷²⁰ While some NAFTA tribunals have interpreted Article 1105(1) as encompassing other forms of discrimination—for example, the *Waste Management* Tribunal commented that a conduct that is “discriminatory and exposes the claimant to sectional or racial prejudice”⁷²¹—this would require far more than what the Claimant alleges here.⁷²²

372. But even if NAFTA Article 1105(1) were to contain a general prohibition on “discrimination” against foreign investors, the Claimant’s arguments are devoid of any merit for the reasons Canada explained in Section IV of this Rejoinder. The Claimant has proffered no evidence whatsoever that any of the alleged discriminatory treatment of which they complain was accorded on the basis of its nationality. All that the Claimant has identified are differences in the outcome of the various GBL negotiating processes in which BC Hydro engaged with various self-generators. Such differences are a fact of life given the unique situation that each self-generator brings to the table in a negotiation, not a wrong that needs to be corrected. They do not constitute discrimination under any standard, let alone the type of “discrimination” that might be found to be a violation of the minimum standard of treatment. The Claimant’s “discrimination” based Article 1105(1) claim must accordingly be rejected.

⁷¹⁹ *Glamis - Award*, fn. 1087, **RA-15**.

⁷²⁰ *Methanex - Award*, Part IV, Ch. C, ¶ 14, **RA- 28**.

⁷²¹ *Waste Management II – Award*, ¶ 98, **RA-47** (emphasis added).

⁷²² Commenting on the award in *Waste Management*, the *Methanex* Tribunal emphasized that a violation of Article 1105 would not occur as a result of simple discriminatory conduct, but would require “sectional or racial prejudice.” *Methanex – Award*, Part IV, Ch C, ¶ 26, **RA-28**.

b) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Failing to Act “Transparently”

373. As with its “discrimination” based claim, the Claimant fails to prove that the customary international law minimum standard of treatment requires a State to act “transparently.” It merely asserts that under customary international law all States must act transparently “when taking measures that affect a foreign investor.”⁷²³ This is but another self-professed “customary” norm that should not be accepted as being part of the minimum standard of treatment of aliens under Article 1105(1).

374. NAFTA tribunals have expressly rejected the proposition that a principle of transparency is part of customary international law. For example, the *Cargill* Tribunal stated that the “Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105’s requirement to afford fair and equitable treatment.”⁷²⁴ The *Feldman* Tribunal reached the same conclusion, finding that “a denial of transparency alone ... does not constitute a violation of Chapter 11.”⁷²⁵ The *Glamis* Tribunal ruled that transparency is not a stand-alone element that imposes any legal obligation on host states under NAFTA Article 1105.⁷²⁶ All three NAFTA Parties have also repeatedly rejected the proposition that Article 1105 includes any obligation of transparency.⁷²⁷ Where the NAFTA parties intended to address transparency, they did so

⁷²³ Claimant’s Memorial, ¶ 661.

⁷²⁴ *Cargill - Award*, ¶ 294, **RA-6**. See also *Merrill & Ring Forestry L.P. v Canada* (UNCITRAL) Award, 31 March 2010 (“*Merrill & Ring*”), ¶ 231, **RA-24** (“[A] requirement for transparency may not at present be proven to be part of the customary law standard.”);

⁷²⁵ *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 (“*Feldman – Award*”), ¶ 133, **RA-13**.

⁷²⁶ *Glamis - Award*, ¶ 561, 619-622, **RA-15**. By examining transparency in the award’s section dealing with the obligation to protect the investor’s legitimate expectations, the tribunal implicitly rejected the investor’s argument that transparency was a stand-alone element under NAFTA Article 1105.

⁷²⁷ See, for example, *Glamis Gold, Limited v. The United States of America* (UNCITRAL) Rejoinder of the United States of America, p. 155, **RA-78** (March 15, 2007); *Metalclad*, Amended Petition of Mexico to the Supreme Court of British Columbia (Sup. Ct. B.C.), ¶ 72 (Oct. 27, 2000), **RA-79**; *Metalclad*, Outline of

expressly.⁷²⁸ It is noteworthy in this regard that Canada's Model FIPA and the 2004 US Model BIT both include obligations to remain transparent but in distinct provisions expressly excluded from any recourse to investor-State arbitration.⁷²⁹

375. Moreover, none of the cases cited by the Claimant support its view that States have a general obligation to remain transparent under customary international law. For example, the Claimant cites the *Metalclad* Tribunal's award as "evidence" of such a customary standard, but fails to mention that the British Columbia Supreme Court overruled the tribunal's decision on that very point.⁷³⁰

376. Putting aside the fact that the Claimant fails to demonstrate the existence of a rule of transparency under customary international law, Canada has already explained in its

Argument of Intervenor Attorney General of Canada (Sup. Ct. B.C.), ¶¶ 31-33 (Feb. 16, 2001), **RA-80**.

⁷²⁸ For example, Chapter Eighteen of the NAFTA sets out a number of requirements designed to foster openness, transparency and fairness in the adoption and application of the administrative measures covered by the Agreement, and the NAFTA Parties have not consented to arbitrate any alleged breaches of obligations arising under Chapter Eighteen through Chapter Eleven's investor State arbitration mechanism.

⁷²⁹ See Canada Model FIPA, Article 19 entitled "Transparency", **RA-66** and 2004 US Model BIT, Articles 10-11, **RA-67**.

⁷³⁰ *United Mexican States v. Metalclad Corp*, 2001 BCSC 664, British Columbia Supreme Court Decision (2 May 2001), ¶ 70, **RA-68** ("In the present case, however, the Tribunal did not simply interpret the wording of Article 1105. Rather, it misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency."). The fact that transparency is not a stand-alone obligation under NAFTA Article 1105 does not mean that the concept is altogether irrelevant. For example, there may be some aspects of transparency within the minimum standard of treatment in the context of denial of justice. This conclusion seems to be consistent with that reached by the *Waste Management* tribunal (on which the Claimant also relies) through its referral to a "complete lack of transparency and candour in an administrative process," not as a stand-alone element of the minimum standard of treatment, but as one illustration of State conduct that "involves a lack of due process leading to an outcome which offends judicial propriety." (*Waste Management, Inc. v United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("*Waste Management – Award*"), ¶ 98, **RA-47**). It is perhaps here where the Claimant gets confused. The Claimant also cites scholars to support its view that "transparency" forms part of the customary international law minimum standard of treatment. For example, they state in his textbook on Article 1105 Patrick Dumberry "identifies protections against discriminatory, arbitrary, grossly unfair, unjust or idiosyncratic, or non-transparent treatment as part of the minimum standard of treatment and collecting scholarly writings on the topic." (Claimant's Reply, fn. 579). The Claimant is mistaken. After extensive research Mr. Dumberry concludes that neither "discrimination" nor "transparency" form part of the customary international law minimum standard of treatment, Dumberry, P. The fair and Equitable Treatment Standard: A Guide to NAFTA (Kluwer Law International, 2013) Case Law on Article 1105 The Substantive Content of Article 1105 (Chapter 3) pp. 177-180, 218-222 (**CA-49**).

Counter-Memorial that BC Hydro acted transparently when it negotiated Celgar's GBL.⁷³¹ And Mr. Lester Dyck has provided a detailed explanation of the transparency built into the GBL negotiation process.⁷³² Rather than acknowledging these facts, the Claimant chooses instead to maintain its hyperbolic characterizations of the process, arguing that "there were no rules",⁷³³ that the negotiations to set GBLs transpired "under an invisible standard,"⁷³⁴ and that BC Hydro intentionally designed the system this way so that it could discriminate against the Celgar Mill.⁷³⁵

377. None of this is true. The GBL setting process was the same for everyone and BC Hydro walked Celgar and other self-generators through all of the factors that would be relevant for consideration in the GBL negotiation.⁷³⁶ BC Hydro and Celgar reached an agreement on the GBL, which the BCUC reviewed and accepted.⁷³⁷ Tellingly, Celgar did not protest that GBL until well after its EPA was in place, but Celgar's after-the-fact disappointment with the outcome of the negotiation does not mean the process was non-transparent. The Claimant's transparency based claim under Article 1105(1) is without merit and should be rejected.

⁷³¹ Canada's Counter-Memorial, ¶¶ 480-484.

⁷³² Lester Dyck Statement I, ¶¶ 51-91.

⁷³³ Claimant's Reply, ¶ 513.

⁷³⁴ Claimant's Reply, ¶ 512.

⁷³⁵ Claimant's Memorial, ¶¶ 663, 668 ("If one were to set out intentionally to design a regulatory scheme that would not meet the minimum standard of treatment, the BC regulatory scheme is a useful template from which to start... This system design enables BC Hydro to discriminate, which should not be regarded as unintentional.").

⁷³⁶ Lester Dyck Statement I, ¶¶ 51-91.

⁷³⁷ In its Reply, ¶ 517, the Claimant argues that BC Hydro provided no information to the BCUC regarding its GBL determinations, however this is inaccurate. *See* Lester Dyck Statement I, ¶¶ 133-140.

c) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Acting in an “Arbitrary” Manner

378. The Claimant also argues in its Reply that BC Hydro acted in an “arbitrary” manner contrary to the customary international law minimum standard of treatment, now on the ground that Celgar was precluded from selling its below-GBL electricity to third parties.⁷³⁸ But in order to be arbitrary, a measure must have no legitimate purpose, must not be based on legal standards or must have intentionally ignored due process and proper procedure.⁷³⁹ The concept of arbitrariness was succinctly described by the International Court of Justice in the *Elettronica Sicula SpA (ELSI) United States v. Italy* case:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law...it is willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.⁷⁴⁰

The ICJ's observation in *ELSI* was endorsed by the *Mondev* and *Loewen* NAFTA Tribunals.⁷⁴¹ Other NAFTA tribunals have similarly found that the concept of “arbitrariness” must be “manifest” in order to breach the customary international law minimum standard of treatment.⁷⁴²

379. In its claim regarding alleged restrictions on below-GBL sales to third parties, the Claimant not only asks the Tribunal to accept its own subjective definition of arbitrariness, which does not come close to what past tribunals have required, but it also

⁷³⁸ Claimant's Reply, ¶ 520.

⁷³⁹ *Joseph Charles Lemire, v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶ 262-263, **RA-69**.

⁷⁴⁰ *Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15, ¶ 128, **RA-70**.

⁷⁴¹ *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev - Award*”), ¶ 127, **RA-30**; *Loewen - Award*, ¶ 131, **RA-22**.

⁷⁴² *Glamis - Award*, ¶¶ 625-626, **RA-15**; *Cargill - Award*, ¶ 291-293, **RA-6**; *Thunderbird - Award*, ¶¶ 194, 197, **RA-42**.

ignores the facts. As Canada has explained above, BC Hydro did not preclude the Claimant from selling its below-GBL electricity to third parties. Unlike with every other EPA BC Hydro signed a Side Letter Agreement with the Claimant allowing it to sell below its GBL with approval from the BCUC who determined that “Celgar is free to sell all or a portion of its generation below the BC Hydro GBL in the market.”⁷⁴³ The Claimant thus has no grounds upon which to suggest that BC Hydro has precluded it from selling its below-GBL electricity to third parties. For these reasons alone, the Claimant has failed to establish that Canada has breached any prohibition against arbitrary behaviour under Article 1105(1).

d) The Claimant Fails to Establish that BC Hydro Violated the Customary International Law Minimum Standard of Treatment for Acting in a “Grossly Unfair, Unjust or Idiosyncratic” Manner

380. Finally, the Claimant argues that BC Hydro acted in a “grossly unfair, unjust, and idiosyncratic” manner contrary to the customary international law minimum standard of treatment, alleging that BC Hydro used its “unequal bargaining power” to withhold information from the Claimant in order to provide favorable deals to other mills on the basis of their “political connections,”⁷⁴⁴ that BC Hydro set the GBL for the Celgar Mill in a “highly idiosyncratic context,”⁷⁴⁵ and that BC Hydro’s decision to “preclude[] Celgar from selling its below-GBL electricity to any third party” was “singularly idiosyncratic.”⁷⁴⁶

381. Canada has already explained in its Counter-Memorial that “[t]he Claimant provides no support for these serious accusations of impropriety and political

⁷⁴³ BCUC, Decision G-188-11, p. 49, **R-275**.

⁷⁴⁴ Claimant’s Memorial, ¶ 668.

⁷⁴⁵ Claimant’s Reply, ¶ 511.

⁷⁴⁶ Claimant’s Reply, ¶ 520.

interference.”⁷⁴⁷ In reply, the Claimant asserts that “[t]he evidence on which Mercer relies...speaks for itself,”⁷⁴⁸ but it fails to provide any evidence of impropriety or political interference. The Claimant fails to mention that it requested that the B.C. Government search the offices of several provincial Ministers for documents, presumably to support such allegations that the province did so and that it found no responsive documents.⁷⁴⁹

382. Likewise, the Claimant fails to explain how the GBL setting process for the Celgar mill was “highly idiosyncratic.”⁷⁵⁰ As Mr. Dyck explains in his witness statement,⁷⁵¹ and as both the expert reports of Dr. Rosenzweig⁷⁵² and Mr. Stockard⁷⁵³ confirm, the GBL setting process was the same for every proponent in the Bioenergy Call for Power Phase I and every subsequent call for power. Nor was section 7.4(b) in Celgar’s EPA “singularly idiosyncratic.” As Mr. Scouras has explained in his first and second witness statements,⁷⁵⁴ the same provision was applied to everyone, *with the exception of Celgar*, who received an accommodation through the Side Letter Agreement. As with all of the other complaints lodged against BC Hydro, this one must be rejected. There was nothing “grossly unfair, unjust, and idiosyncratic” about the GBL negotiation process.

⁷⁴⁷ Canada’s Counter-Memorial, ¶ 487.

⁷⁴⁸ Claimant’s Reply, fn. 591.

⁷⁴⁹ Letter from Michael Shor to Michael Owen, *Re: Mercer International Inc. v. Canada*, Mercer Response to Canada’s Document Request Objections, 17 May 2013, enclosing Claimant’s Redfern Schedule, Document Requests, 1.5, 3.4, 3.5.1, 3.5.2 and 4.5, pp. 22-23, 44-47 and 76-77, **R-564**.

⁷⁵⁰ Claimant’s Reply, ¶ 511.

⁷⁵¹ Lester Dyck Statement I, ¶¶ 35-91; and Lester Dyck Statement II, ¶ 30.

⁷⁵² NERA Expert Report, ¶¶ 48-56.

⁷⁵³ Pöyry Expert Report I, ¶¶ 98-99, 120-121, 136 and 153-154; Pöyry Expert Report II, ¶¶ 63-64, 96-98, 102-104, 108-110 and 111.

⁷⁵⁴ Jim Scouras Statement I, ¶¶ 52-65; Jim Scouras Statement II, ¶¶ 34-40.

2. The Claimant Fails to Establish a Breach of Article 1105(1) due to the Failure to Provide a “Stable Regulatory Environment”

383. In its Memorial, the Claimant argued that at the time of its investment, “the only official governmental pronouncement regarding self-generation was BCUC Order G-38-01...[which] did not apply to FortisBC or to Celgar”⁷⁵⁵ and that it had “various legal protections” under the *UCA* and the 2002 Heritage Contract to implement its “Arbitrage Project.”⁷⁵⁶ Canada explained in its Counter-Memorial that the customary international law minimum standard of treatment under NAFTA Article 1105 does not entitle the Claimant to a “stable regulatory framework,”⁷⁵⁷ and that in any event FortisBC informed the Claimant that there was only a 50 percent chance that the BCUC would approve its Arbitrage Project.⁷⁵⁸ It also appears to have been reflected in the Claimant’s own assessment of the regulatory risks associated with this project.⁷⁵⁹ The Claimant was under no illusion as to the regulatory environment in which it was operating.

384. In its Reply, the Claimant maintains that it was entitled to a stable regulatory environment under NAFTA Article 1105, but rather than respond to the overwhelming evidence that it knew well the regulatory risks associated with the Arbitrage Project, it now founds its claim on an entirely different allegation—specifically that the GBL regime itself was a violation of customary international law because there was “no written GBL standard or guidelines”⁷⁶⁰ and it was thus “unstable.”⁷⁶¹

⁷⁵⁵ Claimant’s Memorial, ¶ 666.

⁷⁵⁶ Claimant’s Memorial, ¶¶ 665, 666, 670, 671.

⁷⁵⁷ Canada’s Counter-Memorial, ¶ 469.

⁷⁵⁸ Canada’s Counter-Memorial, ¶¶ 473-475; Dennis Swanson Statement I, ¶¶ 62-65; and Dennis Swanson Statement II, ¶¶ 5-12.

⁷⁵⁹ See Mercer International Group, Celgar Electricity Opportunities, July 2007, at 9-10, R-278. [REDACTED]

⁷⁶⁰ Claimant’s Reply, ¶ 505.

385. But once again, the Claimant fails to proffer any evidence, let alone cite even a single case, to support its claim that at customary international law it was entitled to the “stable regulatory framework” envisioned by its claim—namely one that would require BC Hydro to have a “written GBL standard or guidelines.”⁷⁶² In light of the information that *was* provided to all participants in the Bioenergy Phase 1 Call for Power,⁷⁶³ Canada questions what more could have been provided to Celgar. There was a GBL standard, there was disclosure of the standard and there was consistency in the application of the standard. The Claimant’s argument here is essentially the same as the argument it advances in respect of “transparency,” which Canada has already explained is without merit.⁷⁶⁴ Neither the GBL regime nor its application by BC Hydro created an unstable regulatory framework, and certainly not one that could be found inconsistent with Canada’s obligation under Article 1105(1).

3. The Claimant Fails to Establish that the Acts and Omissions of the BC Ministry of Energy and the BCUC Violated Article 1105(1)

386. In its Memorial, the Claimant alleged that certain decisions of the BCUC violated the customary international law minimum standard of treatment under Article 1105(1). For example, it claimed that BCUC Order G-48-09 was “egregiously discriminatory and unfair,”⁷⁶⁵ “utterly perverse,”⁷⁶⁶ and “arbitrary,”⁷⁶⁷ and that the BCUC continued “to draw additional arbitrary distinctions,” citing Order G-198-11 as one example.⁷⁶⁸ The Claimant broadens its complaint in the Reply, and now faults the BCUC not just for its decisions but for also failing to:

⁷⁶¹ Claimant’s Reply, ¶ 506.

⁷⁶² Claimant’s Reply, ¶ 505.

⁷⁶³ Lester Dyck Statement I, ¶¶ 54-59.

⁷⁶⁴ Lester Dyck Statement I, ¶¶ 51-91.

⁷⁶⁵ Claimant’s Memorial, ¶ 675.

⁷⁶⁶ Claimant’s Memorial, ¶ 676.

⁷⁶⁷ Claimant’s Memorial, ¶ 673.

⁷⁶⁸ Claimant’s Memorial, ¶ 673.

(1) establish a binding rule of governing self-generation applicable province-wide, (2) review and approve GBL guidelines, (3) require transparency in BC Hydro's GBL determinations, and (4) exercise substantive oversight over BC Hydro GBL determinations.⁷⁶⁹

387. But neither the acts *nor* the omissions of the BCUC can provide a foundation for a claim under Article 1105(1). Canada explained in its Counter-Memorial that a challenge to the decisions of an administrative tribunal is not a valid basis on which to allege a violation of the minimum standard of treatment.⁷⁷⁰ The same conclusion should apply to complaints regarding an alleged failure of an administrative tribunal to act. Professor Douglas aptly summarizes the customary international law rule: "Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible."⁷⁷¹ Thus, if the Claimant has a complaint regarding the acts or omissions of the BCUC, it does not belong in this forum. Such a complaint should have first been raised before British Columbia's domestic courts and were not. As a State cannot be held liable for the alleged failings of its legal system when the system has not been given the full opportunity to correct the defects that are complained of,⁷⁷² the Claimant's complaints regarding the acts and omissions of the BCUC cannot serve as the foundation for a claim under Article 1105(1).

⁷⁶⁹ Claimant's Reply, ¶ 477.

⁷⁷⁰ Canada Counter-Memorial, ¶ 489.

⁷⁷¹ Zachary Douglas, "International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed", *International and Comparative Law Quarterly* (ICLQ), pp. 29 and 34, **RA-77**.

⁷⁷² See e.g. Christopher Greenwood, "State Responsibility for the Decisions of National Courts," in *Issues of State Responsibility before International Judicial Institutions*, pp. 55-73, **RA-71**. In this regard, NAFTA Tribunals have repeatedly affirmed that they are not courts of appeal. See *Mondev - Award*, ¶ 136, **RA-30** ("[I]nternational tribunals are not courts of appeal"); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, ¶ 99, **RA-72** (A claimant cannot "seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction"); *Loewen - Award*, ¶ 134, **RA-22** ("[A] NAFTA claim cannot be converted into an appeal against the decisions of municipal courts"); *Waste Management II*, ¶ 129, **RA-47** ("[T]he Tribunal would observe that it is not a further court of appeal"); *Thunderbird - Award*, ¶ 125, **RA-42** ("[I]t is not the Tribunal's function to act as a court of appeal").

388. Perhaps more importantly, the Claimant,⁷⁷³ and Dr. Fox-Penner,⁷⁷⁴ do not appear to understand the BCUC's role or the regulatory framework in British Columbia.⁷⁷⁵ Mr. Bursey explains that the BCUC has adopted an approach of regulating only when required so as not to impede competitive markets.⁷⁷⁶ He also explains that the B.C. Court of Appeal has found that the BCUC's legal authority is limited and that it cannot usurp the role of public utilities in areas such as resource planning (i.e., procurement).⁷⁷⁷ In this respect, the BCUC does not have a U.S-style "command" and "control" approach to the regulation of public utilities.⁷⁷⁸

389. Mr. Bursey and Mr. Les MacLaren explain that the BCUC's use of principles as opposed to attempting to dictate the manner in which GBLs were set was reasonable and appropriate⁷⁷⁹ given the BCUC's limited legal authority,⁷⁸⁰ the small number of self-generators that were initially involved and the technical and operational complexity of each of these self-generators.⁷⁸¹ Mr. Bursey also observes that industrial self-generators have historically requested that the BCUC let these customers negotiate a baseline or a

⁷⁷³ Claimant's Reply, ¶ 477.

⁷⁷⁴ See, e.g., Fox-Penner Report, ¶¶ 88-97.

⁷⁷⁵ Les MacLaren Statement II, ¶¶ 23-27.

⁷⁷⁶ David Bursey Expert Report, ¶¶ 21-22.

⁷⁷⁷ David Bursey Expert Report, ¶ 51(f); *See also British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, [1996] B.C.J. No. 379, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 27, **R-73**; Les MacLaren Statement II, ¶ 24. ("In the case of utilities, the onus is on the utility to seek out least cost supply, and for the BCUC to examine the resulting EPAs under section 71 of the *Utilities Commission Act ... The BUCC, however, is only empowered to accept these EPAs or find them unenforceable, in whole or in part, under this provision. It has no authority to dictate the terms of an EPA.*")

⁷⁷⁸ David Bursey Expert Report, ¶¶ 52 and 66. ("Dr. Fox-Penner's perspective that the BCUC did not follow best regulatory practice is based on his view that the BCUC should intervene and direct the market and utility-customer relationship more aggressively than it did. His perspective is not consistent with the British Columbia public utility regulatory regime and the case law that governs the BCUC in the exercise of its mandate.")

⁷⁷⁹ David Bursey Expert Report, ¶¶ 63 and 65.

⁷⁸⁰ David Bursey Expert Report, ¶¶ 67-68; Les MacLaren Statement II, ¶ 25.

⁷⁸¹ David Bursey Expert Report, ¶¶ 78-80; Les MacLaren Statement II, ¶ 25.

GBL directly with their utility⁷⁸²—an approach that the Claimant has also advocated for before the BCUC.⁷⁸³

390. The Claimant raises similar allegations with respect to the Ministry of Energy's supposed failure to regulate in a manner tailored to its liking.⁷⁸⁴ The Ministry, however, is only responsible for providing broad policy guidance in the province.⁷⁸⁵ The Claimant may dislike the fact that BC Hydro is afforded some latitude in this context but this is not a licence to criticise Ministry and the BCUC for failing to discharge regulatory responsibilities that they do not have.

391. Finally, Canada observes that when Ministry of Energy did intervene before the BCUC in Order G-202-12 proceeding to advocate that the BCUC adopt a province-wide approach to GBLs,⁷⁸⁶ it was the Claimant who successfully opposed this position.⁷⁸⁷

⁷⁸² David Bursey Expert Report, ¶¶ 69 and 74.

⁷⁸³ See Letter from Kim Moller, Sangra Moller LLP to Erica M. Hamilton, Commission Secretary, Re: Zellstoff Celgar Limited Partnership Complaint Pursuant to Section 25 of the *British Columbia Utilities Act* (the "*Act*"), 25 March 2011, p. 3, **R-565**. ("Celgar also believes that the process for establishing a service agreement [with a GBL] between FortisBC and Celgar should be similar to that undertaken by BC Hydro in its service area – that is, the process should involve the customer, the utility, the Commission and no others. In the BC Hydro service area, since the implementation of the *Clean Energy Act* ... many of the agreements in which GBLs are established are no longer even subject to Commission review (see the Howe Sound Pulp and Paper transaction discussed in Appendix B), and many of those that have been filed in past years were not made subject to comment or review by ratepayers or other intervenors. Rather, BC Hydro has simply filed the agreement for the Commission's approval. Celgar submits that a similar process relating to agreements that establish a GBL and a Contract Demand should apply in the FortisBC service area.")

⁷⁸⁴ Claimant's Reply, ¶ 477.

⁷⁸⁵ Les MacLaren Statement I, ¶¶ 17-22

⁷⁸⁶ See Letter from Les MacLaren, Assistant Deputy Minister, to Erica Hamilton, Commission Secretary, Re: FortisBC Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), 22 June 2012, pp. 3-5, **R-575**.

⁷⁸⁷ Letter from Kim Moller, Sangra Moller, to Erica Hamilton, Commission Secretary, RE: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Project No. 3698675/Order G-54-12; Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology ("Compliance Filing to Order G-188-11"), 10 August 2012, enclosing Letter from Brian Merwin to Erica Hamilton, Commission Secretary, Re: Zellstoff Celgar Limited Partnership ("Celgar") and Order G-54-12 – FortisBC Inc. ("FortisBC") Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (the "Guidelines") – Compliance Filing to Order G-188-11, 10 August 2012, pp. 3-7, **R-499**. ("[R]ecent Commission Orders G-156-10 and G-188-11 have resulted in the recognition of

D. Conclusions

392. The Claimant has attempted to convert every one of its complaints regarding the GBL regime in British Columbia into a violation of the minimum standard of treatment. But aside from misrepresenting the applicable standard of treatment under Article 1105(1), its claims are really no more than a request that the Tribunal find Canada liable because of its disappointment with the outcome of a negotiation process in which it voluntarily engaged. Absolutely none of the Claimant's claims have a place before this Tribunal, let alone as the basis for a claim under Article 1105(1), and they should all accordingly be rejected.

VI. DAMAGES⁷⁸⁸

393. The Claimant puts at issue two measures. The first is an alleged "restriction" placed on the Claimant by both BC Hydro and the BCUC that prevents it from selling its below-GBL electricity. Specifically, the Claimant alleges that BC Hydro unlawfully added a clause into the Claimant's EPA preventing it from selling below-GBL electricity to third parties (section 7.4(b)) and that the BCUC, through its Order G-48-09, unlawfully

certain rights afforded Celgar to utility service within the existing regulatory framework – without the need for broader policy review. The Ministry and BC Hydro chose not to seek reconsideration of, or appeal of those Orders. They should not now be entitled to question or impede the implementation of those Decisions in these compliance proceedings on the premise that a broader Province-wide policy is now required ...")

⁷⁸⁸ Before proceeding, Canada addresses the preliminary issue of its position on the level of certainty required for a successful damages claim under NAFTA. Canada set out its position clearly in its Counter Memorial when it argued that a claimant must "establish the quantum of its loss with sufficient certainty" (¶ 495). Based on the applicable jurisprudence, Canada concluded that the quantum alleged "must be probable and not merely possible", and thus not "remote or speculative" (¶ 495). Canada explained that the standard is the "preponderance of evidence" or the "balance of probabilities" (Counter Memorial, footnote 944). Even the Claimant admits that the parties agree on that point (Claimant's Reply, ¶ 537, and footnote 614). Nevertheless, in a different paragraph of its Reply (¶ 538), the Claimant misrepresents Canada's position when it says that "Canada's main focus is on the certainty of damages, with its damages expert Dr. Rosenzweig dismissing virtually every number on which Mr. Kaczmarek relies as "speculative" simply because it is uncertain. But the damages standard does not require certainty." There is nothing, however, in either Canada's Counter Memorial or NERA's first expert report advocating for a legal standard of certainty for the proof of damages. Indeed, when the Claimant makes this bald allegation in its Reply, it does not point to any supporting passages in Canada's materials because none exists. In any event, Canada repeats the position set out in its Counter Memorial (¶¶ 504-509, and NERA Expert Report, ¶¶ 128-132) that the Claimant has not met the requisite level of certainty in order to establish its damages claims.

prevented the Claimant from having access to “embedded cost power” that it could use to replace electricity it wanted to sell to third parties. In light of the restriction on below-GBL sales, the Claimant alleges that “BC deprived Celgar of additional profit it could have earned, based on the difference between the value of those additional electricity sales and the cost of embedded cost replacement electricity.”⁷⁸⁹

394. The second measure concerns the setting of the Claimant’s GBL by BC Hydro for the purpose of the Claimant’s bid into the Bioenergy Call for Power. The Claimant alleges that, “BC Hydro set Celgar’s GBL too high”⁷⁹⁰ and thus should be compensated for the difference between that and a “proper GBL”⁷⁹¹ under the EPA. To this end, the Claimant proffers eleven alternative GBLs for the Tribunal’s consideration in the quantification of damages.

395. The Claimant’s entire damages assessment is premised on BC Hydro procuring additional electricity from the Claimant. While the Claimant alleges that it “makes no claim that BC Hydro was required to purchase Celgar’s *below*-load electricity,”⁷⁹² its entire damages quantification is founded on that proposition. In essence, the Claimant asks to be compensated for the refusal of its “Arbitrage Project” under the Bioenergy Call for Power even though it acknowledges that the refusal of that project was not a breach of the NAFTA.⁷⁹³

396. Canada has divided this portion of its Rejoinder into three sections. In Part A, we explain how the Claimant’s damages related to its below-GBL self-generation are unfounded. In Part B, we explain how the Claimant’s damages related to its alternative GBL scenarios are meritless, and summarize the methodological and calculation errors in

⁷⁸⁹ Claimant’s Reply, ¶ 528.

⁷⁹⁰ Claimant’s Reply, ¶ 553

⁷⁹¹ Claimant’s Reply, ¶ 553.

⁷⁹² Claimant’s Reply, ¶ 36.

⁷⁹³ Claimant’s Reply, ¶ 36.

Navigant's second report. Finally, in Part C, we explain how the Claimant does not independently quantify its Article 1105 damages claim.

E. The Claimant's Damages Related to Celgar's *Below-GBL* Self-Generation are Unfounded

397. The Claimant alleges that it has effectively and unlawfully been prevented from selling its below-GBL electricity to BC Hydro or third parties through section 7.4(b) of the EPA and BCUC Order G-48-09.⁷⁹⁴ As Canada explained above, the Claimant grossly mischaracterizes these measures⁷⁹⁵ – the fact that the Claimant has not yet been able to sell any of its below-GBL electricity is entirely its own making.⁷⁹⁶ It is axiomatic to say that a claimant is not entitled to damages in this context.⁷⁹⁷

398. Putting these problems aside, the Claimant's allegations of loss nonetheless fail for three reasons:

- Celgar had no financially viable market for its below-GBL energy;
- BC Hydro would not have purchased Celgar's below-GBL electricity;
- The 1991 Ministers' Order requires Celgar to use its 52 MW turbine to serve its own load.

⁷⁹⁴ It is important to note that, in its Rejoinder, Mercer has now abandoned a separate damages claim under BCUC Order G-48-09. In its Reply, Mercer concedes that it "does not claim additional or separate damages resulting from Order G-48-09's net-of-load restriction, because, as Canada correctly contends, the

[REDACTED] (Reply, ¶ 205).

⁷⁹⁵ See Measures at Issue section above.

⁷⁹⁶ Dennis Swanson Statement II, ¶¶ 37-38; and Jim Scouras Statement II, ¶ 40.

⁷⁹⁷ *ILC Draft Articles*, Article 39, Commentary 2, **RA-19**; *MTD Equity Sdn. Bhd. v. Chile* (ICSID No. ARB/01/7), 25 May 2004, Award, ¶¶ 242-243, **RA-74**; *MTD Equity Sdn. Bhd. & MTD Chile S.A v. Chile* (ICSID No. ARB/01/7), Decision on Annulment, ¶¶ 93-101, **RA-75**; and *Bogdanov v. Republic of Moldova*, Arbitration Institute of the Stockholm Chamber of Commerce (September 22, 2005), ¶ 5.2, **RA-76**.

1. Celgar had No Financially Viable Market for its Below-GBL Energy

399. Canada's Counter-Memorial emphasized the lack of evidence underpinning the Claimant's damages case, particularly with regard to: (1) customers the Claimant could have identified for its below-GBL electricity; (2) concrete commitments to a given amount of electricity; (3) any contract it would have entered into; (4) its capability of obtaining a permit from the National Energy Board allowing it to export electricity; and (5) its capability of obtaining transmission access to deliver its electricity at economical rates.⁷⁹⁸

400. Rather than provide the requested evidence in its Reply, the Claimant instead argues that below-GBL sales to third parties is proven by a submission that BC Hydro made to the BCUC leading up to Order G-48-09.⁷⁹⁹ In that submission BC Hydro estimated the potential cost that could be incurred on an annual basis to generate power under its PPA with FortisBC, so that the Claimant could engage in its arbitrage scheme. But the logic of the Claimant's argument does not follow – that BC Hydro *may* have incurred costs to replace the power the Claimant would arbitrage is hardly proof that the Claimant would have been in a position – absent the challenged measures – to sell this power to market for profit.⁸⁰⁰ More importantly, as will be seen below, empirical data in fact proves that this would have not been the case (and is still not the case in light of market conditions).

401. Although the Claimant files a new witness statement from Mr. Robert Friesen, he offers little insight into any actual third party sales opportunities that may have existed

⁷⁹⁸ Canada's Counter-Memorial, ¶ 507.

⁷⁹⁹ Claimant's Reply, ¶ 546.

⁸⁰⁰ In its Reply, the Claimant alleges that Canada should be "estopped" from providing the Tribunal with evidence that no third party sales were available in light of BC Hydro's submission to the BCUC. The Claimant's estoppel argument is without merit. The Claimant correctly identifies the test for estoppel under international law. It fails, however, to explain how it relied on BC Hydro's statement that it could incur costs if the Claimant engaged in arbitrage to its detriment. See Claimant's Reply, ¶ 548, fn 621.

for the Claimant at the relevant time. In fact, the Claimant merely repeats the same unsupported allegations that it made in its Memorial, *i.e.*, that it had targeted [REDACTED] [REDACTED] as a potential buyer of below-load electricity;⁸⁰¹ and that in 2008, NorthPoint had identified “opportunities” for [REDACTED] contracts on Mid-C at prices in excess of \$100/MWh.]⁸⁰²

402. The Claimant’s damages expert, Mr. Kaczmarek, also fails to provide any additional evidence despite Canada’s requests and merely reiterates his unsubstantiated assertion that the Claimant could have sold into any number of renewable energy markets, including: Washington State; Oregon State; the State of California, and the provinces of Ontario and Quebec.⁸⁰³ But merely naming these jurisdictions as “possibilities” is hardly proof that opportunities for the sale of renewable energy actually existed.

403. Neither the Claimant nor its expert is capable of proffering concrete evidence to support their claims because such evidence does not exist. In fact, Canada demonstrates below that: (a) while prices for electricity at Mid-C may have yielded profitable opportunities in 2008 (a point that the Claimant emphasizes),⁸⁰⁴ none of the challenged measures in this arbitration prevented Celgar from seizing these opportunities at that time. More importantly, prices thereafter decreased dramatically, thus eroding the Claimant’s opportunity to make profitable sales to third parties (*i.e.* sales at market prices sufficiently large to cover the cost of replacement electricity from its utility and other costs associated with transporting the electricity to market); (b) the scarcity of available firm transmission capacity is such that Celgar cannot sustain long-term sales contracts; and (c) the Claimant had no sales opportunities to any of the “renewal energy markets” listed by Mr. Kaczmarek, or anywhere else in the Western Interconnection grid.

⁸⁰¹ Claimant’s Reply, ¶ 566. *See also* Claimant’s Memorial, ¶ 298. Navigant Report II, ¶ 71.

⁸⁰² Claimant’s Reply, ¶ 567.

⁸⁰³ Navigant Report I, ¶ 102; and Navigant Report II, ¶¶ 71-72 and 80-83.

⁸⁰⁴ Claimant’s Reply, ¶¶ 567-568.

a) Celgar Cannot Make Profitable Sales at Mid-C

404. In its Reply and supporting statements, the Claimant provides no information relating to the power prices at Mid-C other than that indicated in the witness statements of Mr. Merwin and Mr. Friesen. Mr. Merwin's testimony indicates that in mid-2008, prices at Mid-C exceeded \$100/MWh.⁸⁰⁵ Mr. Friesen testifies that sales opportunities at that time were "very real," but provides no further details on what those opportunities might have entailed.⁸⁰⁶

405. Canada thus sought the assistance of Mr. Dean Krauss, currently of NorthPoint and a former colleague of Mr. Friesen's, who testifies that the opportunities to which Mr. Friesen and Mr. Merwin refers would have lasted, at most, three months. Mr. Krauss states that within NorthPoint Mr. Friesen "was generally responsible for short term electricity transactions which would include spot, monthly and quarterly (sometimes referred to as "multi-month"),⁸⁰⁷ and consistent with Mr. Friesen's portfolio, [REDACTED]

[REDACTED]⁸⁰⁸

The profitability of any transaction concluded thereafter would depend on the evolution of Mid-C prices. But Mr. Michael MacDougall of Powerex indicates that Mid-C prices in 2008 were abnormally high since electricity prices are generally correlated to the price of natural gas, and North America expected a shortage of conventional natural gas around that time.⁸⁰⁹ However, in light of the 2008 recession and a significant decrease in the price of natural gas,⁸¹⁰ the market data provided by Mr. MacDougall indicates that the daily prices of electricity at Mid-C plummeted from for around [REDACTED] per MWh on

⁸⁰⁵ Brian Merwin Statement I, ¶ 83.

⁸⁰⁶ Robert Friesen Statement I, ¶ 9.

⁸⁰⁷ Dean Krauss Statement I, 31 March 2015 ("Dean Kraus Witness Statement"), ¶ 11.

⁸⁰⁸ Dean Kraus Statement I, ¶ 24.

⁸⁰⁹ Michael MacDougall Statement I, ¶ 59.

⁸¹⁰ Michael MacDougall Statement I, ¶¶ 59-60.

July 8, 2009 to approximately [REDACTED] per MWh on January 27, 2009.⁸¹¹ Prices for forward sales (i.e., longer term transactions) also decreased correlatively.⁸¹²

406. Most importantly, Celgar was not in a position to enter into long-term market sales of electricity during the summer of 2008 because its PSA with FortisBC was not yet in force, and without the PSA, it could not purchase the replacement power it needed in order to sell its entire generation to market. Although Mr. Merwin states these opportunities were identified “(i)n mid 2008, once we were finalizing our agreement with FortisBC”,⁸¹³ Mr. Merwin is also aware that Celgar and FortisBC had both agreed that they should first seek regulatory approval from the BCUC to gain business certainty with respect to the PSA.⁸¹⁴ In fact, the PSA contained a provision making notional sales to Celgar conditional on first obtaining the BCUC’s approval.⁸¹⁵ That Celgar could not secure this agreement early enough to take advantage of opportunities yielded by the unusually high prices at Mid-C is not attributable to Canada.

407. The Claimant contends that the exclusivity clause in Section 7.4(b) of its EPA with BC Hydro and BCUC Order G-48-09 prevented Celgar from selling below-GBL electricity to third parties at the remarkably high prices in mid-2008. However, the EPA was signed on January 27, 2009, and BCUC Order G-48-09 was issued on May 6, 2009. Even if these measures could be characterized as imposing a restriction on below-GBL

⁸¹¹ Market Data Workbook, *Daily Peak MidC Price (by Day)*, data provided by the US Energy Information Administration, **R-444**. See Michael MacDougall Witness Statement, ¶¶ 61, 62. See also Dean Krauss Statement I, ¶ 24.

⁸¹² Michael MacDougall Witness Statement, ¶ 62.

⁸¹³ Brian Merwin Statement II, ¶ 25.

⁸¹⁴ Canada’s Counter-Memorial, ¶ 211; Dennis Swanson Statement II, ¶ 10; Don Debiegne, Personal Notes, April 18, 2008, **R-491**. FortisBC had previously explained to the Claimant that there was no legal requirement to file the PSA for approval with the BCUC.

⁸¹⁵ Canada’s Counter-Memorial, ¶ 240; FortisBC-Zellstoff Celgar Power Supply Agreement, 21 August 2008, Section 15.1 **R-248**: “Exporting Electrical Generation Output. The obligations of Celgar and FortisBC hereunder all shall be subject to the satisfaction of each of the following conditions: ... (c) all necessary approvals of the BCUC of the Power Agreements, including the BCUC Acceptance, shall have been obtained”.

sales, the prices at Mid-C were at that time insufficiently high to even cover the costs of the Claimant's replacement electricity (even at FortisBC's "traditional embedded cost rates"⁸¹⁶) and other transmission costs,⁸¹⁷ let alone to make a profit.

408. After analyzing actual market data, Canada's expert Dr. Rosenzweig confirms that, "between 2009 and 2013, Mid-C rates were quite consistently below Celgar's cost of replacing its generation to meet load, even if it were allowed to take power under FortisBC's embedded cost Rate Schedule 31".⁸¹⁸ With respect to future Mid-C prices he concludes:

current forward rates for the Mid-C market are well below the costs that Celgar would incur to sell in that market. While forwards markets are not always a perfect representation of future spot prices, they are generally the best available data. Absent a tectonic shift in the Mid-C market or in FortisBC embedded cost rates, this relationship seems unlikely to invert.⁸¹⁹

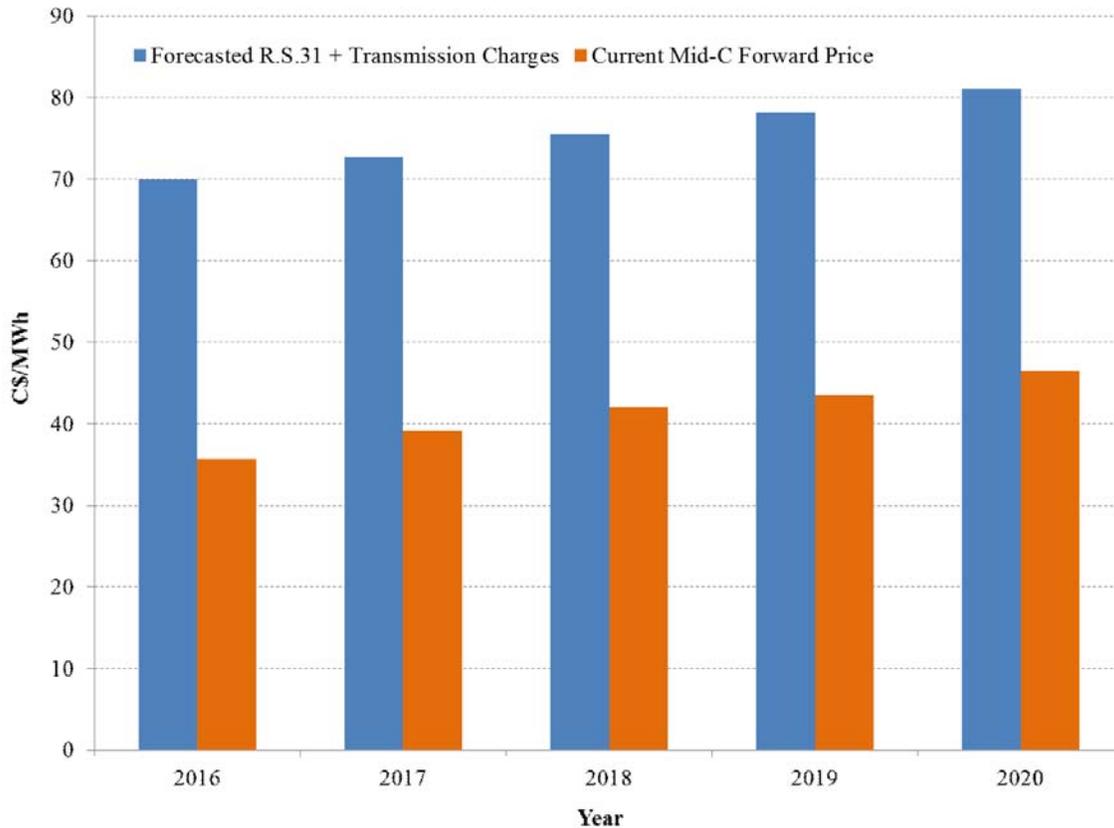
⁸¹⁶ Claimant's Reply Memorial, ¶ 228.

⁸¹⁷ Dennis Swanson of FortisBC indicates that, in the first half of 2009, it would have cost Celgar C \$39.07 per MWh for FortisBC to supply the first 36 MWh of electricity, in addition to a corresponding monthly demand charge of C \$5.370 per MVA. It would have also cost Celgar something in the range of C \$20.89 to C \$218.04 per MWh to supply the remaining 4 MW of power for Celgar to sell its entire below-load energy to the market. In addition, the Claimant would have been responsible for the payment of Scheduling fees of C \$0.86 per MWh and Reactive and Voltage control charges of C \$0.89 per MWh. When adding the transmission costs, line losses and NorthPoint's brokerage fees, it is evident that Mid-C prices would not have warranted Celgar entering into market sales while facing such costs. *See* Dennis Swanson Second Statement, ¶¶ 22-24; Michael MacDougall Witness Statement, ¶ 56; Dean Krauss Witness Statement, ¶ 25. *See also* Market Data Workbook, *Daily Peak MidC Price (by Day)*, data provided by the US Energy Information Administration, **R-444**.

⁸¹⁸ NERA Expert Report II, ¶ 149.

⁸¹⁹ NERA Expert Report II, ¶ 150.

**Figure 3: Annual Mid-C Forward Price and Forecasted FortisBC RS-31 Tariff
2016 through 2020**



409. In light of the overwhelming evidence to the contrary, the Claimant's assertion that it could have entered into long-term sales of its below-GBL electricity to third parties on the Mid-C market for profit is entirely false.

b) Celgar Does Not Have the Required Transmission Rights in Order to Sustain Profitable Sales in the US in the Long-Run

410. The Claimant faces additional barriers to the sale of its below-GBL electricity to third parties. For Celgar to deliver its power to a U.S. buyer, at Mid-C or any other agreed-upon location in the United States, it must obtain the necessary transmission rights from its plant to the point of delivery. In addition to transmitting over FortisBC's and BC Hydro's transmission networks, this process entails securing the required transmission access outside of British Columbia and into the United States.

411. In its Reply, the Claimant asserts that it could have obtained the required transmission, relying on the statement of Mr. Friesen and the expert report of Mr. Kaczmarek to support its assertion.⁸²⁰ Mr. Friesen, however, merely states that such transmission was available “out of British Columbia,”⁸²¹ but proffers no support for his statement. Moreover, the only evidence on which Mr. Kaczmarek relies is data provided by the Bonneville Power Administration, which allegedly shows that “adequate transmission capacity appears to have existed for Celgar to export 40 MW of below load self-generated electricity during 2008-2009.” On this basis, Mr. Kaczmarek concludes that the Claimant could have secured long-term transmission capacity.

412. Mr. MacDougall of Powerex explains, however, that while there may have been some transmission capacity going “out of British Columbia” (i.e., from the point of receipt in BC until the BC/US border), there was too little firm transmission capacity available into the US (i.e., from the BC/US border onwards) necessary to sustain long-term sales. In fact, it is not sufficient to get the electricity to the BC/US border; rather, “it takes a continuous path from the source to the point of delivery to affect the delivery of electricity at the quality of service required by the buyer”.⁸²²

413. Moreover, he explains that Mr. Kaczmarek misinterprets the data provided by the Bonneville Power Administration and in fact long-term firm transmission capacity into the U.S. was (and is) incredibly scarce.⁸²³ For instance, Mr. Krauss explains that, when NorthPoint performed hourly sales of Celgar’s surplus energy into the US, it typically

⁸²⁰ Claimant’s Reply, ¶ 569, Friesen Witness Statement, ¶ 11, Second Navigant Report, ¶¶ 73-78.

⁸²¹ Friesen Witness Statement, ¶ 11.

⁸²² In the case where power is exported out of British Columbia into the United States, the transmission facilities are owned and operated by different entities. For example, on the B.C. side transmission facilities are operated by BC Hydro and on the U.S. side by the Bonneville Power Administration. The electrons cannot be held at the border until transmission capacity becomes available, but must be delivered on a continuous basis from source to sink. Reservations for transmission services will be required on both the Canadian side and on the U.S. side of the border in order to send electricity from the point of receipt and the point of delivery. *See* Michael MacDougall Witness Statement, ¶ 42.

⁸²³ Michael MacDougall Statement, ¶¶ 43-46.

used non-firm transmission rights.⁸²⁴ This is consistent with internal Mercer documents which indicate that "... it is the Company's view that ... trying to sell significant volumes of power outside the province has substantial challenges because of the lack of transmission space."⁸²⁵

414. Finally, Mr. MacDougall explains that the Claimant could have turned to non-firm transmission capacity in order to enter into sales of power in the United States. However, unlike firm transmission which provides the right holders with access to the transmission path,⁸²⁶ non-firm transmission poses a high risk of curtailment, particularly when electricity prices are high and transmission services in high demand.⁸²⁷ Even if the Claimant could find a long-term contract for the sale of its electricity into the U.S., such an arrangement would be risky using non-firm transmission as the Claimant would be liable to pay liquidated damages in case of non-delivery, particularly in periods of peak demand of transmission.⁸²⁸

c) Celgar's Energy Does Not Qualify as a Renewable Energy Resource in the NorthWest United States.

415. The Claimant contends that it had opportunities to sell its below-GBL electricity as a green or renewable biomass-based resource on the market.⁸²⁹ Mr. Merwin testifies that "Celgar had targeted [REDACTED] as a prospective buyer of Celgar's existing generation output, and had engaged in fruitful preliminary discussions with them."⁸³⁰ Mr. Merwin, however, provides few further details.

⁸²⁴ Dean Krauss Statement, ¶ 23.

⁸²⁵ Letter from Richard Short to Davide Ure, Re Electricity Sale Contract Accounting, 2 March 2009, at MER00192105, **R-566**.

⁸²⁶ Michael MacDougall Statement I, ¶ 47.

⁸²⁷ Michael MacDougall Statement I, ¶¶ 49-51. Dean Krauss Statement I, ¶ 18.

⁸²⁸ Michael MacDougall Statement I, ¶ 37. *See also* Dean Krauss Statement I, ¶ 32.

⁸²⁹ Claimant's Reply, ¶ 18.

⁸³⁰ Brian Merwin Statement I, ¶¶ 82, 144; Claimant's Memorial, ¶ 298; Claimant's Reply, ¶ 566.

416. Canada thus contacted Puget Sound and was put in contact with its Director of Strategic Initiatives, Mr. Roger Garrett, who was the Director of Resource Acquisition at the relevant time. Mr. Garrett has no recollection of the Claimant or its energy projects.⁸³¹ Further, he confirms that the Claimant's electricity would not have been an eligible renewable resource that Puget Sound could have procured under Washington's Renewables Portfolio Standard.⁸³²

417. Mr. Garratt's testimony is also consistent with the explanation provided by Mr. MacDougall of Powerex on the question of potential opportunities for renewable power sales in the U.S. Northwest. In his testimony, Mr. MacDougall explains that no lucrative opportunities exist for sales of renewable power outside of statutory compliance markets in the form of Renewables Portfolio Standard ("RPS"),⁸³³ i.e., regulations requiring electric utilities to "meet a given portion of their load with renewable energy".⁸³⁴ But these markets "typically favour in-state generation... and, for this reason, are often more difficult to access for any facility located outside the jurisdiction concerned".⁸³⁵

418. Mr. MacDougall examined whether the Claimant could have sold its electricity into any number of renewable energy markets in the United States and Canada.⁸³⁶ He concluded that it is highly unlikely that Celgar could have made sales of renewable energy into the markets identified by Mr. Kaczmarek (i.e., Washington, Oregon, California Ontario and Québec).⁸³⁷ Mr. MacDougall also concludes that no other

⁸³¹ Roger Garratt Statement, ¶¶ 15-16. While Mr. Garratt executed a Mutual Confidentiality and Nondisclosure Agreement on behalf of Puget Sound with Mercer in 2007, he indicates that signing such agreements is merely a precondition for entertaining discussions with Puget Sound staff, but only those opportunities that warrant further consideration are brought to his attention. Roger Garratt Statement, ¶¶ 11-12.

⁸³² Roger Garratt Statement, ¶ 18.

⁸³³ Sometimes also called Renewable Energy Standard ("RES")

⁸³⁴ Michael MacDougall Statement I, ¶ 30.

⁸³⁵ Michael MacDougall Statement I, ¶ 30.

⁸³⁶ Michael MacDougall Statement I, ¶ 72.

⁸³⁷ See Second Navigant Report, ¶¶ 72, 104.

opportunities for renewable sales existed in the U.S. Northwest and Alberta. His conclusions are summarized below:

Compliance Markets for Renewable Power	
Jurisdiction	Why Celgar cannot access the Renewable Energy Market
Washington	<ul style="list-style-type: none"> • From 2006 to 2012, Washington’s RPS specifically excluded black liquor from the definition of “renewable resources”.⁸³⁸ • Even after 2012, facilities that commenced operations before March 31, 1999 are not eligible, except for “qualified biomass energy” plants.⁸³⁹ • Celgar’s plant does not fit within the definition of “qualified biomass energy” because it is not directly interconnected with a qualifying utility in Washington.⁸⁴⁰ • Even if Celgar’s turbine had commenced operations after March 31, 1999, it would not have been able to deliver its electricity on a real time basis without shaping, storage or integration services, as required.⁸⁴¹
Oregon	<ul style="list-style-type: none"> • Facilities that commenced operations before January 1, 1995 are not eligible under Oregon’s RPS.⁸⁴²
Montana	<ul style="list-style-type: none"> • Eligible facilities must be located within Montana or another US state. • Eligible electricity generated from biomass is limited to facilities with a nameplate capacity no greater than 5 MW.⁸⁴³
California	<ul style="list-style-type: none"> • Biomass facilities that commenced operations after January 1, 2005 are not eligible under the RPS.⁸⁴⁴ • It is, in practice, exceedingly difficult for out-of-country biomass plants to obtain an eligibility status from the California Energy Commission.⁸⁴⁵

⁸³⁸ Michael MacDougall Statement I, ¶ 74. *Initiative 937 (Washington)*, Section 4, **R-402**.

⁸³⁹ Michael MacDougall Statement I, ¶¶ 75-77. *Washington Revised Code*, Title 19, Section 285-030(12)(a), **R-447**.

⁸⁴⁰ Michael MacDougall Statement I, ¶ 77. *Washington Revised Code*, Title 19, Section 285-030(12)(d), (18), and (19), **R-447**.

⁸⁴¹ Michael MacDougall Statement I, ¶¶ 78-79.

⁸⁴² Michael MacDougall Statement I, ¶ 81. *Senate Bill 838 (Oregon)*, 2007, Section 2, **R-449**.

⁸⁴³ Michael MacDougall Statement I, ¶ 82. *Montana Code Annotated*, Section 69-3-2003(10), **R-451**.

⁸⁴⁴ Senate Bill No. 107 (California), Section 3, **R-453**.

⁸⁴⁵ Michael MacDougall Statement I, ¶ 86.

Compliance Markets for Renewable Power	
Jurisdiction	Why Celgar cannot access the Renewable Energy Market
	<ul style="list-style-type: none"> • The transmission challenges faced by Celgar make it unlikely that a utility would purchase Celgar's power in order to comply with the RPS.⁸⁴⁶
Arizona	<ul style="list-style-type: none"> • Facilities commissioned before January 1, 1997 are not eligible under the RPS.⁸⁴⁷
Colorado	<ul style="list-style-type: none"> • Colorado's RES is designed so as to assign a premium to renewable electricity generated within the state, which renders imports of renewable power unlikely.⁸⁴⁸
New Mexico	<ul style="list-style-type: none"> • Facilities brought into service before July 1, 2007 are not eligible.⁸⁴⁹
Nevada	<ul style="list-style-type: none"> • Nevada's RPS is designed to afford preference to solar generation, which makes imports of out-of-state biomass-based generation unlikely.⁸⁵⁰
Idaho, Wyoming and Utah	<ul style="list-style-type: none"> • There are no compliance markets.⁸⁵¹
Alberta	<ul style="list-style-type: none"> • Alberta has not put in place an RPS. • Regulations exist for the offset of greenhouse gas emission occurring within the province.⁸⁵²
Ontario and Québec	<ul style="list-style-type: none"> • The transmission costs and line losses over such a long distance make any profitable sales highly unlikely.⁸⁵³

⁸⁴⁶ Michael MacDougall Statement I, ¶ 90.

⁸⁴⁷ Michael MacDougall Statement I, ¶ 91. *Arizona Administrative Code*, Section R14-2-1802(C), **R-459**.

⁸⁴⁸ Michael MacDougall Statement I, ¶ 93.

⁸⁴⁹ Michael MacDougall Statement I, ¶ 94.

⁸⁵⁰ Michael MacDougall Statement I, ¶ 95.

⁸⁵¹ Michael MacDougall Statement I, ¶ 96. Utah has implemented a renewable portfolio "goal" with no imperative standards. Utilities pursue the renewable energy goals to the extent that it is cost-effective to do so, which renders imports of biomass-based generation from British Columbia highly unlikely.

⁸⁵² Michael MacDougall Statement I, ¶¶ 97-99.

⁸⁵³ Michael MacDougall Statement I, ¶ 100

2. BC Hydro would not have purchased Celgar's below-GBL electricity

419. In light of the unreality of selling its below-GBL electricity to third parties, the only way the Claimant can salvage its damages case is to assume that BC Hydro would procure all of its electricity as firm energy at prices reflect in the EPA.⁸⁵⁴ As Canada explained in its Counter Memorial, the Claimant's assumptions on this point "are beyond speculative, they are total fantasy".⁸⁵⁵

420. In its Reply, the Claimant concedes that BC Hydro was not "legally obligated to buy"⁸⁵⁶ its below-GBL electricity, but continues to muse that, absent section 7.4(b) and Order G-48-09, BC Hydro was "highly likely" to have procured all of it.⁸⁵⁷ However, BC Hydro refused to procure the Claimant's below-GBL electricity during the Bioenergy Call not because of section 7.4(b) (which it agreed to amend in any event) or Order G-48-09 (which was not yet a measure at the time), but because the electricity did not meet the terms of the Call. The Claimant's argument is in effect that BC Hydro was required at the time to buy into the Claimant's "Arbitrage Project" even though the Claimant confirms that the rejection of that project was not a violation of the NAFTA.⁸⁵⁸ In any event, none of the reasons proffered by the Claimant support the conclusion that BC Hydro would have procured all of the Claimant's electricity.

421. First, the Claimant argues that it is "highly likely" that BC Hydro would have procured the Claimant's entire load out of a supposed fear that the electricity would be "exported out of the Province".⁸⁵⁹ However, neither BC Hydro nor the Province care

⁸⁵⁴ Navigant Report, ¶ 155.

⁸⁵⁵ Canada's Counter Memorial, ¶ 504.

⁸⁵⁶ Claimant's Reply, ¶ 36. In a subtler perpetuation of its fantasy, the Claimant merely asserts again that "it is highly likely BC Hydro would have done so rather than let that energy leave the Province".

⁸⁵⁷ Claimant's Reply, ¶¶ 36, 206, 551-563.

⁸⁵⁸ Claimant's Reply, ¶ 32.

⁸⁵⁹ Claimant's Reply, ¶ 555.

whether the Claimant sells its electricity outside of British Columbia. Mr. Les MacLaren testifies that:

[T]he province is neutral as to where a purchaser of Celgar's electricity resides. Whether the electricity remains in BC or is exported out of the province does not matter. BC Hydro is required to achieve electricity self-sufficiency, but individual generators are not discouraged from engaging in exports to the extent that there are opportunities to do so.⁸⁶⁰

422. Second, the Claimant suggests that, without section 7.4 and Order G-48-09, Celgar's below-GBL electricity "would qualify for purchase by BC Hydro under the very procurement policies in effect at the time."⁸⁶¹ That is an untrue statement, as Mr. McLaren explains:

[T]he Ministry of Energy was clear throughout the 2008 Pulp and Paper Self-Generation Working Group process that re-pricing of existing generation would not be supported, and that only incremental or new generation would be acquired. In effect, BC Hydro was policy-barred from acquiring existing self-generation. This policy was also clearly set out in the Bioenergy Phase I Call for Power documentation.⁸⁶²

423. Third, the Claimant alleges that it would have in fact been "inconsistent with stated BC policy for BC Hydro *not* to have purchased Celgar's additional electricity and instead allow it to be exported".⁸⁶³ This is a remarkable statement, which Mr. Scouras confirms is also untrue:

This would be completely contrary to our GBL-based procurement practice for existing self-generators and would contravene government policy and BCUC rulings dealing with arbitrage. Presuming the BCUC concluded that it was permissible for FortisBC to use PPA energy to facility its customers' export sales

⁸⁶⁰ Les MacLaren Statement II, ¶ 16.

⁸⁶¹ Claimant's Reply, ¶ 556.

⁸⁶² Les MacLaren Statement II, ¶ 19; Jim Scouras Statement I, ¶¶ 40 and 44.

⁸⁶³ Claimant's Reply, ¶ 558.

does not change the eligibility requirements under BC Hydro's procurement processes."⁸⁶⁴

424. Finally, the Claimant alleges that BC Hydro has had a consistent practice of procuring electricity in order to increase its resource stack and would thus likely procure all of the Claimant's below-GBL electricity.⁸⁶⁵

425. Mr. MacLaren, however, explains that:

it would have been almost impossible for BC Hydro to justify the Celgar EPA to the BCUC if it had to effectively pay twice as much for the same set increase in electricity. The BCUC has in the past rejected a significant EPA on the basis that the agreement was not in the public interest [BCUC Order G-176-06]. It would almost certainly find that this one was not justifiable because of such a price.⁸⁶⁶

426. For these reasons, the Claimant has no basis to even suggest that, absent section 7.4(b) and Order G-48-09, BC Hydro would procure the Claimant's below-GBL electricity.

3. The Ministers' Order Required Celgar to Use the Turbine Installed in 1993 Expansion to Serve its Own Load

427. If the Tribunal finds that the Claimant should have been permitted to sell its below-GBL electricity, the Claimant is still bound by the terms of the Ministers' Order,

⁸⁶⁴ Jim Scouras Statement II, ¶ 53.

⁸⁶⁵ Reply Memorial, ¶¶ 557-561. Moreover, since the publication of its 2008 Long Term Acquisition Plan (LTAP), BC Hydro's projected energy needs have diminished. BC Hydro now actually manages a surplus of power and is projecting lower demand increases into the future, as set out in its Integrated Resource Plan (2013) at Chapter 4.2.1: "there is no need for incremental resources in the near to mid term of [BC Hydro's] planning horizon"; at 4.2.2, BC Hydro explored various actions to reduce costs including "[r]educe spending on Independent Power Producer (IPP) resources"; at 4.3.4.1, the forecasts regarding BC Hydro's long term needs are "uncertain"; however, at 4.3.4.2, "BC Hydro is expected to meet the majority of its [long term] load growth through DSM", C-298. Claimant's Reply, ¶ 577. Mercer refers to the 2013 IRP in its Reply (¶¶ 577-578), though it fails to raise this aspect of it, presumably because it does not fit into the narrative Mercer wishes to spin.

⁸⁶⁶ Les MacLaren Statement II, ¶ 20. See also David Bursey Expert Report, ¶ 135(d)(ii)(c). ("Such procurement would not be in the ratepayer or public interest because it would ... fail a prudency review before the BCUC under Part 3 when setting BC Hydro rates, because the energy procurement would simply add costs but not add to the power supply resources.")

which requires it to use its original turbine⁸⁶⁷ to serve its own electricity needs.⁸⁶⁸ As a result, even if this Tribunal finds that Order G-48-09 or Section 7.4(b) is a violation of the NAFTA—and it should not— then the Ministers' Order would still prohibit Celgar from selling any electricity generated below Celgar's GBL as electricity from this turbine was intended for load displacement.⁸⁶⁹

428. In its Reply, the Claimant argues in the alternative that, if any such self-sufficiency commitment arose out of the Ministers' Order, it could not conceivably have included any increased generation capacity arising out of Celgar's self-funded Blue Goose Project, thus capping the Claimant's damages at Celgar's average annual generation to load (minus sales) for the period 1994 to 2006.⁸⁷⁰ There is, however, nothing in the language of the Ministers' Order that restricts its application in that manner. Nor has the Claimant provided any evidence to support its contention that the Ministers' Order should somehow be limited as the other separate parts of the mill evolved during the lifespan of the new turbine. Consequently, there is no principled reason to calculate the Claimant's alleged damages using this alternative rubric.

F. The Claimant's Damages Related to its Alternative GBL Scenarios are Unfounded

429. The Claimant's second basis for damages concerns the setting of its GBL by BC Hydro, which it alleges was arbitrary and discriminatory. The Claimant proffers eleven alternative "GBL Scenarios," each predicated on the Claimant having a lower GBL in its

⁸⁶⁷ The Celgar pulp mill has two turbines. The first is a 52 MW turbine that was installed in 1993 which is subject to the Ministers' Order. Its newer, 48 MW turbine was installed in 2010 and is used to generate electricity that is then sold to BC Hydro under the EPA.

⁸⁶⁸ In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion, Ministers' Order dated May 23, 1991 ("1991 Ministers' Order") p. 2, **R-100**; Celgar 1990 EPC Application, **R-97**. Canada has established the validity of the Order. 1991 Ministers' Order, p. 2, **R-100**; Celgar 1990 EPC Application, **R-97**. Counter Memorial, ¶¶ 173-187 and 499-501; Peter Ostergaard Statement I, ¶¶ 20-22; Les MacLaren Statement II, ¶¶ 40-43; David Bursey Expert Report, ¶¶ 182-185; Denise Mullen Statement I, ¶ 62.

⁸⁶⁹ 1991 Ministers' Order, p. 2, **R-100**; Celgar's 1990 EPC Application, **R-97**.

⁸⁷⁰ Reply ¶¶ 541-543. The Claimant estimates that this is equivalent to 249.7 GWh/year.

EPA with BC Hydro. The Claimant thus seeks compensation under the EPA for a *higher volume* of electricity that it believes BC Hydro was required to have procured.⁸⁷¹ It states that “if Celgar’s nondiscriminatory GBL should have been lower, it is all but certain that BC Hydro would have done what it did in every other EPA with a BC self-generator, and purchased all above-GBL electricity on a firm basis.”⁸⁷²

430. The Claimant’s alternative GBL damages assessments conflict directly with NAFTA Article 1108(7)(a), which states that Articles 1102 and 1103 “do not apply to: (a) procurement by a Party or a state enterprise.”⁸⁷³ The Claimant asks to be compensated on the basis that the BC Hydro procures *more* electricity from the Claimant in the EPA. In light of Article 1108(7)(a), that request must be denied.

431. Putting aside this fatal flaw of the Claimant’s submission, the Claimant’s assessment of loss under its “alternative GBL scenarios” is in any event unfounded and overstated because:

- The Claimant’s proffered “GBL options” are arbitrary and have no basis in Provincial procurement policy;
- The Claimant wrongly assumes that the EPA would be renewed;
- Navigant makes numerous quantification errors in its second report; and
- The Claimant ignores the effect of the Ministers’ Order.

432. Nonetheless, Canada quantifies the Claimant’s damages under its various “GBL scenarios” to correct for the errors and assumptions that the Claimant makes in these calculations.

⁸⁷¹ Claimant Reply Memorial, ¶¶ 553-554.

⁸⁷² Claimant Reply Memorial, ¶ 554.

⁸⁷³ NAFTA Article 1108(7)(a).

1. The Claimant's Proposed GBLs are Arbitrary and Have no Basis in Provincial Procurement Policy

433. The Claimant proffers eleven alternative "GBL scenarios," which can be found under Figure 31 of its Reply.⁸⁷⁴ The Claimant assertion that Canada violated the NAFTA in eleven different ways does nothing to add confidence to these claims, most of which are, in any event, completely arbitrary. For example, the Claimant alleges that it should be compensated on the basis of a GBL set in 2003 when the Province's Heritage Contract was enacted. However, none of the Claimant's comparator mills had a GBL set at that date. More egregiously, the Claimant alleges that it should have a GBL of "zero," and computes damages upwards of \$225 million on that basis. However a zero GBL (along with the other scenarios) has no connection to BC Hydro's procurement policies. Rather, this is simply a demand for preferential treatment in the form of an energy subsidy.⁸⁷⁵

2. The Claimant wrongly assumes that the EPA would be renewed

434. Not only does the Claimant assume a lower GBL under the current EPA, they also assume a renewal of the EPA *into perpetuity* with the same GBL, the same favorable green energy prices, and the same quantum of electricity being sold. Canada already explained that the Claimant's assumption is highly speculative and without merit.⁸⁷⁶ By assuming the renewal of their EPA into perpetuity rather than at the end of its term (which is the year 2020), the Claimant overstates its damages by \$77 million in its zero GBL scenario.

⁸⁷⁴ Claimant's Reply, ¶ 535.

⁸⁷⁵ Les MacLaren Statement II, ¶ 22.

⁸⁷⁶ Canada's Counter Memorial, ¶ 506. In its Counter Memorial, Canada points out that "the Claimant's EPA with BC Hydro terminates in 2020 and it is highly speculative to assume that BC Hydro will both need and be willing to re-contract with the Claimant at the end of its current EPA term. It is also speculative to assume that the Claimant would receive the same electricity price in a subsequent EPA since market conditions may be different in the future."

435. In its Reply, the Claimant continues its assumption that it will sell to BC Hydro on identical terms forever. The Claimant's assumption is unfounded and none of its arguments have merit.

436. First, the Claimant argues that BC Hydro will renew the EPA *at least once* because the parties originally discussed a 20-year term for the Agreement rather than the 10-year term, which currently holds.⁸⁷⁷ However, it was the Claimant who requested a 10-year rather than 20-year proposal and the Claimant cannot now request compensation on the basis that it accepted a 20-year term. It is not at all certain that BC Hydro will renew Celgar's EPA, let alone on the same terms as those found in the existing agreement.⁸⁷⁸

437. Second, the Claimant argues that BC Hydro will need to procure additional electricity in 2020, and thus another EPA is likely. However, BC Hydro's resource stack is presently in a surplus situation and it is not clear that it will require the procurement of additional electricity in 2020.⁸⁷⁹

438. Third, the Claimant asserts that BC Hydro's long term resource plan projects that 50% of the existing bioenergy EPAs will be renewed and that, for a variety of reasons, Celgar is likely to meet BC Hydro's renewal requirements.⁸⁸⁰ The Claimant's confidence here is misplaced. To begin with, BC Hydro's IRP lists cost and price as the overriding

⁸⁷⁷ Claimant's Reply, ¶¶ 575-576.

⁸⁷⁸ NERA Report I, ¶ 132; and NERA Report II, ¶ 157.

⁸⁷⁹ BC Hydro Integrated Resource Plan (November 2013), Chapter 9.2.4., **R-567**. Indeed, BC Hydro's 2013 IRP indicates that "the combined IPP supply and targeted DSM results in BC Hydro having an adequate energy supply until F2028 and adequate capacity supply until F2019". That same IRP notes that BC Hydro's future resource needs are more modest than it had anticipated back at the time of its 2008 LTAP. BC Hydro Integrated Resource Plan (November 2013), Chapter 4, at 4.2.1, **R-568**. Moreover, BC Hydro's self-sufficiency requirement of 3000 GWh "insurance" energy has since been relaxed. See Les MacLaren Statement I ¶ 80,

⁸⁸⁰ The Claimant argues that (1) Celgar was the second lowest bidder in the first Bioenergy Call for Power; (2) Celgar's black liquor is a more reliable energy source than Howe Sound's and Tembec's hog fuel and natural gas, and Celgar is one of BC's most modern mills; and (3) Celgar's mill is highly responsive to BC Hydro's power needs. See Claimant's Reply, ¶¶ 577-578.

considerations with respect to the renewal of an EPA. In that respect, the Claimant's second and third reasons for renewal are irrelevant.⁸⁸¹ Nor is it clear what the Claimant means when it asserts that Celgar is "responsive" to BC Hydro's needs—unless it believes those needs include repeated regulatory challenges to its procurement practices.

439. Fourth, the Claimant asserts that it is reasonable to assume that Celgar's EPA will be renewed at the price that was then in effect under its EPA because BC Hydro was willing to agree to a 20 year EPA and price in 2009.⁸⁸² The Claimant claims that, in every case where BC Hydro has renewed a bioenergy EPA (e.g. Tembec, Canfor, Howe Sound), it has paid a higher price for self-generated electricity, which is another reason why Mr. Kaczmarek has assumed such a price increase in its projection.⁸⁸³ The evidence, however, again shows that the Claimant is wrong. For instance, when BC Hydro renewed the SEEGEN bioenergy EPA in 2013, it negotiated a considerably lower price.⁸⁸⁴ BC Hydro's 2013 IRP also predicts that BC Hydro will enjoy "an adequate energy supply until F2028 and adequate capacity supply until F2019."^{885 886}

⁸⁸¹ Although Celgar was the second lowest bidder in the Bioenergy Call, this is no indication that it will be equally as successful at some undefined point in the future. The Claimant's assertion in this respect is completely speculative.

⁸⁸² Claimant's Reply, ¶ 580.

⁸⁸³ Claimant's Reply, ¶ 584-585.

⁸⁸⁴ Letter from Janet Fraser, BC Hydro to Erica Hamilton, Commission Secretary, p.5 and Table 1 (p.7), **R-**, where BC Hydro and SEEGEN agreed to a firm energy price of \$43/MWh on a levelized basis, which is considerably lower than the \$60/MWh price contained in the original EPA. http://www.bchydro.com/energy-in-bc/meeting_demand_growth/irp/document_centre/reports/november-2013-irp.html. Additionally, none of the three EPAs referred to here by the Claimant were renewals; they were either new or replacement EPAs, all of which were entered into in 2009/2010 during the bioenergy call period, prior to the release of BC Hydro's most recent IRP.

⁸⁸⁵ BC Hydro Integrated Resource Plan (November 2013), Chapter 9.2.4, **R-567**. As the Claimant acknowledges in its Reply, BC Hydro's 2013 IRP indicates that it expects to pay less upon the renewal of its EPAs: "[d]ue to the fact that these are existing projects where the IPP's initial capital investment has been fully or largely recovered over the initial term of the EPA, BC Hydro expects to be able to negotiate a lower energy price". (BC Hydro, 2013 Integrated Resource Plan (November 2013), Chapter 4.2.5.1, at 4-15, **R-568**.) Moreover, NERA observes that "because "it is unlikely that Celgar would be able to sell to third parties at a price that was economically attractive" ... "renewing with BCH is the only realistic option, and this remains a speculative assumption". See NERA Expert Report, ¶ 157.

440. Finally, the Claimant says that BC Hydro is wrong to assume (in its 2013 IRP) that capital costs of new self-generation would be recovered over the turbine's first ten years, since turbines are typically depreciated over a 20 year period, which means that Celgar will still need its electricity sales income post 2020 to offset such depreciation.⁸⁸⁷ The problem with the Claimant's proposition here is that, because Bioenergy Call was a bidding process, BC Hydro was indifferent to amount of time Celgar believed it would take to recover the capital costs of its projects.⁸⁸⁸ In the end, like its claim that Celgar should have been given a lower GBL, this is simply another attempt by the Claimant unilaterally to amend Celgar's 2009 EPA.

3. The Claimant Overstates the Damages Relating to its GBL

441. Putting aside the fact that the Minister's Order has the effect of rendering the Claimant's damages null and the fact that their alternative GBLs have no causal relationship with BC Hydro's procurement policies, if the Tribunal nonetheless determines that Celgar should have been assigned a lower GBL by BC Hydro and that BC Hydro was required to procure more electricity from the Claimant, then the damages are as follows.⁸⁸⁹

⁸⁸⁶ The Claimant also suggest in its Reply that bioenergy prices will likely rise due to an expected scarcity of wood fibre. While the cost of wood fibre may be a factor in the energy prices that BC Hydro pays under its biomass EPAs, the overriding consideration for renewal is BC Hydro's demand/supply balance as well as the need for competitive, cost-effective power. See Claimant's Reply, ¶ 581; and Brian Merwin Statement II, ¶ 34.

⁸⁸⁷ Claimant's Reply, ¶¶ 582-583.

⁸⁸⁸ Presumably, the Bioenergy bidder included in its bid price the cost of servicing the depreciation of its turbine. Moreover, because 90% of Celgar's investment in its Green Energy Project was subsidized by a \$46.8 million grant from the federal government under the PPGTP, presumably Celgar has already recovered the bulk of its net capital investment through EPA revenues.

⁸⁸⁹ NERA Expert Report II, Table 1, ¶ 188.

<u>Mr. Kaczmarek's Damages Scenario</u>	<u>GBL</u>	<u>Mr. Kaczmarek's Uncorrected Damges</u>	<u>Mr. Kaczmarek's Corrected Damges</u>	<u>Overstatement in Damages</u>	<u>Percentage Overstatement</u>
	(MWh)	(C\$ '000s)	(C\$ '000s)	(C\$ '000s)	(%)
No Load Displacement Obligation and/or Comparable to Skookumchuck Mill's 1997 EPA	█	█	█	█	71%
Comparable to Tolko Industries Ltd.'s GBL	148,674	147,019	83,388	63,632	76%
Comparable to Howe Sound's 2010 EPA	█	█	█	█	77%
Celgar's 2001 generation-to-load (Order G-38-01)	186,123	119,783	67,059	52,724	79%
Levels comparable to Skookumchuck Mill's 2009 EPA	█	█	█	█	79%
Celgar's 2002 generation-to-load (2003 Heritage Contract)	220,022	95,062	52,278	42,784	82%
Celgar's avg. 1994-2006 generation-to-load (Ministers' Order)	249,700	73,213	39,337	33,876	86%
Celgar's 2006 generation-to-load (BC Hydro EPA)	268,200	59,519	31,271	28,248	90%
Celgar's avg. 2005 & 2006 generation-to-load (Before Project Blue Goose)	271,095	57,359	30,009	27,351	91%
Celgar's 2007 generation-to-load (BC Hydro EPA)	326,715	15,074	5,747	9,327	162%

4. Like its First Report, Navigant's Second Damages Report is Fatally Flawed

442. In its Rejoinder Expert Report, NERA provides a detailed rebuttal to Navigant's Second Expert Report. In this section, Canada briefly summarizes NERA's rebuttal which concludes that Navigant: (1) fails to quantify how the measures have caused Celgar to suffer negative competitive effects; (2) continues to rely on speculative data and assumptions; and (3) reprises old errors and commits new ones.

443. In its second report, Navigant again picks up the Claimant's claim that Celgar suffered negative competitive effects as a result of the impugned measures. It argues that NERA ignored Navigant's point that Celgar had been "more exposed to fluctuations in pulp and paper prices than it would have been absent the Measures".⁸⁹⁰ NERA, however, explains that Navigant's argument is merely an unsubstantiated theory about the different

⁸⁹⁰ Navigant Expert Report II, ¶ 30.

levels of risk that Celgar might face compared to other mills who are able to sell their below load electricity. Neither Navigant nor the Claimant's witnesses have provided any evidence of the same.⁸⁹¹ To the contrary, the facts show that, unlike some of its competitors, Celgar did not shut down during the economic downturn of 2008-2009.⁸⁹² Moreover, the evidence that the Claimant does rely on is shown to be inherently biased and unreliable.⁸⁹³

444. In its second report, Navigant claims that, while its data might be speculative, that is only so because it was unable to access actual data due to the impugned measures.⁸⁹⁴ NERA quite rightly dismisses such an excuse because the evidence is clear that the requisite firm long-term transmission from BC to external markets was simply not available to Celgar.⁸⁹⁵ Notwithstanding Navigant's reliance on evidence from Mr. Freisen that Celgar could have accessed such markets, Powerex's evidence conclusively points to the contrary.⁸⁹⁶ Navigant claims that it is not speculative to assume that Celgar could have sold its below GBL output to BC Hydro because: (1) BC Hydro would have purchased it rather than have the energy be sold outside of BC; (2) of Celgar's low production costs; and (3) Celgar would be an attractive green energy source at a time when BC Hydro's energy needs are expected to increase.⁸⁹⁷ NERA debunks each of these points in its second report.⁸⁹⁸

⁸⁹¹ NERA Expert Report II, ¶ 123.

⁸⁹² NERA Expert Report II, ¶ 124.

⁸⁹³ NERA Expert Report II, ¶¶ 127-129.

⁸⁹⁴ Navigant Expert Report II, ¶ 70.

⁸⁹⁵ NERA Expert Report II, ¶¶ 145-146.

⁸⁹⁶ NERA Expert Report II, ¶ 145; Roger Garratt Statement, ¶ 18; Michael MacDougall Statement, ¶ 37.

⁸⁹⁷ Navigant Expert Report II, ¶¶ 51-59.

⁸⁹⁸ NERA Expert Report, ¶ 155: i) it is unlikely that Celgar would have found such a purchaser and the replacement cost of energy would not have made arbitrage economically attractive; ii) the other Bioenergy call bidders provided incremental energy for which BC Hydro would not have incurred any supply costs; and iii) Celgar would not be adding any incremental resources to meet its load increases.

445. In its second report, NERA separates Navigant's errors into three categories: (1) the ones in Navigant's first report that it admits to and corrects in its second report;⁸⁹⁹ (2) the ones in Navigant's first report that it fails to admit are errors (but should),⁹⁰⁰ and (3) new errors and errors newly identified in Navigant's second report.⁹⁰¹ We commend the Tribunal to NERA's second expert report for detailed discussions on each. In any event, ignoring that NERA has demonstrated that there is no basis for damages, taken *in toto*, this multitude of errors calls into question both the accuracy and the reliability of Navigant's damages reports.

⁸⁹⁹ Under the heading of errors admitted: Navigant failed to account for all of the electricity that Celgar produced, thus artificially lowering Mercer's profits in its actual scenario, which artificially increased damages (Second NERA Report, Appendix 2, ¶ 3); Navigant used an incorrect date to begin calculating Mercer's damages (Second NERA Report, Appendix 2, ¶ 4); Navigant committed an arithmetical error in its calculation of the average debt to equity ratio of the comparable companies it chose (Second NERA Report, Appendix 2, ¶ 6).

⁹⁰⁰ Under the heading of errors repeated but not admitted: Navigant continues to rely on speculative data and assumptions (Second NERA Report, ¶¶ 138-140, 144, 151-153, 155-161); Navigant continues to calculate damages *in perpetuity* (Second NERA Report, ¶¶ 156-161); Navigant incorrectly assumes that BCH would purchase Celgar's below-GBL electricity (Second NERA Report, ¶ 155); Navigant fails to consider the cost-causality principle in assessing Celgar's replacement rate (¶ 135-136); Navigant assumes that Celgar could sell its below GBL electricity to third parties at an economically viable rate (Second NERA Report, ¶¶ 144-153); Navigant ignores the nullifying effect on damages of the Side Letter Agreement between Celgar and BC Hydro (Second NERA Report, ¶ 154); Navigant assumes that Celgar's EPA with BC Hydro will be renewed in 2020 (Second NERA Report, ¶¶ 156-161); Navigant assumes that a potential third party purchase of Celgar would include debt financing (Second NERA Report, Appendix 2, ¶¶ 9-10); Navigant commits technical errors in its calculation of the cost of equity for the hypothetical purchaser of Celgar (Second NERA Report, Appendix 2, ¶¶ 11-19); Navigant ignores Celgar's under-delivery penalties in its but-for scenario (Second NERA Report, Appendix 2, ¶¶ 20-23); Navigant continues to rely on Mr. Switlischoff's BLAP to calculate damages even though he himself now denies that it is an indicator of any discriminatory behavior and Navigant ignores or fails to grasp that the same defects of BLAP render it unable to measure the effects of potential discrimination (Second NERA Report, ¶¶ 23 and 167); Navigant agrees that a simpler model would produce the same quantum yet it continues to defend its more involved and complex model (Second NERA Report, Appendix 2, ¶ 8); Navigant ignores the effect of the 1991 Minister's Order requiring Celgar to self-supply its own load (Second NERA Report, ¶ 162).

⁹⁰¹ Under the heading of new errors and errors newly identified: Navigant ignores transmission tariffs that Celgar would have to pay on additional electricity it sold to BCH (or any other customer) (Second NERA Report, Appendix 2, ¶ 25); Navigant has errors in its calculations of the amount of interest accrued on the damages it calculates in the historic period (Second NERA Report, Appendix 2, ¶ 26); Navigant ignores the impact of the upcoming Rate Schedule 37 which will potentially significantly reduce Mercer's damages by providing Celgar with a refund and lowering its rates (Second NERA Report, ¶ 142); Navigant provides no competitive harm analysis and instead relies on Mr. Merwin's inapt and flawed cost curves (Second NERA Report, ¶¶ 122-131).

5. The Claimant ignores the effect of the 1991 Ministers' Order

446. As with the other two measures discussed above (the EPA's exclusivity clause and Order G-48-09), the effect of a valid 1991 Ministers' Order on possible damages arising out of an improperly set GBL would still be to prohibit Celgar from selling any electricity generated below Celgar's load because its 52 MW turbine is committed for self-supply, thus eliminating or virtually eliminating any damages to the Claimant.⁹⁰²

G. The Claimant Fails to Independently Quantify its Article 1105 Damages Claim

447. The Claimant does not independently quantify damages under Article 1105, leaving Canada and the Tribunal in the position of having to speculate as to what they might be. For example, should the Tribunal find that BC Hydro acted non-transparently when setting the Claimant's GBL, the Claimant makes no case as to what the GBL would be had BC Hydro acted transparently. It is not for Canada or the Tribunal to assume the existence of loss, the burden of proof rests with the Claimant and it has failed to meet that burden.

VII. COSTS

448. NAFTA Article 1135 allows a Tribunal to award costs in accordance with the applicable arbitration rules.

449. Canada requests that the Tribunal order the Claimant to pay the arbitration costs for this NAFTA arbitration and to indemnify Canada for its legal fees and costs.

450. Canada respectfully requests the opportunity to submit a more detailed submission on costs in the future so that it can fully address all relevant considerations.

⁹⁰² 1991 Ministers' Order, p. 2, **R-100**; Celgar 1990 EPC Application, **R-97**.

VIII. CONCLUSION AND REQUEST FOR RELIEF

451. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

Respectfully submitted on behalf of
the Government of Canada
this 31 day of March, 2015.



Sylvie Tabet
Michael Owen
Adam Douglas
Louis-Philippe Coulombe
Stephen Kurelek
Krista Zeman

Counsel for the Respondent
Trade Law Bureau (JLTB)
Departments of Justice and of
Foreign Affairs, Trade and
Development