

Before the

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

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 In the Matter of Arbitration between: :
 :
 MERCER INTERNATIONAL INC., :
 :
 Claimant, :
 : ICSID Case No.
 and : ARB(AF)/12/3
 :
 GOVERNMENT OF CANADA, :
 :
 Respondent. :
 :
 - - - - - x Volume 3

HEARING ON JURISDICTION AND THE MERITS

MAY CONTAIN RESTRICTED ACCESS AND CONFIDENTIAL
INFORMATION

Thursday, July 23, 2015

The World Bank Group
701 18th Street, N.W.
"J" Building
Assembly Hall B1-080
Washington, D.C.

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:00 a.m. before:

- MR. V.V. VEEDER, President of the Tribunal
- PROF. FRANCISCO ORREGO VICUÑA, Co-Arbitrator
- PROF. ZACHARY DOUGLAS, Co-Arbitrator

Also Present:

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Secretary to the Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT VEEDER: We'll start Day 3 of this
3 Hearing, which is now the 23rd of July.

4 Is there any housekeeping that we need to
5 address?

6 We ask the Claimants first.

7 MR. SHOR: Yes, we have one housekeeping
8 item. I was reprimanded by my colleagues yesterday
9 when I handed you that revised exhibit, and they said
10 you just can't give them a piece of paper, they will
11 lose it, it will not be in with all the other papers,
12 so we have a complete, new presentation binders from
13 our opening that contain the substitute page, if
14 that's okay.

15 PRESIDENT VEEDER: Thank you very much.

16 Your colleagues were completely right, but we
17 haven't lost it yet.

18 MS. GEHRING FLORES: And one more matter. We
19 just want to note that Canada yesterday informed us
20 that they will not be calling Mr. James McLaren for
21 cross-examination. I believe he was scheduled to come
22 after Mr. Allan. Yes, yes.

09:02:34 1 PRESIDENT VEEDER: He was due to come today;

2 he was due to come this afternoon.

3 MS. GEHRING FLORES: Correct.

4 PRESIDENT VEEDER: And, so, after Mr. Allan

5 at 1:30, assuming we'd finished the previous

6 witnesses, we'd move to Mr. Austin?

7 MS. GEHRING FLORES: That's my understanding,

8 yes.

9 MR. DOUGLAS: Yes.

10 PRESIDENT VEEDER: Anything else on the

11 Claimant's side?

12 MS. GEHRING FLORES: No, Mr. President.

13 PRESIDENT VEEDER: And on the Respondent's

14 side?

15 MR. DOUGLAS: No, Mr. President.

16 PRESIDENT VEEDER: That was all in open

17 session, and I take it we now go back into closed

18 session to resume your cross-examination.

19 MR. DOUGLAS: Yes, please.

20 PRESIDENT VEEDER: So, we will go into closed

21 session.

22 (End of open session. Confidential business

09:03:19 1 information redacted.)

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09:03:19 1

CONFIDENTIAL SESSION

2 PRESIDENT VEEDER: We're now in closed
3 session.

4 ELROY SWITLISHOFF, CLAIMANT'S WITNESS, RESUMED

5 PRESIDENT VEEDER: Sir, I need to remind you
6 that you're still testifying under the form of the
7 Declaration you made yesterday.

8 THE WITNESS: I understand, President Veeder.

9 PRESIDENT VEEDER: There will be further
10 questions.

11 MR. DOUGLAS: Thank you, Mr. President.

12 CONTINUED CROSS-EXAMINATION

13 BY MR. DOUGLAS:

14 Q. Good morning, Mr. Switlischoff.

15 A. Good morning.

16 Q. Welcome back.

17 A. Thank you.

18 Q. I hope you had a decent evening in
19 Washington?

20 A. It was restful.

21 Q. Good. I'm glad to hear.

22 I just have a few questions following up from

09:03:46 1 yesterday, and then we'll proceed with the remainder
2 of my questions.

3 We spoke yesterday about the 1993 PPA between
4 BC Hydro and FortisBC?

5 A. We did.

6 Q. Are you familiar with the terms of that PPA
7 generally?

8 A. Generally.

9 Q. And under the PPA, BC Hydro must supply
10 200 megawatts of capacity to FortisBC?

11 A. That's correct.

12 Q. And the PPA was for a term of 20 years?

13 A. I believe that's correct.

14 Q. Okay. So, BC Hydro must ensure at all times
15 that it has the resources to meet those PPA
16 obligations?

17 A. Subject to nomination on a rolling five-year
18 interval with nominations made for every year up to
19 the limit with penalties, I believe, for draw in
20 excess of the nominations.

21 Q. So, if I just understood your answer, at
22 least as a general rule, BC Hydro must have on hand at

09:04:55 1 all times 200 megawatts of capacity?

2 A. No, the nominated amount.

3 Q. Okay, thank you.

4 I believe we were discussing yesterday the
5 wonderful Blue Goose Project and--

6 (Pause.)

7 Q. Sorry, to come back to the PPA, the nominated
8 amount that you were referring to is an amount that's
9 nominated by FortisBC?

10 A. I believe that's correct, yes.

11 Q. And they have consistently nominated that
12 about 200 megawatts of capacity?

13 A. I can't confirm that.

14 Q. Okay.

15 Let's say the Claimant, the Celgar Mill,
16 decided not to generate any of its electricity and to
17 take it all from FortisBC. Would BC Hydro's
18 obligation to FortisBC still have to have on hand the
19 200-megawatt nomination?

20 A. I'm sorry, could you ask that again? I lost
21 you halfway through with the--

22 Q. That's okay. I'm just giving a hypothetical

09:06:19 1 situation where, let's say the Celgar Mill decided not
2 to generate any electricity whatsoever?

3 A. That part I'm with you with.

4 Q. And it decided to purchase all of its
5 electricity from FortisBC. I'm just saying if
6 BC Hydro's obligation under the 1993 PPA would still
7 remain at 200 megawatts, if that is the nominated
8 amount FortisBC elects?

9 A. I don't believe there is any connection
10 between the draw of Celgar on Fortis and Fortis'
11 nomination to BC Hydro. I don't think those two are
12 connected.

13 Q. Yes, that's what I'm saying is that the
14 capacity requirement remains consistent, whether or
15 not Celgar purchases--

16 A. Regardless of Celgar's--
17 (Overlapping speakers.)

18 Q. The capacity requirement remains consistent
19 whether or not the Celgar Mill chooses to buy all of
20 its electricity needs from FortisBC?

21 A. I agree.

22 Q. And if the Claimant Celgar Mill--sorry.

09:07:26 1 MR. DOUGLAS: I'm trying, Mike.

2 BY MR. DOUGLAS:

3 Q. --decided to meet its mill needs with its own
4 electricity, BC Hydro's obligation to FortisBC would
5 still be to have on hand 200 megawatts of capacity?

6 A. They'd have to have on hand the nominated
7 amount.

8 Q. And in the scenario where the Celgar Mill
9 decides to not generate any electricity and to buy all
10 of its electricity from its utility, is it possible
11 that FortisBC, in that scenario, could elect not to
12 buy or take any PPA Power?

13 A. No, I don't think that's the case. I think
14 Fortis counted on PPA being there in almost all years.
15 I think when the Mill started generating and supplying
16 its own load at a greater level in 1994, Fortis
17 lowered its PPA nomination at that time.

18 Q. But within the realm of the Contract, let's
19 say, in the realm of possibilities, given that
20 FortisBC has other generation resources available to
21 it, it's possible that it could choose or elect not to
22 draw PPA Power to source the needs of the Celgar Mill,

09:09:01 1 should it elect to purchase all of its needs?

2 A. No, I don't think that was ever possible. I
3 don't think Fortis ever did not take PPA Power.

4 Q. So, it's not Fortis--sorry?

5 But would it be FortisBC's decision on
6 whether to take the PPA Power?

7 A. Yes, of course.

8 Q. Okay. Sorry. Thank you.

9 A. You're welcome.

10 Q. You know more about this.

11 Okay. Turning to the Blue Goose Project, the
12 Claimant engaged Blue Goose to move its production to
13 a level where energy surplus could be achieved?

14 A. I don't know if that was the Blue Goose's
15 objective.

16 Q. Okay. Do you want to turn to Tab 14 for me.
17 This is Pöyry Exhibit 114, and at Page 1. I should
18 say it's Page 1 of 49.

19 MR. DOUGLAS: Mr. Shor, apologies. Did you
20 receive an index?

21 MR. SHOR: I did not.

22 MR. DOUGLAS: We do have one.

09:10:27 1 Q. This is a fuel plan requirement submitted by
2 the Claimant into the Bioenergy Call for Power
3 Phase I.

4 A. I'm sorry, your binders are falling apart
5 here.

6 Q. Oh, I'm sorry. Would you like some
7 assistance?

8 A. No, that's okay. I think I've managed to
9 repair it.

10 Q. If there is one that's broken, we can replace
11 it. I can give you mine if you like.

12 A. I think I'm okay for now. I'll let you know,
13 but thank you for the offer.

14 Q. You're welcome.

15 A. I'm with you now.

16 Q. Okay. So, at Page 1 of 49 there is a
17 reference to the Blue Goose. And it states that Blue
18 Goose is to move its production to a level where
19 energy surplus could be achieved.

20 A. Sorry, I'm looking for the reference to Blue
21 Goose.

22 Sorry, I see in the fourth paragraph it reads

09:11:50 1 Celgar completed a major capital investment program in
2 2006.

3 Q. Yes.

4 A. Sorry. I was looking for Blue Goose, but I
5 see that now.

6 Q. That's fair enough. I said Blue Goose, so I
7 don't blame you.

8 So, you see that--and the capital upgrade in
9 2006 would be Blue Goose?

10 A. I'm assuming so.

11 Q. Okay. And so its intended purpose was to
12 move its production to a level where energy surplus
13 could be achieved?

14 A. I see that.

15 Q. Okay. And during the negotiation of its EPA,
16 the Claimant told BC Hydro that it has the capability
17 to generate more energy in its pulping process than
18 the Mill requires?

19 MR. SHOR: I don't know if there is any
20 foundation that the Witness knows what the Claimant
21 told somebody.

22 MR. DOUGLAS: Where is the reference in the

09:12:42 1 document? I'm just asking the Witness to confirm what
2 was represented by the Claimant during the
3 agreement--sorry, the Witness has obviously testified
4 about Blue Goose and its capabilities, so...

5 MR. SHOR: I thought your question asked
6 whether the Claimant told BC Hydro something.

7 MR. DOUGLAS: Oh, sorry. I'll rephrase the
8 question.

9 BY MR. DOUGLAS:

10 Q. So, I'm just looking here at this paragraph,
11 and this is a Fuel Plan submitted as part of the
12 Bioenergy Call for Power Phase I. This is what the
13 Claimant is submitting and telling BC Hydro; is that
14 correct?

15 A. I'm not certain if this was submitted. This
16 appears to be a Fuel Plan requirement for the RFPES.

17 Q. Okay. So, this would have been submitted to
18 BC Hydro?

19 A. I would think so, yes.

20 Q. So, in this paragraph we're talking about the
21 Blue Goose Project, and it says that in 2007 was the
22 defining year where biomass consumption increased to

09:13:52 1 the point where significant quantities of available
2 energy became accessible for incremental electricity
3 production?

4 A. I see that.

5 Q. Okay. If you could turn to Tab 16 for me,
6 please.

7 A. Yes.

8 Q. This is the Claimant's application to the
9 Canadian Federal Government for PPGDP funding?

10 A. I see that.

11 Q. And the PPGDP funding was the \$58 million
12 subsidy the Claimant received to install the new
13 turbine at the Mill?

14 A. Very well.

15 PRESIDENT VEEDER: Is this C-180?

16 MR. DOUGLAS: This is C-180, yes.

17 BY MR. DOUGLAS:

18 Q. Very well. Yes?

19 A. If you say.

20 I'm not familiar with the exact amount of the
21 awards.

22 Q. Okay, that's fine. And without the PPGDP

09:14:44 1 funding, the Claimant's Green Energy Project would not
2 likely have gone forward?

3 A. That's plausible.

4 Q. If you could turn to Page 69190.

5 A. I'm with you.

6 Q. It states that Celgar, with its existing
7 52 megawatts of Green generation capacity is not only
8 self-sufficient but consistently has the ability to
9 supply surplus Green power to the electrical grid.

10 A. I see that.

11 Q. And it goes on it to state that, as a result
12 of Blue Goose, Celgar's energy balance improved so
13 much that it vents the surplus steam it generates into
14 the atmosphere on a continuous basis?

15 A. Yes, it says that.

16 Q. So, Blue Goose made the Celgar Mill energy
17 self-sufficient?

18 A. It improved the balance so much that it
19 generated surplus steam, it says.

20 Q. And steam is what is used to power the
21 turbine-generators?

22 A. Yes, it is.

09:16:06 1 Q. And they had so much surplus steam that they
2 had to vent it into the atmosphere?

3 A. On a continuous basis.

4 Q. And Mr. Merwin told BC Hydro when negotiating
5 the GBL that 2007 represented normal operations for
6 Celgar going forward?

7 MR. SHOR: Again, there needs to be a
8 foundation for the Witness to know what Mr. Merwin
9 told somebody else.

10 BY MR. DOUGLAS:

11 Q. How about Mr. Merwin's Second Witness
12 Statement at Paragraph 18. It's one of those two
13 other white binders.

14 A. Second Witness Statement?

15 Q. Yes, please.

16 A. Paragraph 18?

17 Q. Yes, please.

18 A. I'm with you.

19 Q. Mr. Merwin says that he told BC Hydro when
20 negotiating the GBL that 2007 represented normal
21 operations for Celgar going forward?

22 A. That's what Mr. Dyck said Mr. Merwin said.

09:17:20 1 Q. And does Mr. Merwin state that that is
2 incorrect?

3 A. He says that he would clarify that Mr. Dyck
4 never explained that, by "normal," he meant that
5 Celgar would normally choose to operate the Mill at
6 that level, regardless of whether Celgar had
7 contractual arrangements to sell the excess
8 electricity it generated.

9 Q. And you, yourself, in your Expert Report
10 state that the operational characteristics and
11 reliability of the Blue Goose was unknown in 2007?

12 A. Yes, I believe I stated that.

13 Q. Okay. If you could turn to Tab 83 for me,
14 please. This is Pöyry Exhibit 98.

15 A. I'm there.

16 Q. This is an internal Mercer planning document;
17 is that correct?

18 A. Very well.

19 Q. Dated March 23rd, 2007?

20 A. I'm looking for a date.

21 Tab 83?

22 Q. Yes, please.

09:18:33 1 I might be on the last page.

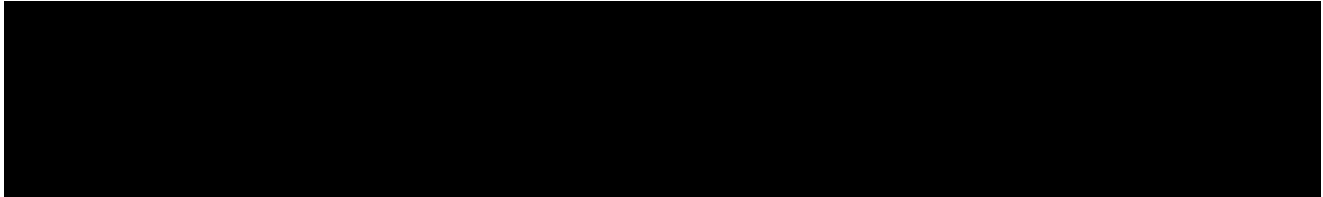
2 A. Yes, it's on the last page. Now I see it.

3 Q. And it discusses the--this document discusses
4 the Mill's strategy for reducing energy costs.

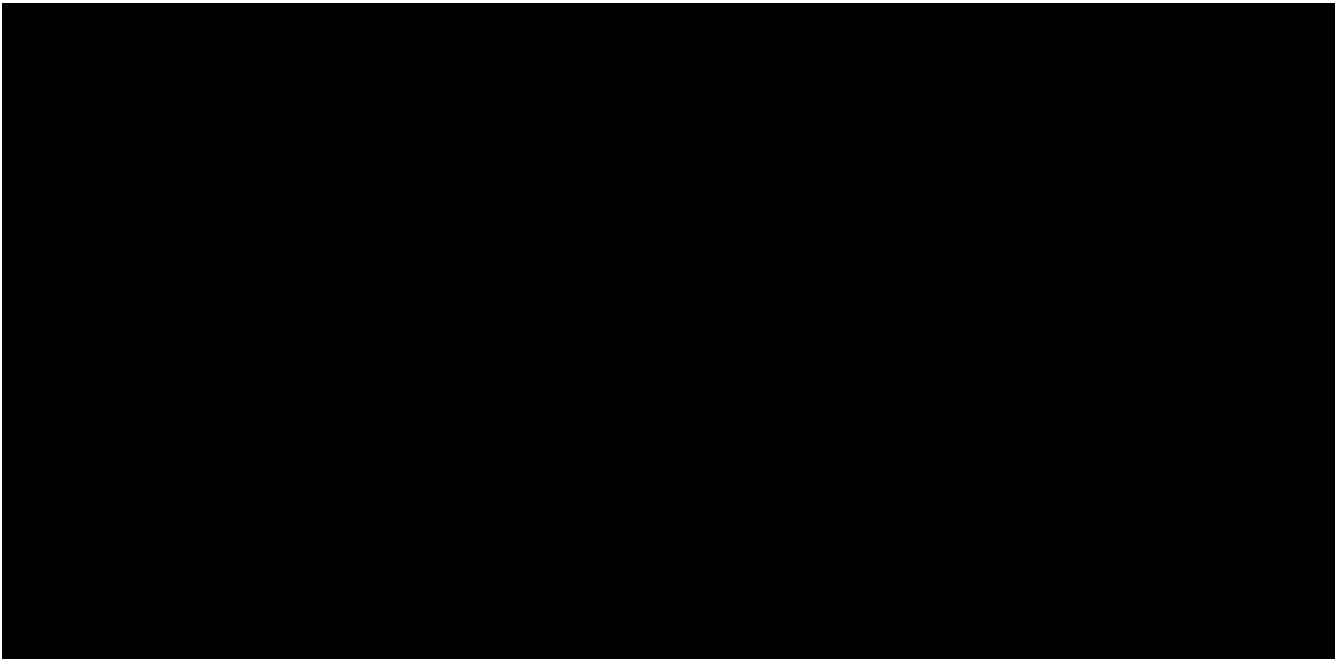
5 A. It appears to, yes.

6 Q. Okay. If you could turn to the number at the
7 bottom, it's 36315.

8 A. I'm there.



12 A. I see the heading.



09:19:46 1 A. Consistently.

2 Q. Consistently. Okay.

3 In 2007, the Mill made an average of [REDACTED] >
4 ADt of pulp per day?

5 A. I'm sorry? The reference?

6 Q. The reference is Tab 96. And this is Pöyry
7 Exhibit 120.

8 Would somebody help the Witness.

9 Are you okay? Would you like assistance,
10 sir?

11 A. Well, I still seem to be doing okay.

12 Q. Okay. Just let me know.

13 A. Page?

14 It's only a couple of pages.

15 Q. It is only a couple of pages. We're looking
16 at the first page.

17 A. Yes.

18 Q. This might be a bit difficult to find.

19 A. Probably looking at the sixth line down
20 average pulp per day?

21 Q. You're absolutely right.

22 A. So, that's average. That's not consistent.

09:20:44 1 Q. Okay. So, but on average, in 2007, the Mill

2 made [REDACTED]>--I'm sorry, [REDACTED]> ADt per day?

3 A. That's what it appears to say, yes.

4 Q. Okay. And in 2008--sorry, this is a

5 spreadsheet continuing over a couple of pages?

6 A. I found your reference.

7 Q. Okay. And so, in 2008, it was [REDACTED]>?

8 A. That's the number that appears, yes.

9 Q. Okay. And in 2009, the number was [REDACTED]?

10 A. That's the number that appears.

11 Q. Okay. And in 2010, it was [REDACTED]?

12 A. I agree again.

13 Q. Okay. So, this increase in pulp production

14 is what Blue Goose was projected to do?

15 A. I believe that's correct.

16 Q. And these figures are over the <[REDACTED]>

17 identified in the document referred to earlier as what

18 was needed to generate energy surplus?

19 A. Again, this is an average, and I believe the

20 document said "consistent."

21 Q. Okay. But, on average, they met that target?

22 MR. SHOR: The question was already answered.

09:22:02 1 MR. DOUGLAS: I just wanted to clarify that,
2 on average, the target was met.

3 THE WITNESS: The average is above the
4 target, but it's not determinable whether that was
5 consistent.

6 BY MR. DOUGLAS:

7 Q. Okay. In your Report, you state that you are
8 an expert in energy contracts?

9 A. I have. I did.

10 Q. Okay. And you conclude at Paragraph 210 of
11 your First Report--you can close up some of those
12 down, and it will reshuffle the deck.

13 Do you have your First Report there?

14 A. I do.

15 Q. And at Paragraph 210, you state that "BC
16 Hydro determined Celgar's Seasonal GBL by converting
17 its annual GBL to an average daily amount and then
18 multiplying that daily average by the number of days
19 in each season."

20 A. Which bullet are you on there?

21 Q. I'm on the first bullet.

22 A. Of Paragraph 210?

09:23:20 1 Q. Yes.

2 Page 81, I believe.

3 A. I'm sorry, I--

4 PRESIDENT VEEDER: It doesn't work.

5 THE WITNESS: I'm not there with you.

6 BY MR. DOUGLAS:

7 Q. Oh, it's the first bullet on Page 81.

8 Sorry. My apologies for not being very
9 helpful this morning.

10 PRESIDENT VEEDER: How about the second
11 bullet?

12 THE WITNESS: Could you please repeat your
13 Statement?

14 BY MR. DOUGLAS:

15 Q. I'm just saying that this is your expert
16 report stating that BC Hydro determined Celgar's
17 seasonal GBL by converting its annual GBL to an
18 average daily amount and then multiplying the daily
19 average by the number of days in each season.

20 A. Yes.

21 Q. Then you compare that to the seasonal shaping
22 of Tembec's GBL?

09:24:08 1 A. I did.

2 Q. Which you state was more favorable and has no
3 basis in reality?

4 A. I did.

5 Q. Was it correct for you to state that it was
6 BC Hydro who set the Claimant's Seasonal GBL?

7 A. Did I--the Claimant's Seasonal GBL?

8 Q. Did BC Hydro set the Claimant's Seasonal GBL?

9 A. They determined it, yes.

10 Q. So, the Claimant did not determine its own
11 Seasonal GBL?

12 A. It attempted to--it agreed with the Seasonal
13 GBL. I don't know if it actually set that amount. I
14 do believe they applied to have some variability in
15 the seasonal amounts, but BC Hydro declined that
16 request.

17 Q. If you could turn to Tab 13 for me, please.

18 PRESIDENT VEEDER: Just before you do that,
19 stop. I'm a little disturbed that what we're looking
20 at, that is Page 81 of the First Expert Report, is
21 different from the paper copy, not in terms of wording
22 but in terms of layout. Are we looking at the right

09:25:14 1 edition or the right version?

2 MR. DOUGLAS: The one that you're looking at
3 on the screen?

4 PRESIDENT VEEDER: The one on the screen has
5 three lines belonging to the previous bullet, whereas
6 the paper one that we're looking at or at least the
7 one that I'm looking at has that previous bullet in
8 full. Is it just--is it a different printing or--

9 MR. SHOR: Is that the First Statement?

10 PRESIDENT VEEDER: Yes, the one that I was
11 given yesterday.

12 THE WITNESS: My copy, President Veeder, is
13 consistent with what I see on the screen.

14 PRESIDENT VEEDER: Well, I was given this by
15 somebody yesterday, and I think it was the Claimant,
16 and it's not consistent.

17 MR. SHOR: I believe it's the same issue with
18 the corrected copy versus the uncorrected copy that
19 affected the pagination and the numbering of that
20 paragraph.

21 PRESIDENT VEEDER: I got the corrected copy
22 from yesterday.

09:26:21 1 MS. ZEMAN: Mr. Chair, in your version are
2 you looking at Page 85? It's the second bullet on
3 Page 85?

4 PRESIDENT VEEDER: No, I'm looking at
5 Page 81.

6 MS. ZEMAN: On the screen or in front of you?

7 PRESIDENT VEEDER: In front of me.

8 MS. ZEMAN: Okay.

9 PRESIDENT VEEDER: And it's different from
10 the pagination on the screen.

11 MS. ZEMAN: I wonder if it is an issue with
12 the redactions, when the Parties indicated redactions,
13 there were brackets that were put in, and that changed
14 the pagination a little bit.

15 PRESIDENT VEEDER: Okay, but the text is the
16 same. I don't have to worry about that, do I? It's
17 definitely looking at the same text?

18 MS. ZEMAN: As far as I understand, yes.

19 MR. SHOR: I don't think anybody changed any
20 text.

21 PRESIDENT VEEDER: Okay. Well, we can track
22 the wording, but obviously if there is different

09:27:01 1 wording, we're in trouble.

2 BY MR. DOUGLAS:

3 Q. So, your testimony, just to come back to
4 where we were, was that the Claimant attempted to
5 agree with the Seasonal GBL, and that you believe they
6 applied to have some variability in the seasonal
7 amount, but BC Hydro declined the request?

8 A. That's my recollection.

9 Q. Okay. If you could turn to Tab 13, please,
10 which is R-128.

11 A. I'm there.

12 Q. I would like to refer you to reference
13 Number 1--actually, if you could turn to Page 15612
14 for me, please.

15 A. I'm there.

16 Q. I would like to refer you to reference
17 Number 1 under "commercial offer."

18 A. Yes.

19 Q. And Claimants selected "seasonally firm
20 energy".

21 A. I see that.

22 Q. And can you turn to reference Item 2 on the

09:28:32 1 next page.

2 A. Yes.

3 Q. The project type is "customer project"?

4 A. I see that.

5 Q. Can you read me the second sentence of the
6 third paragraph.

7 A. "If a proponent"--I'm sorry, the third
8 paragraph?

9 Q. Of the third paragraph, yes.

10 A. "If a proponent elects its project type to be
11 'customer project' and selects 'seasonally firm
12 energy' in Item Number 1, complete a seasonal
13 generation baseline (SGBL) profile (Item 17)."

14 Q. Let's take a look at Item 17. If you could
15 turn to 15621.

16 A. I'm there.

17 Q. The instructions are for the proponent to
18 complete the seasonal generation baseline profile set
19 out below.

20 A. I see that.

21 Q. And Celgar completed this and indicated in
22 season one that its GBL would be [REDACTED] > megawatts?

09:29:37 1 A. I see that.

2 Q. And in the remaining seasons that its GBL
3 would be [REDACTED] > megawatts?

4 A. I see that as well.

5 Q. So, it was the Claimant, then, who determined
6 its Seasonal GBL?

7 A. They nominated these amounts, I will agree
8 with that, but I'm not certain how they arrived at
9 these numbers.

10 Q. But they are numbers; correct?

11 A. They are numbers.

12 Q. They are the Claimant's numbers?

13 A. They are the Claimant's numbers in the
14 proposal, yes.

15 Q. If you could--and is your testimony then
16 going back that BC Hydro declined these numbers?

17 A. No, I think BC Hydro accepted these numbers,
18 but the Celgar subsequently applied for some
19 variability in the numbers, a seasonal variation, and
20 BC Hydro declined that.

21 Q. So, BC Hydro accepted these numbers?

22 A. Are these the numbers that appear in the

09:30:57 1 final EPA?

2 Q. We can take a look, if you like, but yes.

3 A. If they are, then yes, they would have
4 accepted them if they signed the EPA.

5 Q. That's R-135 at Page 280053.

6 (Pause.)

7 Q. Sorry, Mr. Switlishoff. Just one moment.

8 A. Certainly.

9 (Pause.)

10 Q. And you're aware that, in the Claimant's EPA,
11 it may elect to increase or decrease the Seasonal GBL,
12 if it chooses?

13 A. Yes, I believe there's that provision.

14 Q. So, if the Claimant was unhappy with the
15 shape that it initially proposed, it could elect to
16 increase or decrease the Seasonal GBL?

17 A. I recollect that provision.

18 Q. Okay. You selected Tembec's Skookumchuck and
19 Howe Sound's Port Mellon mill as appropriate
20 comparators?

21 A. I did.

22 Q. Based on legal factors for like circumstances

09:32:15 1 that was provided to you by Mercer's counsel?

2 A. Partially, yes.

3 Q. And by your own sense of which
4 self-generators would provide a fair comparison?

5 A. Yes.

6 Q. And these factors are that all three of those
7 pulp mills--Celgar, Tembec, and Howe Sound--produce
8 NBSK market pulp?

9 A. They do.

10 Q. And NBSK stands for Northern Bleached
11 Softwood Kraft?

12 A. It does.

13 Q. And all three pulp mills have negotiated EPAs
14 with BC Hydro?

15 A. Yes.

16 Q. And all three have GBLs--and these are your
17 words--restricting access to embedded-cost utility
18 electricity?

19 A. There are current EPAs, and could you take me
20 to those words, please.

21 Q. Sure. It's Paragraph 91 of your First
22 Report.

09:33:17 1 A. Yes.

2 Q. So, here in this paragraph, you're listing
3 the factors in which you determined the proper
4 comparators?

5 A. Yes.

6 Q. Okay. And one of the factors, and we've just
7 listed a few but one of them was restricting--that all
8 three have GBLs--these are your words, restricting
9 access to embedded-cost utility electricity?

10 A. Yes.

11 Q. Okay. And, finally, all three pulp mills
12 invested in new generation capacity in the decade
13 prior to the BCUC's issuance of Order G-38-01 in 2001?

14 A. That's correct.

15 Q. Is Canfor, Prince George an NBSK pulp mill?

16 A. It is.

17 Q. Did it invest in generation in the decade
18 prior to G-38-01?

19 A. I can't confirm that.

20 Q. But is it one of your comparators?

21 A. It was a mill that I looked at, but it wasn't
22 as good an example or good a comparator as the two I

09:34:23 1 chose.

2 Q. Because it does not fall within your category
3 of fair comparators?

4 A. It may, but I didn't look at the Canfor
5 operations in detail.

6 Q. Okay. Is Tolko (Riverside) an NBSK pulp
7 mill?

8 A. No, it's not.

9 Q. And you state in your Report that it makes
10 little sense to compare BC Hydro's regulatory
11 treatment of Celgar to a sawmill with self-generation
12 such as Tolko sawmill?

13 A. Generally that would be my position.

14 Q. So, Tolko did not meet your criteria for a
15 fair comparison?

16 A. I agree.

17 Q. And you do not assess any mills that invested
18 in generation capacity after G-38-01?

19 A. No, I did not.

20 Q. Such as Cariboo?

21 A. No, sir.

22 Q. Domtar?

09:35:25 1 A. No, sir.

2 Q. Harmac?

3 A. No, sir.

4 Q. And you do not assess any mills that invested
5 in generation capacity greater than ten years before
6 G-38-01?

7 A. I believe that's correct, partially.

8 Q. Such as--sorry, partially?

9 A. Well, there are mills that, for instance--no,
10 I think that's correct, sure.

11 Q. What you state in Paragraph 91 is that you
12 only examined pulp mills that invested in generation
13 capacity in the decade prior to BCUC's issuance of
14 Order G-38-01?

15 A. Yes, but your statement was that I didn't
16 consider mills that had invested prior, and I believe
17 Howe Sound had also invested prior.

18 Q. Okay. And other mills like, again, Cariboo,
19 if they had invested prior, you didn't consider that?

20 A. Correct.

21 Q. Or Domtar?

22 A. Correct.

09:36:21 1 Q. Or Harmac?

2 A. Correct.

3 Q. Okay. In preparation of your Report, you
4 reviewed documents produced by Canada to Mercer?

5 A. I did.

6 Q. And did you review the documents that Canada
7 produced relating to the GBLs for these other mills?

8 A. I did.

9 Q. But you did not include an analysis of those
10 other mills in your Expert Reports?

11 A. Correct.

12 Q. The Celgar Mill has a recovery boiler and a
13 hog boiler?

14 A. Correct.

15 Q. Both produce high pressured steam?

16 A. Correct.

17 Q. The recovery boiler is driven by burning
18 black liquor?

19 A. Correct.

20 Q. The black liquor is a byproduct of the
21 pulping process?

22 A. Correct.

09:36:58 1 Q. And the hog boiler is driven by burning hog
2 fuel?

3 A. Partially.

4 Q. Mostly?

5 A. I think that's fair.

6 Q. Hog fuel is an industry term for wood waste
7 like bark and sawdust?

8 A. It is.

9 Q. I think there are some examples on the table?

10 A. There are.

11 Q. I'm surprised you didn't bring black liquor.

12 A. It's combustible and they don't let you take
13 it on a plane.

14 (Laughter.)

15 Q. A hog boiler like Celgar's, and this is just
16 quoting from Paragraph 30 of your First Expert Report
17 says: "It is not an integral part of the pulping
18 process like a recovery boiler is"?

19 A. I believe I've said that.

20 Q. The Claimant's recovery boiler makes in
21 excess of ██████████ tonnes per hour of steam?

22 A. Yes.

09:37:47 1 Q. And its hog boiler makes about [REDACTED] tonnes per
2 hour of steam?

3 A. Yes.

4 Q. So Celgar's recovery boiler makes about [REDACTED]
5 times more steam than the hog boiler?

6 A. Roughly.

7 Q. And the Claimant's electricity generation is
8 therefore predominantly driven by burning black liquor
9 in the recovery boiler?

10 A. I agree.

11 Q. And you describe in your First Expert Report
12 that hog boilers can be operated on a stand-alone
13 basis provided there is an adequate supply of wood
14 residue fuel at a price that allows for the profitable
15 operation of the facility?

16 A. I did.

17 Q. Okay. In 2009, Tembec owned the Skookumchuck
18 Mill?

19 A. Yes, I believe that's correct.

20 Q. And the Skookumchuck Mill has a recovery
21 boiler and a hog boiler?

22 A. They do.

09:38:28 1 Q. And Skookumchuck's recovery boiler typically
2 produces steam at a rate of about <<[REDACTED]>> tonnes per
3 hour?

4 A. That sounds right.

5 Q. And its recovery boiler produces about half
6 the steam then of Celgar's recovery boiler?

7 A. I see your math.

8 Q. Okay. And it's hog boiler typically produces
9 steam at a rate of approximately <<[REDACTED]>> tonnes per
10 hour?

11 A. That's my understanding.

12 Q. So, Tembec's hog boiler produces about <<[REDACTED]
13 [REDACTED]>> steam than Celgar's hog boiler?

14 A. That maths works for me.

15 Q. Okay. And BC Hydro and Tembec's
16 predecessor--and you corrected me on that
17 yesterday--signed an EPA on September 27, 1997?

18 A. They did.

19 Q. And the Skookumchuck Mill operated under that
20 EPA for most of the 2000s?

21 A. It did.

22 Q. And in 2009, Tembec communicated to BC Hydro

09:39:19 1 its intent to terminate the 1997 EPA pursuant to the
2 early termination provisions of that agreement?

3 A. I believe it did.

4 Q. And you're aware that Mr. Lague testifies
5 that this is because it could--the Mill could no
6 longer << [REDACTED] >>--pardon, I'm going to rephrase.

7 Mr. Lague testifies that it wanted to

8 [REDACTED]
9 [REDACTED]
10 [REDACTED] >>

11 A. I understand that's what Mr. Lague asserted.

12 Q. Okay. And faced with the prospect of Tembec
13 exercising its right to terminate the 1997 EPA, the
14 Parties began negotiating a new agreement?

15 A. I believe under that umbrella, yes, that--but
16 I don't see any analysis regarding Mr. Lague's
17 assertion.

18 Q. With respect to the Parties began negotiating
19 a new agreement? Sorry?

20 A. No, << [REDACTED] [REDACTED] .>>

21 Q. Okay. We'll get to that.

22 Part of the negotiations included setting a

09:40:25 1 GBL?

2 A. They would have.

3 Q. Okay. And to set the GBL, the Parties
4 assessed how the Mill would operate without the
5 obligations of the 1997 EPA?

6 A. I understand that to be correct.

7 Q. Okay. And in order to establish a GBL for
8 the Tembec EPA, Tembec proposed a model?

9 A. They prepared a <<[REDACTED]>> model or--I
10 understand a <<[REDACTED]>> model was prepared, but I
11 did not see that model.

12 Q. Okay. And Tembec argued that a model was
13 needed in order to <<[REDACTED] [REDACTED]
14 [REDACTED]>>

15 A. They argued that, but again, I didn't see any
16 proof of that.

17 Q. Okay. And you state in your Expert Report
18 that the model provided a pretext for BC Hydro to
19 establish a more favorable GBL for Tembec?

20 A. Yes. Without any further investigation of
21 what this purported model showed, yes, it appears that
22 it did.

09:41:43 1 Sorry, did you say a higher GBL or a lower
2 GBL?

3 Q. I said more favorable GBL.

4 A. Yes, a lower GBL.

5 Q. A lower GBL. I was just quoting from your
6 Expert Report.

7 And that's because the model did not reflect
8 Tembec's current normal operating conditions?

9 A. That's my understanding, that's my belief,
10 yes.

11 Q. Okay. And BC Hydro should have considered
12 the Mill's actual generation data?

13 A. Among other things, yes.

14 Q. Okay. So, the historical generation data
15 from years immediately preceding the negotiation of
16 the EPA?

17 A. And their operational configuration, yes.

18 Q. Okay. So, in your view, BC Hydro should have
19 analyzed Tembec's generation patterns under the '97
20 EPA when it was setting the GBL for the new EPA?

21 A. It should have looked further into its
22 operational characteristics; and, if that included the

09:42:39 1 generation under the 1997 EPA, they should have
2 considered that, and as their process required,
3 removed that component from their analysis.

4 Q. Remove which components? Sorry.

5 A. The generation associated with the 1997 EPA.

6 Q. Oh, so you agree that the effects of the 1997
7 EPA should be removed?

8 A. If they were seeking, as they stated, to
9 analyze what the Mill's operation would be absent the
10 '97 EPA, then it would make sense to remove it, yes.

11 Q. But would you agree with that approach, that
12 the Mill should have been analyzed by negating the
13 effects of the '97 EPA?

14 A. But for the capital improvements that were
15 funded by the EPA, the EPA was--the 1997 EPA was

16 << [REDACTED] [REDACTED] [REDACTED]
[REDACTED] >> that could have been viewed to subsidize the
18 capital improvements.

19 Q. Okay. In your Expert Report, you discuss
20 BCUC Order G-38-01?

21 A. Yes.

22 Q. Which you confirm prohibits increased access

09:43:57 1 to utility electricity to facilitate sales by a
2 self-generating customer?

3 A. That's correct.

4 Q. And you argue that Tembec's 14-megawatt GBL
5 allowed them to increase access to BC Hydro's
6 electricity in order to facilitate sales?

7 A. Yes, it did.

8 We're talking now the 2009 EPA?

9 Q. Yes, sorry, I should probably be more
10 specific, thank you. And you compare the level of
11 electricity that Tembec was accessing in the three
12 years before the 2009 EPA took effect?

13 A. I do.

14 Q. Meaning that the electricity they were
15 accessing while they had the obligations under the
16 1997 EPA?

17 A. Sorry, your question is exactly?

18 Q. That when you were examining Tembec's access
19 to electricity in the three years before the 2009 EPA,
20 that was access that they had while having the
21 obligations of the 1997 EPA?

22 A. They did.

09:44:50 1 Q. Okay. And you compare that level of access
2 to the level of electricity that Tembec is able to
3 access under the 2009 EPA?

4 A. Their actual purchases, yes, I compared
5 those, I looked at those.

6 Q. Okay. Did you analyze the level of
7 electricity that Tembec would likely purchase without
8 an EPA?

9 A. Post 2007, post their termination of the 1997
10 EPA or absent the 2009 EPA?

11 Q. Absent the '97 EPA.

12 A. I've made some analysis of what--I didn't
13 analyze what they would generate, but I would analyze
14 some of their operational characteristics absent the
15 1997 EPA, that I don't see any analysis, any
16 corresponding analysis performed by BC Hydro or
17 Tembec.

18 Q. But my question was when you were analyzing
19 the level of electricity that Tembec was purchasing
20 prior to the 2009 EPA versus when the 2009 EPA came
21 along, my only question was whether prior to the 2009
22 EPA, when you were looking at the electricity they

09:46:15 1 were purchasing, whether that was electricity they
2 were purchasing while the 1997 EPA was in effect?

3 A. Yes, that is the electricity they purchased
4 before the--

5 Q. 2009 EPA?

6 A. Sorry, you've lost me with your question.

7 Q. I'm sorry, I may have lost myself.

8 Why don't we turn to your First Expert Report
9 at Paragraph 166.

10 A. I'm there.

11 Q. Thank you.

12 At the bottom you state, and this is the last
13 sentence: "Thus, in the three years before the 2009
14 Skookumchuck EPA took effect, Tembec was purchasing an
15 average of <<[REDACTED]>> gigawatt hours of firm energy from
16 BC Hydro."

17 A. Yes, I stated that.

18 Q. Okay. And the three years before the 2009
19 Skookumchuck EPA, the Tembec had--the '97 EPA was
20 still in effect?

21 A. That's correct.

22 Q. Okay. So, the amount of electricity that was

09:47:29 1 being purchased by Skookumchuck in these three years
2 was within the confines of the '97 EPA?

3 A. That's correct.

4 Q. Okay. So then, my question was: Did you
5 analyze the level of electricity that Tembec would
6 likely purchase without an EPA?

7 A. I looked at what they generate, and I looked
8 at what they would have generated absent an EPA. So,
9 I guess the amount they would purchase would be the
10 remainder of that.

11 Q. Okay.

12 A. So, although I didn't specifically look at
13 the amount they purchased, I did look at the amount
14 they likely would have generated, and it looks like
15 they would have generated their entire load absent an
16 EPA; so, absent an EPA, it doesn't look like they
17 would have had any purchases.

18 Q. Okay. At the time the Skookumchuck--the time
19 of negotiating the 2009 EPA, Skookumchuck had two
20 turbine generators?

21 A. They did.

22 Q. A 15-megawatt extraction turbine, which was

09:49:02 1 used for emergency backup purposes at the time?

2 A. That's my understanding.

3 Q. And that's called TG1?

4 A. That's also my understanding.

5 Q. And they also had a 43.5 megawatt condensing
6 turbine?

7 A. That's also my understanding.

8 Q. Which is called TG2?

9 A. I believe so.

10 Q. And Tembec's position was that, << [REDACTED]
11 [REDACTED] [REDACTED] [REDACTED] >>

12 A. That's the Mill's assertion again.

13 Q. And they suggested to BC Hydro that << [REDACTED]
14 [REDACTED]
15 [REDACTED] >>

16 A. That's what they suggested, I believe, at
17 first.

18 Q. And BC Hydro disagreed [REDACTED]
19 [REDACTED] [REDACTED]
20 [REDACTED]

21 A. Yes, I believe that's correct.

22 Q. And as a result, << [REDACTED] >>, was used

09:50:53 1 A. I don't know if the Parties did. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>

6 Q. Okay.

7 A. So, I think the only analysis I see is
8 that--of output is that of Mr. Lague, and I don't see
9 any of the background to the analysis.

10 Q. One moment, please.

11 A. Certainly.

12 (Pause.)

13 Q. Could you turn to Tab 26 for me, please.

14 A. I'm there.

15 Q. This is an interoffice memo. This is R-189.

16 This is an interoffice memo from BC Hydro analyzing
17 Tembec's Skookumchuck pulp operations.

18 A. I see that.

19 Q. If you turn to Page 4 for me, please.

20 A. I'm there.

21 Q. Looking down to the middle of the page, there
22 is a black bullet called "the proposed GBL for STG1".

09:52:48 1 A. I see that.

2 Q. And that paragraph states: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] >>

6 A. I see that.

7 Q. Does that not give an indication of a
8 modeling exercise undertaken by BC Hydro?

9 A. That's one sentence. There should be some
10 analysis to support that.

11 Q. But it gives an indication that an analysis
12 was completed; is that correct?

13 A. No, it just says they propose. It doesn't
14 say what analysis, if any, was done.

15 This could quite simply be looking at a
16 << [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] >>

21 Q. You're aware that Lester Dyck testifies that
22 they did conduct an engineering analysis?

09:54:01 1 A. I believe that's what he said.

2 Q. And that the file was lost in a migration?

3 A. I believe that's also what he stated.

4 Q. Okay. So, Tembec proposed a GBL of

5 <<[REDACTED]>> megawatts?

6 A. Of <<[REDACTED]>>?

7 Q. That was a test. <<[REDACTED]>>. Thank you.

8 A. Did I pass?

9 Q. Flying colors.

10 A. Thank you.

11 Q. And Hydro, BC Hydro disagreed and set the GBL

12 at the higher 14-megawatt GBL?

13 A. Yes, they appeared to have.

14 Q. Okay. So, Tembec proposed a lower GBL and

15 BC Hydro gave them a higher one?

16 A. That is correct.

17 Q. Not to do a tag team, but my proclivity for

18 Excel spreadsheets late at night is less efficient

19 than my colleague, Ms. Zeman. So, with the Tribunal's

20 permission, I believe she might like to ask you a few

21 questions.

22 A. Certainly.

09:55:09 1 BY MS. ZEMAN:

2 Q. Good morning, Mr. Switlishoff.

3 A. Good morning.

4 I'm sorry, your name is?

5 Q. My name is Christa Zeman.

6 A. Good morning, Ms. Zeman.

7 Q. So, I have a few questions for you.

8 So, my colleague, Mr. Douglas, has canvassed
9 the Parties' positions with respect to the GBL set for
10 Tembec. But, in your view, without an EPA,

11 Skookumchuck would have [REDACTED]

12 [REDACTED] >> is that right?

13 A. That's what my analysis has indicated to me,
14 yes.

15 Q. Okay. And you testified yesterday that

16 << [REDACTED]

[REDACTED] >>

18 A. Yes, that's my belief.

19 Q. You also testified that you did not see any
20 analysis from BC Hydro to support Tembec's

21 unsubstantiated claim that << [REDACTED]

22 [REDACTED] >>

09:56:05 1 A. Correct.

2 Q. Could you please turn to Tab 26.

3 A. I'm there.

4 Q. Mr. Douglas just brought us to this document.

5 So, this is again a BC Hydro--sorry, this is
6 Exhibit R-189, and this is a BC Hydro memo dated
7 April 8th, 2009, with the subject line "Tembec
8 Skookumchuck Pulp Operations CBL/GBL/EPA analysis"; is
9 that right?

10 A. It is.

11 Q. Had you seen this document before Mr. Douglas
12 brought it to you?

13 A. Yes, I believe I have.

14 Q. And I believe you cited to it in your Second
15 Report?

16 A. Yes, I believe I have seen it, yes.

17 Q. Can you turn to Page 2, please.

18 A. I'm there.

19 Q. So, you see here in the middle of the
20 document, << [REDACTED]

[REDACTED] >>

22 A. I see that.

09:57:09 1

<< [REDACTED]

[REDACTED]

[REDACTED] >>

4 Q. Okay. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

09:58:23 1 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 Q. Thank you.

6 << [REDACTED]

[REDACTED]

[REDACTED]

9 A. That appears to be the case, yes.

10 Q. Okay. And can you turn to Page 3.

11 A. I'm there.

12 Q. [REDACTED]

[REDACTED]

14 A. Yes.

15 Q. << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19 A. I see that.

20 [REDACTED]

[REDACTED]

[REDACTED]

09:59:28 1 A. I see that.

2 Q. Can you read the last sentence of the second
3 paragraph.

4 A. "The effective delivered price for biomass
5 fuel in 2009 ranges from \$45 to upwards of \$80 per
6 megawatt hour." Sorry, the last sentence is what you
7 asked.

8 Q. Yes, no problem.

9 A. "In short, the fuel cost to make power is
10 higher than the current EPA price for the power."

11 Q. Okay. Do you contend that this is not an
12 analysis carried out by BC Hydro with respect to the
13 << [REDACTED] [REDACTED] >>

14 A. Not a fulsome analysis, no.

15 Q. Not a fulsome but it is an analysis?

16 A. It's an incorrect analysis, so it appears to
17 be called an analysis. It's not what I would call an
18 analysis.

19 Q. So, you disagree with the conclusions of the
20 analysis, but you would agree that it is an analysis?

21 A. I don't see a numerical investigation of
22 these numbers, so these are conclusions that they're

10:00:31 1 drawing, but I don't see a full analysis to support
2 those decisions that the values for their << [REDACTED]
3 [REDACTED] >> has been
4 analyzed in any way. This seems to be a conclusion
5 rather than an analysis.

6 Q. So, you disagree with the inputs and the
7 basis for the inputs?

8 A. The process between the inputs and making
9 these assertions.

10 Q. Okay.

11 A. That's the analysis part.

12 Q. Okay. So, you stated yesterday that you saw
13 no analysis by Tembec to substantiate the claim that
14 the << [REDACTED]

15 A. Correct.

16 Q. Correct.

17 So, Mr. Shor asked you yesterday about
18 documents that Paper Excellence provided in this
19 arbitration pursuant to the Claimant's document
20 requests.

21 Did you review all of the documents that
22 Paper Excellence provided?

10:01:27 1 A. I did.

2 Q. Okay. So, those would be Exhibits R-576
3 through R-589.

4 A. Okay. I'm not certain what the exhibit
5 numbers are.

6 Q. That was mostly for the record. Those are
7 the exhibit numbers of the documents that were
8 provided by Paper Excellence.

9 So, you agreed yesterday that Exhibits R-587
10 through R-589 provided financial data for the < [REDACTED]
11 [REDACTED]>> for Fiscal Years 2008 and 2009?

12 A. I believe those are the correct references.

13 Q. Okay. Do you have the extra documents?

14 MS. ZEMAN: I'm sorry. Do you mind if we
15 take one moment? There are two additional exhibits we
16 need to refer to.

17 PRESIDENT VEEDER: Of course. Actually, we
18 can take more than one moment. Do you want a bit
19 longer?

20 MR. DOUGLAS: Two seconds.

21 PRESIDENT VEEDER: Two seconds.

22 MS. ZEMAN: We just need to distribute them.

10:02:24 1 PRESIDENT VEEDER: Well, you don't mean two
2 seconds. You mean 20 seconds.

3 MS. ZEMAN: Several seconds.

4 (Pause.)

5 BY MS. ZEMAN:

6 Q. I apologize that the documents do not have
7 R-numbers.

8 PRESIDENT VEEDER: Just wait a moment.

9 (Pause.)

10 PRESIDENT VEEDER: Let's resume.

11 BY MS. ZEMAN:

12 Q. Okay. So, my apologies again. The documents
13 do not have exhibit numbers on them. So, the letter
14 on Paper Excellence heading is Exhibit R-576, and the
15 other document I believe is meant to be R-588, but it
16 does not appear to be a complete version of that
17 document.

18 MS. ZEMAN: I'll take a look at that and--

19 THE WITNESS: But you have the Bates Numbers
20 in the bottom right?

21 MS. ZEMAN: Yes, yes.

22 THE WITNESS: At least on R-588.

10:05:29 1 MS. ZEMAN: Yes, yes, you're right.

2 BY MS. ZEMAN:

3 Q. Okay. So, we were discussing Exhibits
4 R-587--oh, no. No, sorry. Yes. This second document
5 is R-588, and that is the full document.

6 So, we were discussing that you agreed
7 yesterday about Exhibits R-587 through R-589 provided

8 << [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]

10 A. They did, partial.

11 Q. Okay. So, can you turn to Exhibit R-576,
12 which is the letter from Paper Excellence.

13 A. I have that.

14 Q. And this is a letter from Paper Excellence
15 regarding the documents they provided for this
16 arbitration?

17 A. Very well. I haven't seen this document
18 before.

19 Q. You haven't seen this document before?

20 A. Well, hang on a second. Is it the cover
21 letter that--yes, okay. It's the cover letter.

22 Q. Yes. Okay.

10:06:25 1 A. Yes, okay. I have.

2 Q. You have reviewed this document?

3 A. I believe I have.

4 Q. Okay. Can you turn to Page 5, please, which
5 is the second to last page. I guess it's Page 4.

6 A. That would make it 4. Thank you.

7 (Pause.)

8 Q. Can you read for me the first three sentences
9 of the first paragraph under italicized Item 3.

10 A. The first three sentences?

11 Q. Yes, please.

12 A. Certainly.

13 "Paper Excellence understands that Tembec

14 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

22 Q. Thank you.

10:07:28 1 Let's take a look at that << [REDACTED]

■ [REDACTED] >> This is at Tab 86, and it is R-587.

3 A. I'm there.

4 Q. One moment. I need to get there.

5 Okay. So, EBITDA stands for earnings before
6 interest, tax, depreciation and amortization; is that
7 correct?

8 A. I believe that's the vernacular.

9 Q. Okay, thank you. And if you turn to Bates
10 165622, this page has a--oh, sorry, I'll wait for you.

11 A. I'm there.

12 Q. Okay. << [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED] >>

17 A. There is.

18 Q. And a "year to date" column.

19 A. There is.

20 Q. << [REDACTED] [REDACTED]

■ [REDACTED]

■ [REDACTED]

10:11:09 1 Q. My apologies.

2 << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]>>

21 MR. SHOR: That's not correct.

22 MS. ZEMAN: Do you disagree with it?

10:12:09 1 MR. SHOR: That's not what he testified. If
2 you refer to the statement, he's talking about the
3 averages for the two halves of the period. It's an
4 average over five years. It's not an annual figure.

5 MR. DOUGLAS: << [REDACTED]
6 [REDACTED] >>

7 THE WITNESS: Thank you.

8 BY MS. ZEMAN:

9 Q. Okay.

10 A. << [REDACTED]
11 [REDACTED] >>

12 Q. Noted.

13 << [REDACTED]
14 [REDACTED] [REDACTED]
15 [REDACTED]
16 [REDACTED] [REDACTED]
17 [REDACTED]
18 [REDACTED] [REDACTED]
19 [REDACTED]
20 [REDACTED] [REDACTED]
21 [REDACTED]
22 [REDACTED] [REDACTED]

10:13:20 1 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

6 Q. Offset costs. Okay.

7 Well, let's go back to R-576 for a moment.

8 This is the Paper Excellence covering letter, the
9 loose-leaf.

10 A. Yes.

11 Q. On the same page we were just at, on Page 4,
12 this letter also says that Paper Excellence has
13 provided excerpts from Skookumchuck's internal
14 financial reports from the relevant timeframe that
15 show the cost of the operating << [REDACTED]
16 [REDACTED] >> is that right?

17 A. I see that. That's correct.

18 Q. << [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

22 Q. Okay. Can you turn to Tab 85.

10:14:34 1 A. I'm there.

2 Q. This is Exhibit R-589.

3 And this is a cost statement?

4 A. It is.

5 Q. So, this would be one of the cost statements
6 that Paper Excellence referred to in its letter?

7 A. It appears to be.

8 Q. Okay. And this is for the period ending
9 September 27, 2008?

10 A. It is.

11 Q. Okay. So, the first page here is a cost
12 statement for << [REDACTED] >> is that correct?

13 A. Yes. It appears to be.

14 Q. Okay. And on the right-hand side there is a
15 column for year to date actual.

16 A. There is.

17 Q. And at the bottom, there is a line for total
18 production costs.

19 A. There is.

20 Q. And that line states that total production
21 costs << [REDACTED] >> for the period ending
22 September 27, 2008, << [REDACTED] >>

10:15:29 1 A. It does.

2 Q. Okay. And on the next page--this is the cost
3 statement for << [REDACTED] >>

4 A. It is.

5 Q. And << [REDACTED] >> would refer to << [REDACTED]
6 [REDACTED] >>

7 A. It would.

8 Q. Okay. And once again we have a "year to
9 date" column on the side?

10 A. We do.

11 Q. "Year to date" actual?

12 A. It does.

13 Q. And at the bottom total production costs of
14 << [REDACTED] >>.

15 A. I can see without the zoom, but thank you.

16 (Laughter.)

17 Q. Okay. And so, this would be a figure that
18 could be << [REDACTED] [REDACTED]
19 [REDACTED] >> is that right?

20 A. That's what that appears to be, yes.

21 Q. Okay. So, the Mill was << [REDACTED]
22 [REDACTED] >>

10:16:24 1 A. That's correct.

2 Q. And was << [REDACTED]
[REDACTED]
[REDACTED] >>

5 A. That was their << [REDACTED] >>

6 Q. Okay. So, again, this shows that << [REDACTED]
7 [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] >>

10 A. That's what this shows, but what this doesn't
11 show is << [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

15 So, once I factored in the value of--and I
16 believe that's Exhibit--one moment, please. Once I
17 found their << [REDACTED] >> from Exhibit
18 C-163--that's the generation spreadsheet--and << [REDACTED]
19 [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

10:18:14 1 [REDACTED]>>

2 So, what this fails to show is the rest of

3 the <<[REDACTED]

4 [REDACTED]>>

5 Q. Okay. Can we go back to Tab 86.

6 A. Yes, I'm there.

7 Q. Which again is Exhibit R-587.

8 A. It is. I believe it is.

9 Q. This is the [REDACTED] once again.

10 A. I'm there.

11 Q. And you see on the first page, the first line

12 item says <<[REDACTED]>>.

13 A. It does.

14 Q. And that is a cost; is that correct?

15 A. That appears to be.

16 Q. Okay. So, it appears that the Mill was

17 assessing its costs in terms of <<[REDACTED]

18 [REDACTED]>>

19 A. I'm not certain what that--if that's an

20 <<[REDACTED] [REDACTED]

21 [REDACTED]>>

22 Q. Okay. But there is a consideration for

10:19:22 1 << [REDACTED] >> you would agree with that?

2 A. There appears to be, yes.

3 Q. Okay.

4 A. So, that could be << [REDACTED] [REDACTED]
5 [REDACTED] [REDACTED] >>.

6 Q. Okay.

7 Let's go to Exhibit R-588, which is the
8 second loose document that we just handed out.

9 A. Yes. I have that.

10 Q. So, this is the second of the two cost
11 statements that Paper Excellence referred to in its
12 letter; is that right?

13 A. Yes, I think it is.

14 Q. And this is for the period ending August 1st,
15 2009?

16 A. It is.

17 Q. And once again, we have the "year to date"
18 actual column on the right-hand side?

19 A. Yes.

20 Q. And the first page lists costs for << [REDACTED]
21 [REDACTED] [REDACTED] >> for the period
22 ending August 1st, 2009 << [REDACTED] >>; is that

10:20:15 1 right?

2 A. Approximately, yes.

3 Q. Okay. And on the second page we again have
4 the cost statement for << [REDACTED] >>, which, as we
5 discussed previously, is << [REDACTED] >>?

6 A. Yes.

7 Q. And [REDACTED]
8 [REDACTED] >>; is that right?

9 A. Primarily the << [REDACTED] >>.

10 Q. Right. Okay. Thank you.

11 A. And then when I combine that again in 2009
12 with the << [REDACTED] data from C--I'm sorry,
13 from C-163, I end up with << [REDACTED]
14 [REDACTED] >>.

15 Q. And this analysis that you've referred to a
16 couple of times over the last little while, you
17 carried that out after these documents were produced;
18 is that correct?

19 A. Yes, I did.

20 Q. So, we don't have your analysis of the
21 benefit of \$3.5 million on the record?

22 A. I don't believe you do.

10:21:29 1 Q. Apart from what you stated to me.

2 A. Just testified to.

3 Q. Okay.

4 A. Correct.

5 Q. Thank you.

6 Yesterday you provided two charts to show
7 that it was << [REDACTED]

8 [REDACTED] >>

9 A. I don't believe that's what I--those graphs
10 show. Those graphs show that << [REDACTED]

11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED] >>

14 Q. Okay. So, just on that point, so [REDACTED]

15 [REDACTED] [REDACTED]
16 [REDACTED] >> that Mr. Lague testifies to?

17 A. I believe that's Mr. Lague's value, yes.

18 Q. Okay. And that's the point at which << [REDACTED]
19 [REDACTED] >>

20 A. According to Mr. Lague. And again, I didn't
21 see any background to substantiate that particular
22 number.

10:22:28 1 Q. Okay. And--

2 A. But--

3 Q. My apologies.

4 So, your understanding of this figure is that

5 at [REDACTED]
[REDACTED]
[REDACTED] >>

8 A. I believe the way Mr. Lague phrased it, it
9 was--the [REDACTED]
[REDACTED]
[REDACTED] >>

12 Q. Right. I think you're correct about that.

13 A. But maybe we should go there.

14 Q. Sure. It's at Paragraph 35 of his statement.

15 A. Yeah, my Paragraph 35 doesn't help me too
16 much.

17 Q. Oh, I'm sorry. It will be pulled up on the
18 screen here.

19 A. Thank you.

20 Q. Can you read the second sentence out loud of
21 Paragraph 35.

22 << [REDACTED]

10:23:58 1 [REDACTED]

2 [REDACTED]

3 [REDACTED]>>

4 Thank you for taking me there.

5 Q. Thank you. No problem.

6 So, for the 1997 EPA to be <<[REDACTED]

7 [REDACTED]>>, we've discussed that the price that

8 Skookumchuck was receiving <<[REDACTED]

9 [REDACTED]>>; is that right?

10 A. I think we covered that.

11 Q. Yes, several times. So, I just wanted to be
12 clear that that's what we're talking about here. This
13 is what Mr. Lague is talking about here when he's

14 saying <<[REDACTED]>>

15 is that correct?

16 A. Yes, that's what he's stating there.

17 Q. Okay.

18 A. I was unable to substantiate that.

19 Q. Yeah. Okay.

20 So, let's go to your charts. These charts

21 are at the final tab of the Claimant's direct

22 examination binder from yesterday. I'm not sure that

10:25:13 1 we have an electronic version to pull up on the
2 screen?

3 A. Okay.

4 MR. SHOR: We could put them up, if you would
5 like.

6 MS. ZEMAN: That would be helpful, thanks.

7 The last tab there, the primary slides.

8 Yeah. Let's start with 2009.

9 Thank you.

10 BY MS. ZEMAN:

11 Q. All right. So, you provided these two charts
12 yesterday, and these charts illustrate your analysis

13 << [REDACTED] >>

14 A. That's correct.

15 Q. Okay. And you prepared these charts,

16 Mr. Switlishoff?

17 A. I did.

18 Q. And the underlying Excel workbook?

19 A. Yes.

20 Q. Do you consider yourself to be an expert in
21 fiber supply?

22 A. No, I do not.

10:26:16 1 Q. Okay. Did you have any assistance in
2 preparing these documents?

3 A. Yes, I did.

4 Q. Who provided you with that assistance?

5 A. Mr. Wayne Mercer.

6 Q. Thank you.

7 So, let's take a look at your chart of 2009
8 data for Skookumchuck which is up on the screen here.
9 You provided a couple of cautions about the data for
10 2009 yesterday.

11 A. Yes, I did.

12 Q. Including that the pulp mill was shut down
13 for two months?

14 A. It was.

15 Q. And that there were an additional two months
16 where the data was unavailable because the company
17 << [REDACTED] >>

18 A. And I believe that's reflected in R-5--in
19 your R-588 which has the period ending August 1st,
20 2009. So, it would have included only data to the end
21 of July.

22 Q. Okay. So, August and September you say they

10:27:16 1 were not available to put in the dataset; right?

2 A. Yes.

3 Q. Sorry, that was a very unclear question.

4 All right. So, can we turn to R-576 once
5 again?

6 A. I'm there.

7 Q. This again is the loose-leaf letter from
8 Paper Excellence.

9 Did you--you stated earlier that you reviewed
10 this document in preparing your charts; is that
11 correct?

12 A. Yes.

13 Q. Can you turn to Page 2, please.

14 A. Yes.

15 Q. Can you read the italicized sentence at
16 Letter A at the top of the page.

17 << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] >>

22 Q. And this was the Claimant's document request?

10:29:01 1 So, the Mill's << [REDACTED]

2 [REDACTED] >>

3 A. Yes, that appears to be the case.

4 Q. Okay. But, in your analysis you made some

5 adjustments to the data in 2009 on the basis that the

6 << [REDACTED] >>

7 A. No, I didn't make any adjustments. I just

8 didn't report it.

9 Q. Didn't report it. But you made some

10 extrapolations?

11 A. Not on the graph.

12 Q. On the graph.

13 A. I just note that if one wanted to make an

14 extrapolation--

15 Q. That's how you would do it.

16 A. That's the extrapolation that would be made.

17 But I didn't do any changes to the data or--and that

18 extrapolation is not reflected on the graph.

19 Q. Okay.

20 So, let's go back to your charts. You

21 mentioned that Mr. Wayne Mercer, who was the Fibre

22 Supply Manager at Skookumchuck, provided you with

10:29:52 1 quantities for << [REDACTED] >> is that right?

2 A. Yes, he did.

3 Q. And that's the quantity that's on the far
4 left of your chart here?

5 A. It is.

6 Q. And the prices.

7 So, just to back up, make sure we're all on
8 the same page here, what you have done here is you've
9 listed << [REDACTED] >> for
10 Skookumchuck?

11 A. That's correct.

12 Q. From << [REDACTED] [REDACTED] >> from left to
13 right; is that correct?

14 A. That's correct.

15 Q. And these suppliers you took from the
16 documents that Paper Excellence provided?

17 A. That's right. The references are provided in
18 the bottom right-hand corner.

19 Q. Okay. Except for the << [REDACTED] >> figure.

20 A. Correct.

21 Q. And you described [REDACTED] ■
■ [REDACTED] >> is that

10:30:39 1 correct?

2 A. Yes, I do.

3 Q. So, << [REDACTED] [REDACTED] [REDACTED]

4 [REDACTED]>>

5 A. They are.

6 Q. They are.

7 And you stated they are an << [REDACTED]

8 [REDACTED]>> correct?

9 A. I did.

10 Q. Would you say that that is a matter of

11 accounting?

12 A. I think that's a reality.

13 Sorry, a matter of accounting in what sense?

14 Q. So, << [REDACTED] [REDACTED] [REDACTED]

15 [REDACTED]>> correct?

16 A. Correct.

17 Q. And mills pay for << [REDACTED]>> on the basis of

18 weight.

19 A. Correct.

20 Q. And so, some cost associated with the weight

21 of the << [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]>> is

10:31:37 1 that right?

2 A. That follows.

3 Q. Okay. So, it's possible that a mill might

4 account for that cost << [REDACTED]

5 [REDACTED]>>

6 A. I guess it's possible. But it, if anything,

7 perhaps would be a negative cost adder in that without

8 an alternative to deal << [REDACTED]

[REDACTED]

[REDACTED] >>

11 Q. Right. So, it's also possible that a mill

12 might account for that cost [REDACTED]

[REDACTED]

[REDACTED]

15 A. Or it could also go negative if it said, oh,

16 hey, we had to do something with << [REDACTED]

[REDACTED] >> So,

18 that's a further almost, well, a << [REDACTED]>>

19 We wouldn't call it a << [REDACTED]

20 [REDACTED]>>

21 Q. Okay. So, you've assumed for the purposes of

22 your analysis that there is << [REDACTED]

10:32:42 1 [REDACTED]>> is that correct?

2 A. That's correct.

3 Q. Okay, thanks.

4 Were there any assumptions made for the

5 <<[REDACTED]>>

6 A. In discussion with Mr. Mercer, he indicated
7 that the <<[REDACTED]>>.

8 We decided to be more conservative and chose 3 percent
9 as a number that would be difficult to argue with.

10 Q. And <<[REDACTED]>>
11 [REDACTED]>>

12 A. That's right.

13 Q. Okay. And so, the figures that you've
14 arrived to here are <<[REDACTED]>>
15 [REDACTED]
16 [REDACTED]>>

17 A. I believe that's what they represent, yes.

18 Q. Okay. Now, does that represent the total
19 <<[REDACTED]>> that was at the Mill?

20 A. No. Again, that's just a percent. Oh, that
21 would have been generated from the <<[REDACTED]>>

22 Q. Yes.

10:33:49 1 A. I believe that's what that is intended to
2 represent. Whether it's actual or not I couldn't
3 confirm that.

4 Q. Okay. Is it possible for << [REDACTED]
5 [REDACTED]
6 [REDACTED] >>

7 A. I think that mill--pulp mills << [REDACTED]
8 [REDACTED] >> in order to not do that. That that is, in fact,
9 what causes << [REDACTED]
10 [REDACTED] >>

11 Q. So, they try to take out all of the << [REDACTED]
12 [REDACTED] >>

13 A. The << [REDACTED] >> and, from my understanding,
14 there is a component of << [REDACTED]
15 [REDACTED] >>

16 Q. Okay. So, this volume represents all of the
17 [REDACTED]
18 [REDACTED] >

19 A. That's my--a representative amount, yes.

20 Q. Okay. And those all would have gone to the
21 << [REDACTED] >>

22 A. Yes, that's my understanding.

10:34:53 1 Q. Okay. Are you aware of any << [REDACTED]
2 [REDACTED]>> in the relevant time
3 period?

4 A. Amongst who? Between whom?

5 Q. Possible << [REDACTED]>> between Skookumchuck of the
6 << [REDACTED] [REDACTED] [REDACTED]
7 [REDACTED]>>

8 A. It's my understanding that the << [REDACTED]
9 [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

12 Q. Okay. Thank you.

13 PRESIDENT VEEDER: Would this be convenient
14 to have a mid-morning break?

15 MS. ZEMAN: I just have about two or three
16 more questions, and then we'll be done with this line.

17 COURT REPORTER: That's fine.

18 PRESIDENT VEEDER: Okay. Please proceed.

19 MS. ZEMAN: Thanks, David.

20 BY MS. ZEMAN:

21 Q. Can we turn to the 2008 chart.

22 Okay. So, we've established that you've

10:36:02 1 listed the suppliers << [REDACTED] >>

2 A. Yes.

3 Q. But I notice in 2008 that one supplier seems
4 to be missing from your chart.

5 A. And that is?

6 Q. It is << [REDACTED] >> We can take a look at
7 R-586.

8 Do you have your direct cross-examination
9 binder here?

10 A. Yes, I do.

11 Q. It's just one tab before your charts.

12 A. Very good.

13 Q. Okay. So, on your chart you list the
14 reference pages as 165618 and 165619?

15 A. I do.

16 Q. Okay. So, if we can turn to those, you will
17 note that midway through << [REDACTED] >>--I'm
18 on 165618--there is a line for << [REDACTED] >>.

19 A. Yes.

20 Q. And if you follow that all the way across to
21 the year to date values, you will see that << [REDACTED]

22 [REDACTED] >>

10:37:24 1 A. Yes.

2 Q. At a << [REDACTED] >>.

3 A. Yes.

4 Q. And a << [REDACTED] >>.

5 A. Yes.

6 Q. Making a << [REDACTED]

7 [REDACTED] >>; is that correct?

8 A. Yes.

9 Q. And that appears to be, from this line here,
10 the << [REDACTED] [REDACTED] >> in that period?

11 A. Yes, it would.

12 Q. Okay. But it's not on your 2008 chart?

13 A. Yeah, it << [REDACTED] ■

14 [REDACTED] [REDACTED]

■ [REDACTED]

■ [REDACTED]

17 Q. Well, the << [REDACTED] >>, doesn't it?

18 A. It sure does, but << [REDACTED]

19 [REDACTED] >>.

20 Q. I note that you have a line item for << [REDACTED]

21 [REDACTED]

■ [REDACTED] >>

10:38:38 1 A. It does.

2 Q. And if you look at R-586, the << [REDACTED]
3 [REDACTED] >>

4 A. Yeah, and it appeared << [REDACTED] [REDACTED]
5 [REDACTED] >>

6 column that would have shown the highest marginal cost
7 << [REDACTED] I agree.

8 Q. Okay. Thank you. Those are all the
9 questions that I have.

10 PRESIDENT VEEDER: Let's take a break now.
11 Fifteen minutes. We will come back in 15 minutes.

12 THE WITNESS: Thank you, Mr. President.

13 PRESIDENT VEEDER: Please don't discuss the
14 case or your testimony.

15 (Brief recess.)

16 PRESIDENT VEEDER: Let's resume.

17 MR. DOUGLAS: Thank you very much.

18 Are we still in closed session,
19 Mr. President?

20 PRESIDENT VEEDER: We are.

21 MR. DOUGLAS: Great.

22 BY MR. DOUGLAS:

10:59:11 1 Q. Howe Sound Port Mellon Mill, also known as

2 HSPP--

3 A. Yes.

4 Q. Or we can just call it Howe Sound?

5 A. Yes, we can.

6 Q. It consists of three main parts: A kraft
7 mill, three thermomechanical pulping mill lines and a
8 paper machine?

9 A. Yes, it does.

10 Q. Okay. And a thermomechanical pulping line is
11 different than a kraft mill line?

12 A. Very much.

13 Q. And if I understand this correctly, which I
14 may not, a thermomechanical pulp line, rather than
15 using chemicals to pulp, actually uses machines to
16 grind the wood chips down into a pulp?

17 A. I believe it also uses chemicals, but
18 primarily a mechanical process as opposed to a
19 chemical process.

20 Q. Maybe that's where the term "grind to a pulp"
21 came from? That's not a test.

22 PRESIDENT VEEDER: It's beyond your

11:00:09 1 expertise.

2 BY MR. DOUGLAS:

3 Q. Yeah, it's beyond your expertise?

4 A. Thank you, Mr. President.

5 BY MR. DOUGLAS:

6 Q. Does--

7 A. But I note that "hog" is a horizontal
8 grinder.

9 Q. Does the thermomechanical pulp lines at Howe
10 Sound contribute to electricity generation at the
11 Mill?

12 A. Sorry, does the thermomechanical?

13 Q. Uh-huh.

14 A. No, it does not.

15 Q. So it consumes electricity?

16 A. It does.

17 Q. Okay. Does the Celgar Mill have a
18 thermomechanical pulp line?

19 A. No, it does not.

20 Q. Okay. And the Howe Sound Mill Load, because
21 of the thermomechanical pulp line, would be larger
22 than the Claimant's Mill?

11:00:59 1 A. Depending on the size, but, yes, it is as a
2 matter of fact.

3 Q. Mr. Fred Fominoff, who is the general manager
4 at Howe Sound Pulp and Paper, has filed a Witness
5 Statement in this arbitration?

6 A. Yes, he has.

7 Q. He testifies that the Mill requires large
8 amounts of electricity to run primarily because of the
9 thermomechanical pulp line?

10 A. He probably does.

11 Q. And the Mill's load is, he states,
12 <[REDACTED]>-megawatt hours--or megawatts? Pardon me.

13 A. That sounds right.

14 Q. Okay. And then this is obviously larger
15 than--I know depending on which year you measure the
16 Celgar Mill Load, but it would be larger than the
17 current mill load, which is about <[REDACTED]>-megawatt?

18 A. In all years.

19 Q. Okay. When setting a--well, BC Hydro has
20 signed an EPA with Howe Sound?

21 A. They have.

22 Q. And to set that EPA, they negotiated a GBL?

11:01:58 1 A. It did.

2 Q. And to set that GBL, they used a << [REDACTED] >>
3 baseline period?

4 A. It did.

5 Q. Beginning in August of 2006?

6 A. Yes, that's my recollection.

7 Q. And Mr. Fominoff testifies that the << [REDACTED]
8 [REDACTED] [REDACTED] [REDACTED]
9 [REDACTED] >>

10 A. But you'll take me there. I believe that to
11 be true.

12 Q. Sure. If you want to look at Paragraph 15 of
13 his. Um, and I actually am concerned that the version
14 you're about to look at is probably heavily redacted.
15 So maybe it might be easiest if we just pull it up on
16 the screen.

17 A. That would be easiest.

18 MR. DOUGLAS: Fred Fominoff.

19 THE WITNESS: But maybe not faster.

20 Paragraph 15, was it?

21 MR. DOUGLAS: Yes.

22 Thank you very much.

11:03:15 1 THE WITNESS: Thank you. I'm there.

2 BY MR. DOUGLAS:

3 Q. Okay. He states that between 2005 and 2009
4 electricity generation at Howe Sound had been

5 << [REDACTED]
6 [REDACTED] >>

7 A. << [REDACTED] >> yes. That's what I was
8 looking for.

9 Q. And by [REDACTED] >> meaning that there
10 << [REDACTED] >>

11 A. Yes, that's correct.

12 Q. So production of steam is << [REDACTED] >>

13 A. Their << [REDACTED]
14 [REDACTED] >>

15 Q. One of the major [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 A. I believe that was one of the problems he
19 mentioned.

20 Q. Okay. And he testifies that the << [REDACTED]
21 [REDACTED]
22 [REDACTED]

11:04:06 1 A. Yes, I believe that's his evidence.

2 Q. And so the Mill was << [REDACTED]

3 [REDACTED]>>

4 A. That's what he states.

5 Q. Okay. And the Parties negotiated the GBL in

6 2009?

7 A. They did.

8 Q. And Howe Sound proposed that << [REDACTED]

9 [REDACTED] [REDACTED]>>

10 A. I believe they did.

11 Q. And Howe Sound's generation << [REDACTED] [REDACTED]

12 [REDACTED]>>

13 A. I believe that's correct.

14 Q. << [REDACTED] [REDACTED]

15 [REDACTED] [REDACTED]>>

16 A. Your math is probably accurate.

17 Q. But BC Hydro did not agree to << [REDACTED]>>-megawatt

18 hours?

19 A. It did not.

20 Q. Because it believed that to be too low?

21 A. I believe that's the case. Yes, I believe

22 that to be true.

11:05:11 1 Q. So the Parties ultimately agreed not on Howe
2 Sound's proposed <<[REDACTED]>>, but on a <<[REDACTED]>>-gigawatt hour
3 of GBL?

4 A. Sorry. What GBL did they agree on?

5 Q. <<[REDACTED]>>-gigawatt hours.

6 A. I don't know if they agreed on that number.
7 I think they agreed on something north of <<[REDACTED]>>, and
8 that was later adjusted. I think the GBL quoted in
9 the EPA is <<[REDACTED]>>?

10 Q. I'm being told <<[REDACTED]>>.

11 A. Thank you for correcting my error.

12 Q. <<[REDACTED]>>
13 [REDACTED]>>

14 A. Yes, I believe that's the case.

15 Q. Okay.

16 A. Rather, <<[REDACTED] [REDACTED]>>

17 Q. Sure. And so coming back to the
18 <<[REDACTED]>>-gigawatt hours, if we divided that by <<[REDACTED]>>
19 hours of operation, we'd get about <<[REDACTED]>> megawatt
20 hours?

21 A. Megawatts?

22 Q. Megawatts, thank you.

11:06:31 1 Is that correct?

2 A. I'll trust your math.

3 Q. So by using the << [REDACTED] >> when
4 setting the GBL, the Howe Sound GBL was set higher
5 than it would have been using << [REDACTED]
6 [REDACTED] >>

7 A. Yes, I believe that's correct.

8 Q. Okay. Could you turn to Tab 87 for me,
9 please. This is R-67.

10 A. I'm there.

11 Q. This is an email from Mr. Janzen, the key
12 accounts manager for Howe Sound, to Mr. Dyck?

13 A. I see that.

14 Q. In it he describes the reasons for choosing
15 << [REDACTED] >> as the starting point for the GBL
16 establishment period.

17 A. I see that.

18 Q. And the first one is that << [REDACTED]
19 [REDACTED] >>

20 A. It did.

21 Q. And the second is << [REDACTED]
22 [REDACTED] >>

11:07:37 1 A. Whose <<[REDACTED]>>?

2 Q. Howe Sound's <<[REDACTED]>>

3 A. Okay.

4 Q. That was the second reason?

5 A. That's what it states.

6 Q. And the third reason is that [REDACTED]

7 [REDACTED]>> gave the GBL--I'm

8 quoting here--"<<[REDACTED]

9 [REDACTED]

[REDACTED]

11 A. Well, those are not <<[REDACTED]

12 [REDACTED]

[REDACTED]>> -- I see this e-mail is dated

14 November 2010, so I'm at odds to say that's the [REDACTED]

[REDACTED]

[REDACTED]>> This is 2010.

17 I'm not certain what--it is <<[REDACTED],

18 [REDACTED]

[REDACTED]

20 Q. Okay. It's the <<[REDACTED]>> period they used

21 to set the GBL?

22 A. Yes, that's correct.

11:09:00 1 Q. Okay. So there was at least an analysis
2 between the Parties to determine the data that would
3 reflect normal operations at the Mill?

4 A. This doesn't look like an analysis to me.

5 Q. Okay.

6 A. This looks like three justifications. But I
7 really don't see any analysis behind this.

8 Q. Okay. The Below Load Access Percentage is a
9 metric of your own creation?

10 A. Yes, I'll go with you there.

11 Q. It measures the percentage of the pulp mill's
12 electric load that could be met by self-generation
13 that the pulp mill is permitted to meet with embedded
14 cost of electricity while it is selling self-generated
15 electricity?

16 A. Yes, that sounds right.

17 Q. Paragraph 96 of your First Report.

18 A. Thank you.

19 Q. You use this as a way of measuring the
20 effects of discrimination?

21 A. It's the effects of, yes, okay. I can go
22 with you there.

11:10:03 1 Q. And you conclude that Celgar has been
2 assigned a GBL--pardon me. I'll rephrase.

3 Actually, if you want to turn to
4 Paragraph 215 of your First Report.

5 A. I'm there.

6 Q. You state--you conclude, rather, that, if
7 Celgar had been assigned a GBL consistent with the
8 best treatment BC Hydro currently affords other NBSK
9 pulp mills, then Celgar would have a GBL of <<[REDACTED]>>
10 gigawatt hours per year?

11 A. I see that.

12 Q. Which, in your view, would provide Celgar
13 access to below-load embedded cost utility electricity
14 equivalent to Howe Sound's below-load access
15 percentage of <<[REDACTED]>> percent?

16 A. I state that.

17 Q. And so instead of having a GBL of
18 [REDACTED]-gigawatt hours, Celgar would have GBL of
19 <<[REDACTED]>>-gigawatt hours?

20 A. That's right.

21 Q. And Celgar's annual GBL of <[REDACTED]>-gigawatt hours
22 is a defined term in its EPA with BC Hydro?

11:11:01 1 A. Yes, I believe it is.

2 Q. And the difference between the <<[REDACTED]>>-gigawatt
3 hours and the <[REDACTED]>-gigawatt hours is <<[REDACTED]>>-gigawatt
4 hours of energy per year?

5 A. That sounds right.

6 Q. And this is energy that you allege BC Hydro
7 should have procured under the Call in order to treat
8 the Celgar Mill favorably?

9 A. I don't think I've alleged that.

10 Q. But you allege that this is the GBL that
11 BC Hydro ought to have given the Claimant in order to
12 treat the Celgar Mill favorably?

13 A. No. To treat it equivalently.

14 Q. Okay. In order to give it the same treatment
15 as Howe Sound?

16 A. In the establishment of its GBL, yes.

17 Q. In order to remove the discriminatory
18 effects?

19 A. Yes.

20 Q. Okay. So in order to remove the
21 discriminatory effects of the <[REDACTED]>-gigawatt-hour GBL,
22 the GBL should have been set at <<[REDACTED]>>-gigawatt hours?

11:12:04 1 A. To have the same treatment as Howe Sound.

2 Q. Okay. And that would be the GBL in the EPA?

3 A. I'm not sure whether it would be transferred
4 to the EPA. I'm not drawing a parallel between the
5 GBL in the EPA and the GBL that BC Hydro signed.
6 Presumably it would have gotten there, but I don't
7 know if that conclusion is immediately--if I can reach
8 that conclusion immediately.

9 Q. The <[REDACTED]>-gigawatt GBL was the GBL for the EPA?

10 A. It was.

11 Q. So when you say that the GBL should have been
12 <<[REDACTED]>>-gigawatt hours, you're suggesting that should be
13 the GBL for the EPA?

14 A. I'm suggesting that should be the GBL. If
15 that was nominated into the EPA that would--then it
16 would appear there, yes. But if the GBL--I think the
17 proponent had to enter the GBL assigned to it by
18 BC Hydro into the EPA information sheet. So, if that
19 was the Application to the EPA. So if that was what
20 BC Hydro would have assigned to it, I would think
21 that's what Celgar would have entered.

22 Q. Okay. Prior to its EPA with BC Hydro, the

11:13:55 1 Claimant was using its self-generation largely to meet
2 its own load?

3 A. With some sales, yes.

4 Q. Okay. And its load roughly at the time was
5 about <[REDACTED]>-gigawatt hours?

6 A. In 2007 it was.

7 Q. Okay. So with a GBL of <<[REDACTED]>>-gigawatt hours,
8 Celgar would be--pardon me. I'll rephrase.

9 With a GBL of <<[REDACTED]>>-gigawatt hours, if it's
10 bid into the Call, Celgar would be proposing that
11 BC Hydro procure electricity above that amount?

12 A. I think that would be--the <<[REDACTED]>> would be a
13 self-supply obligation. I'm not certain what Celgar
14 would be.

15 Q. So they would be free to sell above that
16 amount?

17 A. That's how I understand the GBL works. The
18 GBL is the self-supply obligation.

19 Q. And with the amount between <<[REDACTED]>> and 349,
20 which is their mill load, Celgar would be buying power
21 as replacement cost in that range?

22 A. That would be my understanding.

11:15:14 1 Q. Okay. So Celgar would be buying an increased
2 amount of power from its utility, FortisBC, than it
3 had been in 2007?

4 A. That would be--in 2007? If it had a lower
5 GBL?

6 Q. Uh-huh.

7 A. No, I don't think it would have in 2007.

8 Q. 2008?

9 A. Nor in 2008.

10 Q. Sorry. I'm just--with the GBL lower to
11 <<[REDACTED]>>--and we've just established that that's your
12 claim--they would be able to sell above that amount.
13 And then I asked you whether they would be able to
14 purchase electricity from FortisBC, then, to replace
15 what they sell above that amount?

16 A. If that was their self-supply obligation,
17 they would have to purchase the rest to serve their
18 load. I would agree with that.

19 Q. And in 2007 they were predominantly
20 self-supplying their own mill needs with their own
21 electricity?

22 A. They made some significant purchases from

11:16:11 1 Fortis as well to supply their load.

2 Q. Those figures bring the <[REDACTED]> down to about
3 <[REDACTED]>?

4 A. I believe it's <[REDACTED]>.

5 Q. Okay. So, again, between <<[REDACTED]>> to <[REDACTED]>, there
6 would be purchases of electricity, where before they
7 were using that amount to self-supply?

8 A. Yes, I think that's how the principle is
9 intended to operate.

10 Q. So there would be increased purchases of
11 electricity from their utility, FortisBC?

12 A. Yes. I think that's correct.

13 Q. Okay. You confirm in your Report that
14 G-38-01 prohibits increased access to utility
15 electricity to facilitate sales by a self-generating
16 customer?

17 A. That's what G-38-01 states.

18 Q. That's at Paragraph 167 of your First Report?

19 A. Yes. I think that's what I've just agreed
20 to.

21 Q. So your proposal for a below-load access
22 which would result in a <<[REDACTED]>>-gigawatt-hour would be

11:17:16 1 contrary to G-38-01 as you understand it?

2 A. Depending on when the baseline was set for
3 G-38-01, if it was the--if 2001 was the baseline year,
4 that may not be the case. If 2006 was the baseline
5 year, that might not be the case. But the year you've
6 chosen, yes, that does appear that that would be
7 increased purchases.

8 Q. So what you're saying is that the Claimant,
9 if it used 2001 as a baseline year, that's what
10 G-38-01 stands for?

11 A. I think it could be interpreted that way,
12 yes.

13 Q. Did BC Hydro set any GBL based on data in
14 2001 during the Bioenergy Call for Power Phase I?

15 A. Not for the Bioenergy Call.

16 Q. Okay. In your Below Load Access Percentage
17 that led to <<[REDACTED]>>-gigawatt hours, would that be
18 reflective of what the Claimant was generating in
19 2001?

20 A. I'd have to check the data.

21 Q. Why don't we do that. Why don't we look at
22 Reply Memorial Paragraph 536. It is Figure 35.

11:19:02 1 PRESIDENT VEEDER: That doesn't look right.
2 MR. DOUGLAS: I'm sorry.
3 PRESIDENT VEEDER: Figure 35?
4 MR. DOUGLAS: Oh, Figure 31. My apologies.
5 PRESIDENT VEEDER: Page 265.
6 THE WITNESS: I'm not certain I have the
7 Reply Memorial in front of me.
8 MR. DOUGLAS: I'm trying to bring up an
9 unredacted version for you on the screen. My
10 apologies. Give us just one moment.
11 THE WITNESS: Where did you take me to? I'm
12 sorry.
13 MR. DOUGLAS: Figure 35, please.
14 THE WITNESS: On page?
15 ARBITRATOR DOUGLAS: 31.
16 MR. DOUGLAS: Thank you, Professor Douglas.
17 THE WITNESS: I'm sorry, Professor Douglas, I
18 didn't catch that.
19 BY MR. DOUGLAS:
20 Q. That's Figure 31.
21 A. I have Figure 31. I'm looking for the page.
22 Q. Was it Page 261?

11:20:07 1 A. Thank you.

2 PRESIDENT VEEDER: 265.

3 MR. DOUGLAS: I'm all over the place today.

4 My apologies.

5 PRESIDENT VEEDER: We're doing the same

6 thing. Don't worry.

7 MR. DOUGLAS: Okay.

8 THE WITNESS: I am there.

9 MR. DOUGLAS: I am not. Give me one moment,
10 please.

11 Here we go. Now it's up on the screen.

12 BY MR. DOUGLAS:

13 Q. You see under Line 5, "Order G-38-01," using
14 2001 baseline year, a GBL is 186.1?

15 A. Yes, it is.

16 Q. So using your BLAP Model, on a percentage of
17 <<[REDACTED]>>-gigawatt hours, that is still
18 lower than what was being generated, by your
19 calculation, in 2001?

20 A. It is.

21 Q. So even if G-38-01 mandated that 2001 should
22 be used as the year to set a baseline, your proposed

11:21:31 1 Below Load Access Percentage that leads to this figure
2 would be contrary to the Order?

3 A. I don't think I claim that it was going to be
4 consistent with the Order. My assertion was to be
5 equivalent to the treatment afforded to Howe Sound.

6 Q. Could you turn to Paragraph 94 of your First
7 Report, please?

8 A. I'm there.

9 Q. When you compare the treatment between mills,
10 you assessed whether the treatment was consistent with
11 the Order G-38-01?

12 A. Yes, I did.

13 Q. So your proposed percentage, then, and the
14 way the BLAP is used results in treatment that is
15 inconsistent with G-38-01?

16 A. In that one comparison, yes, it would appear.

17 Q. Okay. Thank you.

18 MR. DOUGLAS: Those are my questions,
19 Mr. President.

20 PRESIDENT VEEDER: Thank you very much.

21 Redirect?

22 MR. SHOR: Please.

11:22:34 1

REDIRECT EXAMINATION

2 BY MR. SHOR:

3 Q. Good morning, Mr. Switlishoff.

4 A. Good morning.

5 Q. You were asked if the BLAP measure was a
6 metric of your own invention. Did you rely on any
7 ideas for that metric?

8 A. Yes. Actually, in going through the
9 information, documents, I found--I found a converse to
10 that, and that led me to the idea. And it was found
11 in discussion, e-mail discussion between Ms. Champion
12 and Mr. Dyck found at C-94, where Ms. Champion
13 inquires as to the level of self-sufficiency of each
14 of the mills that were in--that bid into the EPA, I
15 believe, is the--is what her question--the selection
16 of mills that she referred to, and that level of
17 self-sufficiency rang with me. And I looked at the
18 remainder, what do they do with the remainder of their
19 electricity that they're not being used to become
20 self-sufficient. So, that was the genesis of my
21 thought process on that.

22 Q. And the Jennifer Champion you referred to was

11:24:06 1 Jennifer Champion who worked at the Minister of
2 Energy?

3 A. I believe that's the same.

4 Q. And Mr. Dyck was Lester Dyck, who was at
5 BC Hydro and responsible for setting GBLs?

6 A. That's also correct.

7 Q. Now, could we pull up Exhibit R-376, please.
8 just the first page.

9 Mr. Douglas referred you to this submission
10 by Celgar in a BCUC proceeding to suggest that Celgar
11 understood that prices under the as-yet unapproved
12 and, thus, unavailable BCUC Rate Rider would remain
13 low for five years.

14 I'm going to refer you to Page 20,
15 Lines 17-20 of that document. And I'd like to you
16 read this carefully and pay particular attention to
17 the words "up to" in front of "five years."

18 Do you see that language?

19 A. I see that.

20 Q. Was the evidence being referred to crystal
21 ball-type evidence that market prices were going to be
22 remain low for the foreseeable future, or was it

11:25:07 1 evidence that fixed price contracts of up to
2 five years duration could have been purchased at that
3 time?

4 A. Would you like me to read that out loud?

5 Q. No. I'd like you to answer the question, if
6 you could. Do you want me to repeat the question?

7 A. No. I believe the question was, was it
8 crystal ball or was it firm contracts? And to my
9 knowledge, there were no five-year contract prices
10 offered as evidence.

11 Q. Mr. Douglas, in his questioning, asserted
12 that BC Hydro only wanted to incentivize new and
13 incremental generation, and then he suggested that
14 Celgar's Blue Goose Project did not need an incentive
15 because Mercer had decided to proceed on its own.

16 Do you recall those questions?

17 A. Yes, I do.

18 Q. Does the GBL concept, which BC Hydro uses to
19 distinguish between new and old generation, ask
20 whether proposed new generation would have been built
21 without an EPA, or it is sufficient that it just be
22 new?

11:26:13 1 A. I believe it is just sufficient that it be
2 new.

3 Q. What about BC Hydro's load displacement
4 agreements? To get a load displacement agreement to
5 install new generation, must a proponent prove that it
6 would not move forward with a project on its own?

7 A. For load displacement agreements?

8 Q. Yes.

9 A. I believe for BC Hydro that is the case, that
10 they require an incentive.

11 Q. They require the proponent to show that the
12 Project would be uneconomic on its own?

13 A. I'm not certain what the rules of BC Hydro's
14 LDA Applications.

15 Q. Is BC Hydro buying energy and load
16 displacement services, or is it dispensing subsidies
17 in these types of agreements?

18 A. Is it buying load displacement services or
19 dispensing subsidies?

20 Q. Is it buying energy and EPAs and load
21 displacement services and load displacement
22 agreements, or is it dispensing subsidies?

11:27:19 1 A. It all depends on the perspective, quite
2 frankly. It purports to be buying load displacement
3 services.

4 Q. BC Hydro doesn't purport to be providing
5 subsidies?

6 A. Correct. I don't think that they do
7 subsidies. In fact, they try not to subsidize.

8 Q. Now, there was some discussion about
9 Order G-38-01 versus Order G-48-09. Mr. Douglas asked
10 you a series of questions suggesting that
11 Order G-48-09 didn't afford Celgar different treatment
12 because it opened the door for Celgar to request a
13 GBL. Do you recall those questions?

14 A. I do.

15 Q. What did Order G-38-01 specifically direct
16 BC Hydro to do?

17 A. To attempt to put a baseline--put in a
18 baseline for customers to ensure they didn't purchase
19 increased amount of power on a historical basis to
20 then resell.

21 Q. And did Order G-48-09 include any directive
22 compelling FortisBC to establish similar baselines?

11:28:28 1 A. No, not at all. I don't think it did at all.

2 Q. Now, after Order G-48-09, when Celgar was
3 desperate to remove the net-of-load requirement and
4 seeking to have the BCUC establish a FortisBC GBL for
5 Celgar, Mr. Douglas pointed out that Celgar had
6 written the Commission saying nice things about the
7 adequacy of BC Hydro's GBL Approach. And then he
8 contrasted that with the bad things you have to say.

9 Was your analysis based on information that
10 was not available to Celgar?

11 MR. DOUGLAS: Mr. President, sorry, could we
12 maybe encourage a few more open-type questions without
13 so much emphasis on how Mr. Douglas is bad and -- or
14 saying there is -- rather sort of leading the Witness
15 to a particular conclusion of the questions being
16 asked.

17 MR. SHOR: The question is, was there
18 different evidence available?

19 PRESIDENT VEEDER: We're not going to rule
20 out leading questions in an international arbitration,
21 but they obviously lead to answers which carry much
22 less weight than if it was a more open question. So,

11:29:31 1 try and keep them open, if you can. The good and bad
2 does seem to indicate a result.

3 MR. SHOR: I'm happy to pull up the document,
4 and we can look at actual language. I was just trying
5 to save some time.

6 THE WITNESS: Could we pull up the document?

7 BY MR. SHOR:

8 Q. Okay. It is R-280, at Pages 10 and 11. Now,
9 at the very bottom, Zellstoff--can you highlight the
10 Paragraph 2.2?

11 I think this is the language he referred to
12 as from Celgar, and do you recall your testimony about
13 the advocacy of BC Hydro's GBL methodology?

14 A. Yeah. I had significantly more data to work
15 from than these--than what Zellstoff Celgar would have
16 had in making these determinations.

17 Q. What different data did you have?

18 A. I had significant amounts of data to -- of
19 communications to look through at how BC Hydro
20 purportedly set the GBLs for the different--between
21 itself and its self-generating customers.

22 Q. So, would Celgar have had any information

11:31:14 1 about how GBLs were set for anyone other than Celgar?

2 A. Absolutely not. I don't think it even--well,
3 it was nontransparent. There was no way to determine
4 how that--how those GBLs were set at the time, and
5 even sometimes retrospectively.

6 Q. I'd like to turn now to Order G-156-10. That
7 was the proceeding following G-48-09 in which Celgar
8 was seeking a GBL from the BCUC.

9 Do you recall that?

10 A. That was the cost-of-service proceeding?

11 Q. Can we pull up Page 101 of the Decision, the
12 fourth paragraph. I think Mr. Douglas asked you
13 whether Celgar requested reconsideration of G-48-09.

14 A. Of G-48-09?

15 Q. Yes. And I want to highlight the language
16 here. Could you read this paragraph?

17 A. "BC Hydro replies that the CEA does not
18 affect the Commission's discretion in relation to the
19 matters raised by the Celgar GBL Application.
20 BC Hydro submits that Celgar made its arguments in the
21 proceeding to review the PPA amendment application,
22 and in BC Hydro's view, nothing material has changed

11:32:41 1 since G-48-09 was issued. There are, therefore, no
2 grounds for reconsideration."

3 Q. And could we turn to the next page, the top
4 half?

5 PRESIDENT VEEDER: Just give us the page
6 numbers again.

7 MR. SHOR: I'm sorry. It's page 102, top
8 half.

9 THE WITNESS: "Celgar proposes a revision to
10 Section 2.1 of the BC Hydro PPA as follows: Item (b),
11 shall not be sold to any FortisBC customer that is
12 self-supplying its load requirement that has been
13 designated to be served by FortisBC."

14 BY MR. SHOR:

15 Q. In your view, was Celgar, in this proceeding,
16 requesting reconsideration of G-48-09 and a revisiting
17 of the amendment to the PPA?

18 A. That's what it would appear, yes.

19 Q. Now, you mentioned that G-38-01 allowed
20 self-generators access to BC Hydro electricity for
21 arbitrage purposes as long as they do not increase
22 their purchases above historical levels.

11:33:54 1 In the G-156-10 proceeding, where Celgar was
2 seeking a GBL from Fortis, what did the BCUC have to
3 say about whether Celgar too could have a GBL that
4 maintained its historical access to electricity
5 supplied by Fortis, including BC Hydro PPA Power,
6 which had historically--which it had historically
7 consumed?

8 And maybe if we pull up Page 103, second
9 paragraph, that will help you answer the question.

10 A. So the Commission here is--the Commission
11 Panel is saying that what Celgar is proposing is
12 expressly prohibited as long as the order is in full
13 force and effect, and as long as the PPA between
14 Fortis and Hydro is in effect. So, it's essentially
15 putting Celgar back to net-of-load and saying that
16 Fortis--B.C. won't be able to supply them any power.

17 Q. Can we turn to Page 115 and the third
18 paragraph.

19 A. 115?

20 Q. 115, third paragraph.

21 A. I think we're at 113.

22 Q. Could you read that language, please?

11:35:31 1 A. "That being said, the Commission Panel notes
2 that the PPA between the two utilities has a
3 termination date, and there may come a time when
4 Order G-48-09 no longer has any relevance. Therefore,
5 the Commission Panel declines to establish a GBL
6 between FortisBC and Celgar. The Parties are at
7 liberty to establish their own GBL and, should they
8 desire, to incorporate it into a General Service
9 Agreement and submit it to the Commission for
10 approval."

11 Q. So this type of GBL that the Commission is
12 suggesting FortisBC--and go off and negotiate with
13 Celgar, is that different in kind from the GBL that
14 BC Hydro's customers get?

15 A. Is it different? In that it would have--in
16 some respects it may be, but it contains a common
17 thread in that it would allow FortisBC to supply or
18 should have allowed FortisBC to supply Celgar between
19 the GBL and its load, but without the--with the
20 exclusion of the PPA Power component.

21 Q. I want to focus on that exclusion of the PPA
22 Power component element. Would such a GBL have

11:36:41 1 presented all the same issues with segregating
2 FortisBC electrons from BC Hydro electrons that have
3 arisen since G-48-09?

4 A. Sorry. Could you rephrase that question?

5 Q. Would such a GBL, one that excluded or hived
6 off BC Hydro PPA Power, have presented all the same
7 issues with segregating FortisBC electrons from
8 BC Hydro electrons that have arisen under
9 Order G-48-09?

10 A. I think so, yes.

11 Q. So, it would not have solved Celgar's
12 differential treatment, would it?

13 A. No, I do not think so. It continues to this
14 day.

15 Q. And even if they had a FortisBC GBL?

16 A. GBL.

17 It still wouldn't solve the problem here.

18 Q. In 2001, did Riverside (Tolko) seek a GBL
19 from the BCUC?

20 A. In 2001?

21 Q. Yes.

22 A. Yes.

11:37:32 1 Q. Did the BCUC set one?

2 A. Yes, it did.

3 Q. Did the BCUC, in setting that GBL, require
4 that electricity Riverside indirectly received from
5 BC Hydro through the FortisBC PPA be hived off?

6 A. No, it did not.

7 Q. Now, shortly after 48-09, did the Commission
8 revisit the GBL that it set for Riverside?

9 A. Yes. I believe there was a proceeding just
10 for that purpose.

11 Q. What did it do?

12 A. It put Riverside also, I believe, on a
13 net-of-load.

14 Q. I'm not talking about the 2009 proceeding.
15 I'm talking--I'm sorry.

16 MR. DOUGLAS: Let the Witness answer the
17 question.

18 MR. SHOR: Sorry to interrupt,
19 Mr. Switlishoff.

20 I think there were two proceedings, were
21 there not?

22 BY MR. SHOR:

11:38:20 1 Q. Did Riverside bring the proceeding
2 immediately after G-48-09 seeking to confirm its GBL?

3 A. I recall that, but I wasn't intimately
4 involved in that particular proceeding.

5 Q. Do you recall what the Commission did?

6 A. No, I do not, in the first Application of
7 Tolko's.

8 Q. Okay. Can we pull up Page 115 of the
9 Decision, the last two paragraphs?

10 PRESIDENT VEEDER: Do help us with the
11 exhibit number.

12 MR. SHOR: We're still on Exhibit C-10. My
13 apologies.

14 PRESIDENT VEEDER: Okay.

15 BY MR. SHOR:

16 Q. Now, here the Commission was addressing
17 Celgar's arguments that it should be afforded the same
18 treatment that the Commission affords BC Hydro
19 self-generators. Could you please read what the BCUC
20 had to say on that score?

21 A. "The Commission Panel has considered Celgar's
22 submission that the establishment of a GBL between it

11:39:19 1 and FortisBC would be the only approach that is
2 consistent with, and follows, that taken by BC Hydro
3 in relation to its self-generation customers. In the
4 Commission Panel's view, which was shared by all
5 Parties, including Celgar, to the proceeding, the
6 issue of equity between pulp mills in B.C. falls
7 outside the Commission's jurisdiction."

8 MR. SHOR: Thank you. I have no further
9 questions.

10 Excuse me, I forgot. I was relying on notes,
11 and I have a another series of questions.

12 PRESIDENT VEEDER: Please proceed. We'll
13 wait until you finish.

14 MR. SHOR: I apologize.

15 BY MR. SHOR:

16 Q. Mr. Switlishoff, you were taken through a
17 variety of cost reports from Tembec for 2008 and 2009
18 by counsel for Canada.

19 Do you recall that?

20 A. I was. I do.

21 Q. And you were asked whether you had done any
22 calculations to calculate the total economic benefit

11:40:29 1 to Tembec of its self-generation facility, were you
2 not?

3 A. I did. I was.

4 Q. Could you walk us through the calculations
5 you performed?

6 A. Yes. Yes, I can.

7 Q. Please do.

8 A. May I refer to an aid?

9 Q. You can refer to your notes.

10 A. So what I did is, << [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] >>

13 A. Very good. So if we turn to--

14 Q. Exhibit R-589 is the--

15 A. Yes, that's what I'm looking for, but I think
16 that's in another binder here. I don't have enough
17 chairs.

18 Yes. It's R-589. So, working from R-589, I
19 first took the << [REDACTED] [REDACTED] >> data of--for 2008, the
20 [REDACTED]
[REDACTED] >>

22 Q. And those would be the << [REDACTED] >> that the

11:42:01 1 Mill experienced--

2 A. That's my understanding.

3 And then I--so, I took that as a << [REDACTED]

4 [REDACTED]

5 [REDACTED]>> which are on the next page of this exhibit.

6 Q. And those << [REDACTED]>> reflect the << [REDACTED]>>

7 A. They do.

8 Q. And just so we're clear, those are the

9 << [REDACTED]

10 [REDACTED]>>

11 A. That's correct.

12 Q. Is that all the electricity that the Mill
13 generated?

14 A. << [REDACTED]>> The Mill generated << [REDACTED]>> electricity.

15 Q. Does this analysis at all account for the
16 << [REDACTED]>>

17 A. No, it does not.

18 Q. How would you account for it?

19 A. Well, I take the << [REDACTED]

20 [REDACTED]

[REDACTED]

[REDACTED]

11:43:09 1 [REDACTED]

2 [REDACTED]

3 Q. Okay. Let's take it one step at a time. You
4 had the actual generation data used for self-supply?

5 A. Yes. I had actual sales and generation data
6 from Exhibit C-163.

7 Q. And what was that figure for 2008?

8 A. For 2008, I show a total generation of
9 <<[REDACTED]>> and total sales of
10 <<[REDACTED]>> That left <<[REDACTED]>>
11 used for self-supply.

12 Q. And how did you arrive at <<[REDACTED]
13 [REDACTED]>> that amount of electricity?

14 A. I apportioned--I took [REDACTED]
15 [REDACTED] [REDACTED]
16 [REDACTED] >>

17 Q. So, let's take it one step at a time.
18 What--those Rate Schedules are public documents;
19 correct?

20 A. They are.

21 Q. What was the value you used for 2008?

22 A. For 2008, the Rate Schedule 1823, energy, the

11:44:25 1 average energy value was \$28.025 per megawatt hour.

2 Q. And that's the blended Tier 1 and Tier 2 step
3 rate?

4 A. It is.

5 Q. If you had used the Tier 2 step rate, it
6 would have been much higher; correct?

7 A. Significantly.

8 Q. Okay. What value did you arrive at when you

9 << [REDACTED]
10 [REDACTED] >>

11 A. << [REDACTED] >>

12 Q. Is that the only << [REDACTED] >>, or did
13 they << [REDACTED] >>

14 A. I believe they [REDACTED]
15 [REDACTED] >>

16 Q. And what was the << [REDACTED]
17 [REDACTED] >>

18 A. The [REDACTED] >> I used, again, Rate
19 Schedule 1823, and there's only a single value for
20 that, and that's \$4,781.50 per megavolt ampere per
21 month.

22 Q. And what value do you arrive at when you

11:45:25 1 << [REDACTED]

[REDACTED]

3 A. My value for the << [REDACTED]

4 [REDACTED]>>.

5 Q. So, what did you arrive at as the << [REDACTED]

6 [REDACTED]>>

7 A. On a total basis, I arrived at << [REDACTED]>>.

8 Q. That was the << [REDACTED]>?

9 A. That's correct.

10 Q. So, it was << [REDACTED]

11 [REDACTED]>>

12 A. That's my conclusion.

13 Q. And are there << [REDACTED]

14 [REDACTED]>> that aren't even included in

15 that analysis?

16 A. Yes, there are.

17 Q. Could you explain what those would be?

18 A. Yes. There are--<< [REDACTED]

19 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11:46:35 1 [REDACTED] >>

2 Q. And that would be << [REDACTED] >> at
3 Skookumchuck in its--

4 A. Both.

5 Q. --in its sawmills?

6 A. Both at Skookumchuck and at its neighboring
7 sawmills, which were Canal Flats and Elko.

8 Q. Were Canal Flats and Elko owned by Tembec?

9 A. They were at the time.

10 Q. Can we go through the 2009 analysis that you
11 performed?

12 A. Yes, we can. And for 2009, again, I started
13 with Exhibit R-588, and I used the << [REDACTED]

14 [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] >>. Then I added back in

16 << [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

20 And then I went through again my application
21 of the generation and sales data. My generation for
22 2009 from exhibit, again, C-163, I have as

11:48:04 1 << [REDACTED] >>, and the total sales I have as
2 << [REDACTED] >>.

3 MR. OWEN: Excuse me. I'm sorry to
4 interrupt. I'm going to object at this point.
5 Yesterday was a gray rabbit. This is definitely a
6 white rabbit. We've already had our cross.
7 Mr. Switlshoff could have presented this evidence
8 with all of the evidence that he provided yesterday.
9 We asked if the evidence in cross was on the record.
10 He said no. Now, we have it all being introduced in
11 redirect. How are we going to respond to this? It is
12 patently unfair.

13 MR. SHOR: If I may respond.

14 PRESIDENT VEEDER: You must.

15 MR. SHOR: The outrage is on our part, not
16 their part. Throughout this proceeding, they asserted
17 that the Tembec << [REDACTED] >>. They
18 presented no analysis, no data ever to support that.
19 When they finally produced a witness from Tembec, he
20 produced a Witness Statement that also had no data and
21 no analysis to support it. We asked for the
22 documents. We got the documents two weeks ago.

11:49:16 1 This is our first opportunity to address it.
2 We had no opportunity otherwise, and Canada opened the
3 door to this testimony by asking the questions
4 presenting these data. We didn't even present it.
5 They asked. Mr. Switlishoff gave the numbers. They
6 want to leave it there so they can say there is no
7 data to support it.

8 We are just filling in the door that they
9 opened to--and protecting ourselves against the
10 last-minute Mr. Lague testimony that was totally
11 unsubstantiated. These data are all on--the data that
12 Mr. Switlishoff is presenting are all on the record.
13 Canada can check. If they have a problem with any of
14 it, we're happy to bring Mr. Switlishoff back, and
15 they can ask him further questions if they want.

16 PRESIDENT VEEDER: You could have raised this
17 in direct examination, couldn't you?

18 MR. SHOR: I did in summary form. I only had
19 10 minutes, so I really couldn't. We had asked for
20 longer time.

21 MR. OWEN: Could I--

22 PRESIDENT VEEDER: Well, you had the offer to

11:50:13 1 bring the witness back later for further
2 cross-examination. Is there a problem?

3 MR. OWEN: Mr. President, I'd like to respond
4 to a couple mischaracterizations by Mr. Shor just now.
5 So we presented Mr. Dyck initially as a witness with
6 our Counter-Memorial, and we also presented the
7 April 8 analysis that Mr. Kurelek and Mr. Dyck did
8 that you saw that had prices, the consideration of the
9 << [REDACTED] >>. I know Mr. Switlishoff says it's
10 not enough of an analysis, but there's a full
11 memorandum there. We presented his testimony with a
12 Counter-Memorial.

13 They came back in the Reply and they said
14 this was absurd, you couldn't rely on any of this.
15 You know, it wasn't good enough that there were
16 contemporaneous documents and a witness from BC Hydro.

17 So what we did was we went the extra mile,
18 and it took a lot of effort to convince Mr. Lague to
19 come here and testify. We had approached him
20 initially, and he wasn't going to do it. So we
21 presented him as a witness in the arbitration. Then
22 in the middle of May--and I can get you the exact date

11:51:13 1 in a minute--Mr. Shor writes me and he says, "Oh, we
2 have document requests. We want all these documents
3 from Paper Excellence." And, you know, we went and
4 Mr.--we went and we approached Paper Excellence and we
5 had to talk to their general counsel. And I said
6 we'll use best efforts. We got all those documents,
7 and those are all the hog fuel analyses and the
8 internal spreadsheets. They've shared those documents
9 willingly to be open and transparent.

10 Mr. Shor says it was two weeks ago that he
11 got these documents. It was actually June 19. It was
12 a month ago. I've got the--well, if you look at the
13 exhibit, the number--sorry, r-576. It is dated
14 June 19, 2015. So, they've had these documents for a
15 month.

16 Then he basically comes in and he presents
17 all this new analysis yesterday. He basically throws
18 all these spreadsheets. He could have given them to
19 us yesterday morning. He could have given them to us
20 earlier. Now he's coming back after his Witness
21 didn't have any of this on the record, and he's
22 basically having his Witness read in in redirect after

11:52:21 1 we've done our cross-examination all this new
2 evidence. We have to go back to the drawing board all
3 over again. It is unfair. This is a white rabbit.

4 MR. SHOR: Let me respond to that. These
5 documents were filed in this proceeding by Canada, not
6 by us.

7 PRESIDENT VEEDER: So when you're pointing to
8 "these documents," you're pointing to--

9 MR. SHOR: R-588.

10 PRESIDENT VEEDER: R-588.

11 MR. SHOR: And R-589, the spreadsheets. They
12 were filed by Canada--that's what I meant--two weeks
13 ago. I don't even think it was two weeks ago. It was
14 probably one week ago. We did receive them a month
15 ago. They were filed a week ago. We had no
16 opportunity ever to respond to these. The only way we
17 could respond to them is at the hearing.

18 Canada introduced them. We didn't--we didn't
19 even ask questions about them. Canada introduced
20 them. And Mr. Switlishoff has testified they are
21 completely inadequate to demonstrate the points Canada
22 tries to make from them. And we're just trying to

11:53:16 1 have him complete that portion of his testimony so
2 that the Tribunal can make its own assessment based on
3 the actual data.

4 PRESIDENT VEEDER: We're going to have to
5 deliberate about this, given the difficulties that
6 both sides seem to be encountering. But can I come
7 back to the suggestion made by the Claimants? We
8 don't have Mr. Dyck or Mr. Lague until next week.
9 They're prepared to complete this reexamination and
10 then at some appropriate time have the Witness come
11 back for further cross-examination before Mr. Dyck and
12 Mr. Lague testify. Now, does that give some way to
13 meeting the difficulties which you've described?

14 MR. OWEN: It does. I just--we've been
15 trying--we tried to be very, very open. You know,
16 we've gotten mill managers here. We've got them to
17 testify. We've got them to produce evidence. And
18 then we get document requests in the middle of May.
19 We go to third parties and we get the documents, and
20 then it's even more. You know, if Mr. Shor wants to
21 be fair to us, he can be fair like we're being fair.
22 He can give us the analysis beforehand. So I'd just

11:54:21 1 like to make that point. And you're right,
2 Mr. President, it will help a little bit, but, you
3 know, at this late stage in the game, you know, he's
4 had a month to do all this. How long do we have to do
5 it now?

6 PRESIDENT VEEDER: Let's break.

7 MR. SHOR: You had the same month.

8 PRESIDENT VEEDER: Let's not continue the
9 debate. We need to withdraw to talk about this. How
10 much further redirect have you got?

11 MR. SHOR: I think he's just got another two
12 calculations for 2009.

13 PRESIDENT VEEDER: We're not going to allow
14 that for the moment. Beyond that, how much redirect
15 examination?

16 MR. SHOR: That's all I have.

17 PRESIDENT VEEDER: So you've basically
18 finished.

19 MR. SHOR: Yes.

20 PRESIDENT VEEDER: Let's take 10 minutes, and
21 then we'll come back.

22 (Brief recess.)

12:00:46 1 PRESIDENT VEEDER: Let's resume.

2 The Tribunal's Decision is as follows: The

3 Tribunal notes the objection to the current line of

4 questions by the Claimant in reexamination of this

5 Expert Witness on the grounds of unfairness and

6 inappropriate surprise. The Tribunal considers that

7 what has happened should not have happened, that there

8 shouldn't be this kind of surprise in reexamination of

9 an expert witness, but it also recognizes that there

10 are special features to this particular line of

11 questions which makes it appropriate for the

12 reexamination to continue of this Witness subject to

13 the condition itself raised by the Claimant; that when

14 this Witness completes his reexamination, at an

15 appropriate time, if the Respondent wishes to

16 cross-examine this Witness on this current line of

17 questions, they may do so. This appropriate time

18 could be tomorrow afternoon, if that were appropriate,

19 but it could also be, more appropriately, Monday

20 before we start hearing Witnesses from the Respondent.

21 So, that's the price which the Claimants must

22 pay that this Witness must be brought back. And we

12:02:14 1 recognize that maybe he was intending to leave
2 Washington tonight or tomorrow, but we would need him
3 back if required to do so by the Respondent.

4 MR. SHOR: Mr. Switlischoff has told me he
5 loves the Washington weather this time of year. So,
6 he's happy to stay, and he will be here Monday.

7 PRESIDENT VEEDER: All I can say is, if he
8 likes this weather, I'm sorry for him in British
9 Columbia.

10 THE WITNESS: Mr. President, I have one
11 question, if I may.

12 PRESIDENT VEEDER: Yes.

13 THE WITNESS: Will I remain sequestered for
14 that entire period?

15 PRESIDENT VEEDER: We need to talk about
16 that. Probably not. My instinct would be, subject to
17 my colleagues and the Parties, except for this
18 particular matter, except for the figures.

19 THE WITNESS: I understand.

20 PRESIDENT VEEDER: Thank you.

21 Now, from what we've heard, that doesn't
22 cause any difficulty as a practical matter for

12:03:00 1 Claimants or, indeed, for the Witness, but what about
2 the Respondent? Would you rather have Friday or
3 Monday?

4 MR. OWEN: I think Monday, Mr. Chair. I
5 think the other thing I'd like to ask for is a little
6 bit of additional time in lieu of this surprise.

7 PRESIDENT VEEDER: Yes.

8 MR. OWEN: I think we'll need the additional
9 time to consult on all of this new evidence that's
10 being put forward, and we'd certainly like a chance
11 to--anyways, we'll--just one minute, Mr. President.

12 (Pause.)

13 PRESIDENT VEEDER: Turn your mike off.

14 MR. OWEN: So, Mr. President, we'll be happy
15 to do it on Monday. If we could also receive a bit of
16 additional time in light of the circumstances, that
17 would be appreciated as well.

18 PRESIDENT VEEDER: When you say "additional
19 time," you mean more allowance of time against your
20 allocated total time?

21 MR. OWEN: Yes.

22 PRESIDENT VEEDER: We'll give you the floor

12:04:22 1 about that. It depends on how long it would be, but
2 assume it would be as long as you've taken in
3 redirect.

4 MR. SHOR: I just want to point out the
5 obvious fact that Mr. Lague is available. He
6 presented these data. He's available for direct
7 examination to go over all of these same issues as
8 well.

9 PRESIDENT VEEDER: You're on thin ice. I
10 wouldn't go there.

11 MR. SHOR: They have an opportunity. Yeah, I
12 mean if you're talking about additional time, the same
13 amount of time I took for this part of my redirect,
14 you know, the 10 or 15 minutes, I have no objection.

15 PRESIDENT VEEDER: I suppose that's what you
16 had in mind, wasn't it, 15 minutes?

17 MR. OWEN: Maybe I could push my luck to a
18 half hour. It's pretty technical stuff.

19 PRESIDENT VEEDER: You're going to get the
20 transcript tonight, what the Witness has said, and
21 then you're going to consider it over the weekend and
22 let us know on Monday if it's more than 15 minutes

12:05:15 1 and, if so, why.

2 MR. OWEN: Thank you, Mr. President.

3 MR. DOUGLAS: Mr. President, I just wanted to
4 be clear on this sequestration, that there be no
5 communication relating to Tembec between the Claimant
6 and the Witness over the weekend.

7 MR. SHOR: We would be happy to agree not to
8 discuss these financial data with him but not the
9 other issues. We need his help in preparing for the
10 cross-examination of Mr. Lague.

11 PRESIDENT VEEDER: That sounds fair enough.
12 I think nothing to do with the subject matter we're
13 discussing now that is figures. He's certainly not
14 going to have any contact with Mr. Lague.

15 MR. DOUGLAS: I didn't want there to be some
16 gray zone in there.

17 PRESIDENT VEEDER: He can't be all by himself
18 in Washington, D.C., over a long weekend.

19 MR. DOUGLAS: That would be sad.

20 PRESIDENT VEEDER: Nothing to do with the
21 figures.

22 Do you understand that?

12:06:08 1 THE WITNESS: I understand that,
2 Mr. President.

3 PRESIDENT VEEDER: Thank you. Let's
4 continue.

5 BY MR. SHOR:

6 Q. Mr. Switlishoff, I believe we were going over
7 the 2009 data. Perhaps you'll start again from the
8 beginning.

9 A. Thank you, I shall.

10 The 2009 data I used originated with
11 Exhibit R-588, and that was, to recap, the costs at

12 << [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] >>

18 I then turn to Exhibit C-163 and took the
19 total generation value I had of << [REDACTED] [REDACTED] >> and

20 [REDACTED] >> component, which was
21 [REDACTED]

[REDACTED] >> applied to the

12:07:34 1 generation--generation applied to the Tembec load.

2 I then took the << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11 I then took the << [REDACTED]

12 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]>> In this case

16 I only applied nine months of data because I didn't

17 have--the financial statement I had was 10 months, but

18 I took out the one month for the mill shutdown when it

19 << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12:09:18 1 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

2 [REDACTED]

3 Q. That net economic benefit just includes

4 << [REDACTED] [REDACTED] [REDACTED]

5 [REDACTED] >>

6 A. That's correct.

7 Q. Did you include any other << [REDACTED] >> that the Mill

8 would otherwise include? I think you mentioned

9 earlier they << [REDACTED]

10 [REDACTED]

11 A. No. It was solely the << [REDACTED]

12 [REDACTED] >>

13 MR. SHOR: That concludes my questions.

14 PRESIDENT VEEDER: Thank you very much.

15 There will be some questions from the Tribunal.

16 QUESTIONS FROM THE TRIBUNAL

17 ARBITRATOR ORREGO VICUÑA: Mr. Switlishoff,
18 just one question. From Page 30 onwards of your First
19 Report, you describe and explained a number of things
20 about the decisions and the situation that was taking
21 place following 2010, 2011, and particularly the BCUC
22 decisions in terms of what would appear as a policy

12:10:51 1 directed to open up what had been a very tight closure
2 before, which is basically what you referred as to the
3 entitled, to some, embedded costs and then a number of
4 directions to Fortis, to ratifying rights and so
5 forth. And that is clear.

6 My question is this: How would you describe
7 the situation of Celgar today in terms of what it can
8 or it cannot do in respect of selling electricity to
9 third parties in the light of the current situation
10 and, again, of what you describe about the regulatory
11 uncertainty? That has something that it still doesn't
12 quite clear to my reading?

13 THE WITNESS: Yes, Professor Orrego, I can
14 answer that for you. I believe Celgar's situation is
15 still in regulatory limbo. The path for the BCUC
16 decision has been tortured at best. First, we have
17 48-09 that said net-of-load. And then we had 188-11
18 that said some embedded cost power at some price. And
19 then we had 202-12 that said, well, all embedded cost
20 price, but we'll leave the tariff to some future
21 determination. Then we had the tariff applied as a
22 rate rider to a step rate tariff that was eventually

12:12:41 1 denied implementation. So, the rider now exists as a
2 rider to a tariff uncertainty. So, the access,
3 Celgar's access to replacement power for any
4 self-generated power remains undoable at this time.
5 So, they have no ability for any third-party sales at
6 this time of their self-generated electricity.

7 Does that answer your question, Professor?

8 Thank you.

9 ARBITRATOR DOUGLAS: I just had a question
10 arising out of a question that was put to you
11 yesterday about how the stranding of electricity would
12 assist or increase BC Hydro's resource needs.

13 THE WITNESS: Yes, Professor Douglas.

14 ARBITRATOR DOUGLAS: Just so you have it.
15 You don't need a transcript reference, but it was
16 about Page 583. And I think you returned to the same
17 topic this morning when there was a hypothetical put
18 to you as to what would happen if Celgar decided not
19 to generate any of its own electricity. I'm just
20 struggling to understand the relationship between
21 setting the GBL and increasing the resource capacity
22 of BC Hydro, given that Fortis was the utility? What

12:14:13 1 is it about those relationships that will allow you to
2 line up those two factors?

3 THE WITNESS: Yes, Professor Douglas. I too
4 was thinking about that question and my response
5 overnight, and I hark back to Mr. Merwin's testimony
6 and I took particular note of his response that why
7 would BC Hydro buy the cow if it was getting the milk
8 for free. And, in effect, by--and, perhaps,
9 "stranding" was the wrong word. It was compelling the
10 Mill to use all of its self-generated electricity for
11 self-supply thereby not requiring Fortis to supply
12 that power, thereby not requiring Fortis to lean into
13 its PPA Contract with BC Hydro to backfill that amount
14 of supply.

15 ARBITRATOR DOUGLAS: That leaning into the
16 PPA energy in the relationship between BC Hydro and
17 Fortis, is that something we can say with certainty,
18 or what's the analysis that goes behind that
19 statement?

20 THE WITNESS: My experience with the PPA
21 Contract between Hydro and Fortis is that it has
22 represented their marginal source of power supply

12:15:41 1 historically in that it's a very unique power supply
2 contract, and I--given my history in the region, I
3 reach back to equating the PPA Contract to the
4 FortisBC--the taxpayers in the FortisBC's territory
5 right to, if you want to call it, a historical piece
6 of the rock of the embedded generation in the British
7 Columbia. After all, the generation assets of
8 BC Hydro are public assets paid for by all taxpayers
9 in the Province. And by fracturing off the benefit of
10 that from the taxpayers in FortisBC's service
11 territory, they would have been left paying for a
12 resource that they had got no benefit from.

13 So, I view the PPA--and I believe Fortis has
14 viewed the PPA as their marginal piece of the rock, if
15 you will, and its price at slightly above their own
16 embedded cost electricity but usually far below market
17 and, thus, being their variable resource.

18 PRESIDENT VEEDER: Now, yesterday when you
19 were asked about this--again, it's Page 583 of
20 yesterday's transcript--you indicated in answer to
21 Mr. Douglas that the PPA of Fortis was 15 percent of
22 the generation resources as regards energy but not of

12:17:29 1 capacity.

2 Can you explain that a bit further?

3 THE WITNESS: Yes. At the time that we're
4 looking at here, 2007, '08, '09, '10, FortisBC was a
5 capacity-constrained utility in that it could service
6 the bulk of its needs energy-wise, but it was
7 unavailable--didn't have the capacity internally
8 available to meet its needs at the peak hour. So, it
9 viewed the PPA--the PPA afforded it significant
10 flexibility in terms of supply resource in that at
11 times they were purchasing "naked" capacity, if that's
12 a term you're familiar with, in that they would
13 purchase capacity but had the own energy resources and
14 storage resources to supply the energy behind that
15 capacity of their load.

16 So, there's a complicated arrangement that
17 BC Hydro and Fortis are party to called the Canal
18 Plant Agreement that allows the exchange of energy
19 resources amongst the Parties, and that, in concert
20 with the Power Purchase Agreement, allows for Fortis
21 to use the PPA as a capacity resource, rather than an
22 energy resource. So, when we talk about a block of

12:19:12 1 50 megawatts, for instance, from the PPA, that
2 50 megawatts wouldn't be associated with 40 gigawatt
3 hours as one might normally think of for 8,760 hours a
4 year. They could take that 50 megawatts of capacity
5 from the PPA Contract and have only a gigawatt hour
6 because they only take that 50 megawatts in the one
7 hour they need it over their system peak.

8 Is that helpful?

9 PRESIDENT VEEDER: It certainly is. Thank
10 you.

11 A related question, but I can pick it up from
12 what you said to Professor Douglas, that "stranding"
13 was probably the wrong word in talking, as you did
14 yesterday, of Celgar being required to supply all of
15 its own load, that it's being forced to use its own
16 self-generation as opposed to taking supply from
17 Fortis.

18 THE WITNESS: On reflection, I agree with you
19 very much, Mr. President. I chose my words poorly.

20 PRESIDENT VEEDER: Well, I think they may
21 have been chosen for you. But what word would you use
22 instead of "stranding"?

12:20:27 1 THE WITNESS: "Compelled," compelled the Mill
2 to use its self-generation for its load. And I assure
3 you, sir, my words are my own.

4 PRESIDENT VEEDER: I didn't mean to criticize
5 you. I thought it was suggested by the
6 cross-examiner. That's what I meant.

7 THE WITNESS: I may have followed him there.

8 PRESIDENT VEEDER: But just take an example
9 of "stranding." If a mill is self-generating more
10 than its load but it can't--this is a matter of
11 physics, really--it can't redeliver that excess to,
12 say, Fortis, does it stop generating and venting
13 steam? Is that what it has to do?

14 THE WITNESS: It's an instantaneous equation.
15 There is no way to store that electricity. As we
16 heard Mr. Merwin say yesterday, that's the milk he
17 didn't want to give away for free and would have, I
18 would believe as a business decision, chosen to vent
19 rather than to supply for free.

20 PRESIDENT VEEDER: Thank you.

21 Are there any questions arising from the
22 Tribunal's questions? We ask the Claimants first.

12:21:40 1 MR. SHOR: Nothing from Claimants.

2 PRESIDENT VEEDER: And from the Respondent?

3 MR. DOUGLAS: Nothing from the Respondent.

4 PRESIDENT VEEDER: Well, we don't say adieu.

5 We say au revoir. But thank you for now.

6 THE WITNESS: Au revoir, monsieur. Merci

7 beaucoup.

8 (Witness steps down.)

9 PRESIDENT VEEDER: We'll break now. We'll
10 come back at 20 past 1:00. All the arrangements for
11 the videoconference have been completed?

12 I ask the Claimants first.

13 MS. GEHRING FLORES: From what we understand,
14 yes. I believe we've confirmed with Lamiss and others
15 at ICSID that everything is set up. I don't believe
16 we've confirmed that the representatives from Canada
17 are there in Victoria, but I don't know.

18 (Comment off microphone.)

19 MS. GEHRING FLORES: But, otherwise, I
20 believe that everything has been arranged, barring any
21 foreseen technical difficulties, which perhaps are
22 foreseeable.

12:22:36 1 PRESIDENT VEEDER: We'll see.

2 MR. SHOR: The answer to your question is
3 we'll see soon enough.

4 PRESIDENT VEEDER: Okay. We'll come back at
5 25 past 1:00 and we'll hear the next Witness at half
6 past 1:00 by video.

7 MS. GEHRING FLORES: Thank you.

8 (Whereupon, at 12:22 p.m., the Hearing
9 was adjourned until 1:25 p.m., the same day.)

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1 AFTERNOON SESSION

2 JOHN ALLAN, CLAIMANT'S WITNESS, CALLED

3 PRESIDENT VEEDER: Let's resume the Hearing.

4 We have before us Mr. Allan.

5 Mr. Allan, can you hear me by video link to

6 Vancouver?

7 THE WITNESS: Yes, I can. Thank you.

8 PRESIDENT VEEDER: We can see you.

9 THE WITNESS: I can see you. I can see you.

10 PRESIDENT VEEDER: We can see you.

11 You may see to my right my colleagues and to

12 my left also. Could you, first of all, though

13 introduce the two people who are with you.

14 MS. BUTLER: Meghan Butler with the Province

15 of British Columbia.

16 MR. TEJPAR: And Aadam Tejpar with Sangra

17 Moller.

18 PRESIDENT VEEDER: And is there anybody else

19 in the room with you?

20 THE WITNESS: No, there isn't.

21 PRESIDENT VEEDER: Thank you very much.

22 Now, we are in open session, and I can see

01:32:34 1 from the screen that you're seeing us. Can we make
2 sure the camera can switch, first of all, to the
3 Claimant's side. That way.

4 Let's try again. I'm talking about the
5 camera in Vancouver switching to show--I'm sorry, the
6 camera in this room to show the camera on the
7 Claimants.

8 This is working? Okay, fine. Okay.

9 THE WITNESS: Yes, I can see the Claimant.

10 PRESIDENT VEEDER: And let's do for the
11 Respondent to make sure that works, too.

12 It is. Okay. Let's turn the camera back to
13 the Tribunal.

14 Well, we ask you, first, to state your full
15 name and, if you will, to read the words of the
16 Witness Declaration on the sheet of paper that should
17 be before you. If it isn't, I'll read the words out,
18 and then you can follow me.

19 THE WITNESS: I have it, thank you.

20 My name is John Allan. I solemnly declare
21 upon my honor and conscience that I will speak the
22 truth, the whole truth, and nothing but the truth.

01:33:48 1 PRESIDENT VEEDER: Thank you very much.
2 There will be first questions from the
3 Claimant.

4 MR. WITTEN: Thanks very much, Mr. President.
5 Mr. President, I'm Sam Witten, counsel for Claimant.

6 DIRECT EXAMINATION

7 BY MR. WITTEN:

8 Q. Good morning, Mr. Allan. As the Tribunal
9 will recall from your Witness Statement, you spent
10 more than 25 years as a government official in Canada,
11 including as British Columbia's Assistant Deputy
12 Minister of Energy and later Deputy Minister of
13 Energy, and that you were Deputy Minister of Energy in
14 1991, when the Celgar Ministers' Order was issued and
15 then later you were the first Director of the B.C.
16 Environmental Assessment Office in 1996.

17 Mr. Allan, I just have two questions for you
18 on direct.

19 You submitted one Witness Statement in this
20 arbitration which was dated December 11, 2014. Is
21 there anything you would like to clarify regarding
22 your Witness Statement?

01:34:56 1 A. Thank you. Yes, I would.

2 Section 19, at the end of that section, or
3 Paragraph 19, I used the phrase "perpetually
4 enforceable commitment," and in Section 20 or
5 Paragraph 20 I further explain what I mean by that as
6 to why I said that.

7 My reading of the Celgar application for an
8 Energy Project Certificate and the Ministers' Order
9 suggests to me that the application was very general
10 and wordy, non-specific, not technical, not supported
11 by economic-financial or benefit-cost analysis, and
12 thus represented aspirational statements by Celgar as
13 to what amounts of energy would be produced in the
14 thermoelectrical energy generating plant and what
15 amounts of that energy would be consumed in the
16 adjacent or adjoining pulp mill.

17 The Ministers' Order was likewise very
18 generally worded, not supported by any technical or
19 economic or financial analysis, in my view; and, as
20 such, did not impose upon Celgar a commitment for the
21 Mill to be operated on an energy self-sufficient
22 basis.

01:36:17 1 Likewise, I don't believe that Celgar made
2 any firm commitment to be energy self-sufficient in
3 the consumption of energy in the pulp mill.

4 My reason for coming to this conclusion in
5 addition to what I've just said is that the Order does
6 not have any specific metrics with respect to not only
7 the analysis that isn't there to back up the Order,
8 but there is no reporting requirement, there is no
9 monitoring requirement, there is no requirement for
10 someone to be designated as the reporting official in
11 the Government or the reporting official in Celgar,
12 and there's not really any mechanism for follow-up as
13 to how the plant was to be operated.

14 So, for those reasons, I have come to the
15 conclusion that Celgar made no commitment to be energy
16 self-sufficient, and the Minister's order does not
17 impose that commitment on the company.

18 Q. Mr. Allan, I understand that you've had an
19 opportunity to review Mr. Les McLaren's Second Witness
20 Statement; is that correct?

21 A. Yes, sir.

22 Q. In Paragraph 31 of his Second Witness

01:37:22 1 Statement, Mr. McLaren explains that as of 1996, the
2 responsibility for enforcing the Ministers' Order at
3 issue in this arbitration was transferred to the B.C.
4 Environmental Assessment Office. As such, he suggests
5 that the Ministry of Energy was no longer responsible
6 for its enforcement.

7 You were the Director of the Environmental
8 Assessment Office in addition to having served as
9 Deputy Minister of Energy. From these two
10 perspectives, could you please explain what role the
11 Ministry of Energy played, if any, in enforcing the
12 Ministers' Order after the transfer of enforcement
13 responsibilities to the Environmental Assessment
14 Office.

15 A. Well, first of all, I don't think
16 Mr. McLaren's view of how the process worked was quite
17 correct.

18 The Major Project Review Process, the Energy
19 Project Review Process that are both being discussed
20 in this context of this issue both involved an
21 approval of two Ministers: The responsible Minister
22 for the sector and the Environment Minister. When the

01:38:28 1 Environmental Assessment Process was set up, that
2 sequence was reversed, such that the lead Minister was
3 the Minister of Environment, and the responsible
4 Minister always signed off on any authorities issued
5 by that Minister. In this particular case, it would
6 have been the Minister of Energy on an ongoing basis
7 for any energy project.

8 The Environmental Assessment Office was
9 staffed by a number people who really served as
10 project coordinators or, if you will, quarterbacks,
11 with technical expertise still residing in the line
12 Ministries. The Environmental Assessment Office did
13 not take on responsibility for technical analysis for
14 compliance and enforcement. That was all done--in
15 terms of staff, it was all done by staff and line
16 Ministries.

17 So, the environmental assessment office, yes,
18 it's true assumed responsibility for compliance and
19 enforcement of orders, but it was always done in
20 partnership with line Ministries and other parties,
21 other interested parties.

22 So, in this particular case, the

01:39:28 1 Environmental Assessment Office would have done any
2 compliance and enforcement action in conjunction with
3 the Ministry of Energy.

4 Secondly, the Ministry of Energy was
5 responsible for energy demand supply forecasting and
6 policy development and analysis, so I would have
7 thought that the Ministry would have wanted to have
8 known what was going on in the Celgar Mill and other
9 mills like that who performed cogeneration functions
10 so that they would have a handle on what was going on
11 in the electricity sector. We were very hands-on with
12 respect to what was going on in the resource sector in
13 B.C. and in particular in this case the
14 energy-producing sector for electricity.

15 Q. Thank you, Mr. Allan.

16 MR. WITTEN: Mr. President, I have no further
17 questions.

18 PRESIDENT VEEDER: Thank you very much.

19 There will now be questions from the
20 Respondent.

21 CROSS-EXAMINATION

22 BY MR. OWEN:

01:40:24 1 Q. Hi, John, can you hear me?

2 A. Yes, I can, thank you.

3 Q. It's been a couple of months since we last
4 saw each other, and I just wanted to indicate that I
5 was very sorry to hear about your wife, and that I
6 hope she's feeling much better and has a speedy
7 recovery.

8 A. Thank you, Michael, and I should have
9 mentioned at the beginning I wanted to thank anyone
10 who had anything to do with my being able to testify
11 in this manner, as opposed to being there with you in
12 Washington, so thank you for that accommodation.

13 Q. Not at all.

14 Mr. Allan, we've already gone over your
15 record of public service. I'd like to touch briefly
16 on what you did afterwards.

17 You were with the Council of Forest
18 Industries as the CEO from 2003 to 2013; is that
19 correct?

20 A. That's correct.

21 Q. And, in that capacity, did you--were you
22 involved with the pulp and paper task force in and

01:41:17 1 around 2007 and 2008?

2 A. I was.

3 Q. And I think after also that the pulp and
4 paper working group as well?

5 A. Not so much the Working Group. I did receive
6 copies of their submissions, but most of my activity
7 was with the task force.

8 Q. Okay. So, let's go back to your role as
9 Deputy Minister of Energy from 1990 to 1993. In that
10 position you were responsible for supervising and
11 coordinating Provincial energy policy and programs; is
12 that right?

13 A. Yes, I was.

14 Q. And, in that position, were you directly
15 involved in analyzing Energy Project Certificate
16 Applications?

17 A. No, I was not. We had staff responsible for
18 that function.

19 Q. Okay. So, that would have been the
20 responsibility of I think at the time the name's
21 changed a little bit, but it was the Manager of
22 Regulated Projects at one point, and I think at that

01:42:15 1 time right in 1990, it was Assistant Deputy Minister
2 of the Energy Resources Division? Would those be the
3 two managers underneath you?

4 A. Well, the hierarchy was--yes. The hierarchy
5 would have been me as Deputy Minister, the Assistant
6 Deputy Minister of Energy, the Director of the Energy
7 Project Analysis Branch, and then within that branch a
8 number of professional people would be responsible for
9 doing the analysis under the leadership of the
10 Director of the branch.

11 Q. Okay. And did you ever participate directly
12 in what's called the Energy Project Coordinating
13 Committee between the Ministry of Energy and the
14 Ministry of the Environment?

15 A. No, I did not. I never worked in the Project
16 Analysis Branch. I was Director of Policy, and I was
17 Director of Special Projects and Forecasts and
18 Assistant Deputy Minister, but I was never directly
19 involved in the analysis of any Energy Process
20 Certificates, and I was not a member of the Energy
21 Project Coordinating Committee.

22 Q. And did you receive legal advice from the

01:43:23 1 B.C. Ministry of The Attorney General concerning
2 drafting of the Ministers' Orders in the regular
3 course of your role as Deputy Minister?

4 A. My recollection would have been that any of
5 those orders would have been drafted by the Ministry
6 Attorney General solicitor responsible for that
7 sector, so, yes, we would have received legal advice.

8 Q. And that would have gone to--

9 A. At least in terms of drafting the Order.

10 Q. Okay. And who would that legal advice have
11 gone to in the normal course?

12 A. Well, I'm not sure we got legal advice as
13 opposed to one of the Ministry of Attorney General's
14 personnel from over to the Ministry and sitting down
15 with us and drafting the Order. I don't believe we
16 actually asked for legal opinions as to whether or not
17 the applications were sufficient to generate an order.

18 Q. Okay, fair enough.

19 A. We might have. I don't recall.

20 Q. I'm just being advised just for the Court
21 Reporter that we should try to have a bit of a pause
22 between question and answer so we'll try and avoid

01:44:34 1 that, too.

2 So, fair enough, but when the counsel for the
3 B.C. Ministry of The Attorney General would come over,
4 who would they sit down with? They'd probably sit
5 down--my understanding would be the Director or maybe
6 their staff to help assist with the Ministers' Order;
7 is that right?

8 A. That would be correct. One or the other or
9 both.

10 Q. And you testified you weren't directly
11 involved--well, you've already said that. I'm sorry.

12 In fact, you've testified you don't have a
13 specific recollection of Celgar's EPC application in
14 the Ministers' Orders; is that right?

15 A. That is correct.

16 Q. And you've also indicated that you're not a
17 lawyer, and you cannot comment on legal issues; is
18 that right?

19 A. That is correct.

20 Q. So, let's review the regulatory framework in
21 the early 1990s just concerning all of this and just
22 get a better sense of what we're talking about.

01:45:38 1 Now, the Ministers' Orders or, I think they
2 were sometimes called Disposition Orders or Exemption
3 Orders, they were issued pursuant to Part 2 of the
4 Utilities Commission Act; is that right?

5 A. Yes, I have seen the term Disposition Order
6 as well in some of the Orders.

7 Q. Okay. And my understanding of that is it
8 gives--if you wanted to build an energy project, it
9 essentially gives you the right to build that project.
10 You know, you just can't go out and build a thermal
11 plant at that time without getting that right; is that
12 right?

13 A. Yes, you needed an Energy Project Certificate
14 if you had gone through the process, or you needed in
15 this particular case the Ministers' Order exempting
16 you from that process but still giving you the right
17 to go ahead and build that plant.

18 Q. Okay. And just again, to get a sense out of
19 the context, so that would be issued, you know, and
20 there would be an application, and it would be issued
21 for a particular project for a particular purpose; is
22 that right?

01:46:46 1 A. There would be an application and then a
2 decision made on what process to follow, and the
3 processes, as you know, were outlined in the Utilities
4 Commission Act.

5 Q. Okay. Let's talk a little bit about the
6 Utilities Commission Act.

7 So, the Utilities Commission Act I think
8 talkies about regulated projects and one of those
9 projects would be the type of project that Celgar had.
10 And as you indicated, you needed two--if you didn't
11 have an Exemption Order like this, you needed--and I
12 will get to Section 19 in a second--you needed an
13 Energy Project Certificate and an Energy Operating
14 Certificate; is that right?

15 A. Yes, yes.

16 Q. Okay. Maybe we can just go and take a look
17 at what we're discussing. Can you go to Tab 35 in the
18 binder you have, sir.

19 ARBITRATOR DOUGLAS: Would you mind providing
20 the exhibit numbers as you go through.

21 MR. OWEN: Yes, I'm sorry, Professor Douglas.

22 This would be Exhibit R-504.

01:47:56 1 THE WITNESS: I have it, Michael.

2 BY MR. OWEN:

3 Q. One minute. I don't.

4 Okay. So, here we have the Utilities
5 Commission Act. Let's go to Section 19 and just look
6 at the things that could happen in these
7 circumstances, so that will be Page 359.

8 Okay. So, if you made an application for an
9 Energy Project Certificate like Celgar did, the first
10 option, I understand, under 19(1)(a) is that the
11 Minister of Energy, with concurrence of the Ministry
12 of the Environment could refer the application to a
13 full review by the British Columbia Utilities
14 Commission; is that right?

15 A. Well, this says for you, whatever that means,
16 yes.

17 Q. I think that was usually. That didn't occur
18 that often. It was sort of for bigger projects and
19 things like that; is that right?

20 A. Yes. The one project I can think of back
21 then was the Site C project which went to the BCUC for
22 a panel review, public hearing.

01:49:25 1 Q. I think Site C is still sort of chugging
2 along?

3 A. It's been around for a long time.

4 Q. Yeah, it has. Okay.

5 So, and then under Part B, we have a
6 situation where the application is made by a public
7 utility, and that would be anyone selling electricity,
8 and that could also go to the Commission under Part 3
9 for consideration for a Certificate of Public
10 Convenience and Necessity; is that right?

11 A. Right, yes.

12 Q. And the one here we're talking about is
13 19(1)(c), and that is, you could essentially deal with
14 the application through Ministers' Order or an
15 Exemption Order; is that right?

16 A. That's correct.

17 Q. And what's not here, and I'll give it to
18 you--and I don't want to try and flip to the back of
19 this because there are so many amendments to the
20 Utilities Commission Act between 1980 and the period
21 we're talking about. There was also a fourth option,
22 which was the Minister could reject the application.

01:50:27 1 That was added in 1985. Does that ring a bell?

2 A. That does not, but I know that would be
3 concurrent with thinking of the time and subsequently,
4 so, yeah, it makes sense.

5 Q. Okay. So, let's just--Celgar's application
6 was dealt with through 19(1)(c), as we've already
7 talked about, and 19(3) indicates, if you could just
8 take a look at that, order under Subsection (1)(c) may
9 include conditions that could be included in an Energy
10 Project Certificate or an Operation Certificate; is
11 that right?

12 A. Yes.

13 Q. Okay. Now, just to get more of a sense of
14 the Regulatory Framework, I'd like to take you to the
15 supporting regulation for Part 2, so that would be
16 B.C. Reg 3880, and it's R-412 and it's at Tab 26 of
17 your binder.

18 A. Excuse me a minute.

19 Yes, I have it, thank you.

20 Q. Okay. And this is a pretty short one, but I
21 just want to just get a sense of the content of this,
22 so the first part, this is Section (1)(1), it talks

01:52:05 1 about the application for an Energy Project
2 Certificate, and under Part A, it's, you know, got
3 information about the Applicant, so you have to
4 provide your name and address and things of that
5 nature.
6 Do you see that, sir?
7 A. Yes.
8 Q. And then Part B is the Project description,
9 and it talks about having a description of the Project
10 and its purpose and cost; is that right?
11 A. Yes.
12 Q. Okay. And outline of timetable and other
13 various information that had to be provided.
14 Part C is the Project justification, and it
15 talks about having studies, economic studies,
16 technical studies?
17 A. Um-hmm, yes, including--
18 Q. Sorry, go ahead.
19 A. I was going to say including a benefit-cost
20 analysis, yes.
21 Q. Yes. And then Part D is ancillary
22 applications, and that is a list of approvals,

01:53:01 1 permits, or licenses required under the Pollution
2 Control Act and the Water Act, and I think the
3 Pollution Control Act became the Waste Management Act
4 a little later on; is that right?

5 A. I believe that's true, yes.

6 Q. Okay. And whether they were being sought and
7 a list of other approvals, permits, or and licenses
8 you had, so that's sort of a list of other things you
9 needed, and then there is a general section, and then
10 sub two related, if you wanted to make an application
11 for a modification.

12 A. That's correct.

13 Q. Could you turn to Tab 4, please.

14 A. I have it. Guide to the Energy Project
15 Review Process.

16 Q. Exactly.

17 And could I get you to turn to Page 9,
18 please?

19 MR. WITTEN: Excuse me. What is the exhibit
20 number?

21 MR. OWEN: Oh, I'm sorry. Forgive me.

22 R-195.

01:54:21 1 THE WITNESS: The diagram?

2 BY MR. OWEN:

3 Q. Yes. I think this is just sort of a good
4 summary.

5 So, here we have the Energy Project
6 Coordinating Committee, and that had on it
7 representatives of the Ministry of Energy and Mines
8 and Petroleum Resources, as it was known at the time
9 from the Project Analysis Branch, which you discussed.
10 It also had a representative from the Ministry of the
11 Environment, and finally sometimes there was also a
12 BCUC staff member that sort of attended to have a
13 pulse on these things; is that right?

14 A. That's correct.

15 Everything was done on a joint basis with the
16 Ministry of the Environment.

17 Q. Okay.

18 A. And then some other Ministries also, if they
19 felt there was impact on their particular area of
20 jurisdiction.

21 Q. Yeah, and I think usually it was typical that
22 this sort of core Committee would circulate the

01:55:16 1 application within Government to anyone that they
2 thought might have an interest or comment; is that
3 right?

4 A. That's absolutely correct.

5 Q. So, I'd just like to look at "areas of
6 interest" here.

7 Here we have--obviously there is an
8 environmental resource land use column here, and it
9 goes through a number of things that could be
10 considered, and there's--is that--these are
11 considerations that might be considered in the context
12 of an Energy Project Certificate Application; is that
13 right?

14 A. Yes. This was a broad-based list as you
15 know, it was a guideline, and if a project fell within
16 one of these areas of interest, then further work or
17 analysis was usually required.

18 Q. Okay. So, there is environment--just very
19 broadly, there is environmental considerations, there
20 are socioeconomic considerations, and then you also
21 had energy and economics and finance, and under here
22 there is energy policy; is that right, sir?

01:56:17 1 A. Yes.

2 Q. Okay.

3 A. In my view, this was for its time a pretty
4 sophisticated approach to resource and environmental
5 management as practiced by the Province.

6 Q. My understanding is it was a bit of a
7 forerunner of the Environmental Assessment Process. I
8 understand there were three types of processes, there
9 was another process like this for mines, if I'm not
10 mistaken, and this Energy Project Review Process was
11 sort of a forerunner of what would become the
12 Environmental Assessment Process; is that right?

13 A. That's right, there were three processes:
14 Major Project Review Process that Celgar went through
15 for the pulp mill; Energy Project Review Process,
16 which Celgar went through for the power plant, and the
17 Mines Development Review Process. They were all
18 collapsed together into one Environmental Assessment
19 Process in 1995 with the new legislation.

20 Q. Okay. Thank you.

21 Could you turn to Appendix 2, please, of this
22 document.

01:57:23 1 A. Is that the guidelines or--

2 Q. Of the guidelines, yes.

3 So, if Appendix 1 is excerpts from the
4 Utilities Commission Act?

5 A. Yes. And then 2 is the information
6 requirements; right?

7 Q. I'm sorry, I'm being asked to have you repeat
8 your last response.

9 A. I'm sorry. I was agreeing. Appendix 1 is
10 the regulation, and Appendix 2 is information
11 requirements.

12 Q. That's right. And I think, if you look here,
13 what's set out here is almost an explanation of some
14 of the requirements, more detailed explanation of some
15 of the requirements, the regulations, so we have here,
16 you know, a section on project justification and some
17 of the considerations there, and it talks about supply
18 and demand forecasts, procurement, and over the page
19 are benefits and costs; is that right?

20 A. Yes. My view it's a roadmap or an outline of
21 any relevant studies that needed to be done so that
22 proponents weren't wasting their time, money and

01:58:38 1 energy in producing applications that were deficient
2 and the Government was getting good quality
3 information from the proponents at an early stage.

4 So, we very much wanted this to work for both
5 the proponents and the Government in the best way
6 possible.

7 Q. Okay, thank you.

8 Let's take a look at Celgar's Ministers'
9 Order. Can you turn to Tab 9. R-100. And the very
10 first page is just a cover letter. If you could turn
11 to the second page.

12 I just want to get a sense now that we have
13 gone through the reg, just about the different parts
14 of the Ministers' Order. So, first we have sort of
15 the preambular statement, and then let's take a look
16 at--let's go to the back, the Ministers' Order was
17 signed by both the Minister of Energy and the Minister
18 of the Environment; is that right?

19 A. Yes.

20 Q. And it was also signed by representatives of
21 what was at the time the Celgar Pulp Company. I think
22 it was the two parent companies that signed because

02:00:08 1 Celgar Pulp Company was a joint venture.

2 A. That's correct.

3 Q. So, let's just move up on this page, Page 3,
4 to Paragraph 4.

5 And this seems to be a "for a greater
6 certainty" clause, it indicates that this Order is not
7 a waste management permit or part thereof, and it
8 states that it doesn't limit the ability of the
9 Director of Waste Management or a Regional Waste
10 Manager from enforcing the requirements of that
11 provision; is that right, in your view?

12 A. That's correct.

13 Q. Go turn over and go back one page to Page 2,
14 if you will, and here we have Paragraph 3 at the
15 bottom, and it indicates that the Order can be
16 rescinded at the discretion of the Minister, and it
17 gives certain circumstances, the first if there is a
18 breach of the conditions and two others. So, that's
19 sort of a procedural type provision.

20 A. Yes.

21 Q. And then we have Paragraph 2, and Paragraph 2
22 says Celgar shall obtain and comply with all the

02:01:15 1 applicable tenures, licenses, regulations, approvals,
2 standards and permits, and here they talk about a
3 number of things that are in subparagraph (b), there's
4 approvals and permits pursuant to the Waste Management
5 Act, Water Act approvals, everything down to by-laws
6 of the Central Kootenay Regional District and the City
7 of Castlegar; right?

8 A. Correct, that's correct.

9 Q. And the top one--sorry, John, I didn't mean
10 to talk over you.

11 The top one is a final recommendation of the
12 Celgar Expansion Review Panel. Now, that was a panel,
13 my understanding, a joint panel both Provincial and
14 Federal representatives and it started off as part of
15 the B.C. Major Project Review Process; is that right?

16 A. That's right.

17 Q. And eventually there was a Federal
18 Environmental Assessment or, I think, EARP--that they
19 sort of merged and you had both, the panel was
20 responsible for--sort of had to look at both angles,
21 the Federal angle and the Provincial angle; right?

22 A. Yes, largely because there were fisheries

02:02:25 1 impacts, so the Department of Fisheries Notions had an
2 interest, and downstream impacts because the Columbia
3 River flows into the United States, so there would be
4 downstream impacts in the U.S.

5 So, the panel was struck and ordered to have
6 a full public review process on the pulp-mill aspects
7 of the Project.

8 Q. Okay. Thank you.

9 Now, if we go back a page back to Schedule A,
10 these are the recommendations that just got appended
11 on here of the Celgar Expansion Review Panel.

12 A. Yes.

13 Q. Is that right?

14 A. Yes, that's correct.

15 Q. Okay. But those recommendations, they would
16 be implemented separately, in my understanding,
17 through an OIC Process, the Major Project Review
18 Process wasn't implemented or executed through a
19 Ministers' Order?

20 A. Well, in this particular case, because it was
21 Federal-Provincial, there was split jurisdiction, so
22 the Province alone would not have had jurisdiction

02:03:36 1 over the Project. There had to be the necessary joint
2 approvals of both Federal and Provincial Governments.

3 Q. Exactly.

4 A. And the Major Project Review Process was in
5 another Ministry. It was not within the Ministry of
6 Energy, Mines and Petroleum Resources.

7 Q. Okay. I think you've answered my question,
8 but just for clarity, so there would be a Federal
9 approval process on the one hand of these
10 recommendations, and then there would also be a
11 separate Provincial process, it wouldn't be part of
12 this Order. This provision is, really Paragraph 2, is
13 what is referred to in the regulation as ancillary
14 applications, it's a list of other things you have to
15 go get; is that right?

16 A. Yes.

17 I think it's important to recognize that
18 while the Energy Project Review Process and the Mine
19 Development Review Process were enshrined in
20 legislation, Provincial legislation, the Major Project
21 Review Process that the Mill went through was not in
22 legislation. It was a, if you will, policy based or

02:04:41 1 program based review. There was no backup legislation
2 behind the Major Project Review Process.

3 Q. Okay. Thank you.

4 So, now I come to the conditions imposed by
5 the Ministers' Order, and my understanding is that
6 would have to be what's left over. That would be
7 paragraph--everything under Section 1 essentially the
8 Ministers' Order, (1)(a), (1)(b), and (1)(c); is that
9 right?

10 A. Yes, I would say Paragraph 1 or Section 1
11 represented, if you will, the core value or assets or
12 asset value of the Order. The rest of it is all
13 cross-referenced to other processes and permits and
14 requirements that the company had to undertake, so I
15 think (1)(a), (b), and (c) are the core issues.

16 Q. Okay. Can you flip back to Page 3, please.

17 A. Of the Order?

18 Q. Yes, please.

19 A. Yes.

20 Q. I would just like to direct your attention to
21 under Paragraph or Section or Paragraph 4. Can you
22 just read out starting with "AND FURTHER ORDERS THAT."

02:06:03 1 A. Yes, sorry.

2 "AND FURTHER ORDERS THAT, Celgar is bound by
3 the above conditions in the same way as if the
4 Conditions had been included in an Energy Project
5 Certificate or an Energy Operations Certificate issued
6 to Celgar."

7 Q. Okay. So, that would be the conditions that
8 are in Paragraph 1?

9 A. Well, any condition that's in this Order
10 previous to that last paragraph.

11 Q. Okay. Thank you.

12 A. Recognizing that a lot of these conditions
13 refer to legislation not covered by the Utilities
14 Commission Act.

15 Q. Right, exactly, the ancillary applications.

16 A. Yes.

17 Q. Could you turn to Paragraph 21 of your
18 Witness Statement, please.

19 A. Which is tab--

20 Q. It believe there should be a loose-leaf copy
21 or is it Tab 1?

22 MR. OWEN: Meghan?

02:07:13 1 MS. BUTLER: It's at the beginning of his
2 binder here, Michael.

3 THE WITNESS: I have it, Michael. Thank you.

4 BY MR. OWEN:

5 Q. Excellent. So, John, at Paragraph 21 you
6 opine that Celgar's application materials did not
7 contain the kind of detail that would be required for
8 the Province's regulation of commitments by the
9 private sector; is that right?

10 A. Yes, that's correct.

11 Q. And you reviewed the application in detail?

12 A. I have, yes.

13 Q. At Paragraph 22 you indicate that Celgar did
14 not provide information regarding "what mixture of
15 fuel such as natural gas or black liquor would be used
16 to produce energy"; is that right? For the production
17 of energy.

18 A. Yes, at the end of that section, yes.

19 Q. Okay. Let's take a look at Celgar's EPC
20 application. And this will be a bit frustrating
21 because Celgar's EPC application does not have page
22 numbers, but it's at Tab 6, Exhibit R-97.

02:08:30 1 A. I'm there.

2 Q. Okay. So, this should be six pages in, and
3 there is a heading called "chemical recovery," so,
4 that's where I am going to orient you.

5 A. Yes.

6 Q. So, the heading is at the bottom of the page,
7 if you just turn over the page.

8 Now, here we have some bolded text, there is
9 some bolded text on this page, and there is also some
10 bolded text under mill steam--mill water, steam and
11 power requirements; is that right?

12 A. Yes, that's correct.

13 Q. Is there any other bolded text anywhere in
14 this application, aside from the headings, of course?

15 A. No, there isn't, that I can tell or can see.

16 Q. Okay. Thank you.

17 I would just like, if you could flip back to
18 the--I hope you haven't lost your spot. I should have
19 told you to keep your hand there.

20 A. It's not that long.

21 I have it.

22 Q. You got it? Okay.

02:10:13 1 A. Yes.

2 Q. Could I refer you to the description, there's
3 two bolded passages together in one paragraph. Could
4 I refer you to the second section in bold. Could you
5 read the two sentences there in bold at the bottom of
6 that paragraph, please.

7 A. Well, mine are at the top of the page, but I
8 will start off with "the heavy black liquor, which
9 contains the lignin and cooking chemicals from the
10 digester, will be burned in a new recovery boiler
11 (27). The heat generated in burning the black liquor
12 will be used to produce steam. This steam passed
13 through a turbo generator will under normal conditions
14 apply 100 percent of the modernized mill's electrical
15 power requirements."

16 Q. So, that passage talks specifically about the
17 fuel that will be used to produce steam, and that
18 steam will be used to supply 100 percent of the Mill's
19 electrical power requirements in normal operations?

20 A. It states that, yes.

21 Q. It's specific, though?

22 A. It's a specific statement based on, if you

02:11:39 1 will, the general description of the Mill. And my
2 view, and we have just gone through this, none of
3 these words satisfy the requirements of 388/80, which
4 we have gone through for technical, economic,
5 financial analysis, including benefit-cost analysis.

6 So, as I said earlier on in response to
7 Mr. Witten, my review of the application says it's
8 generally worded, nonspecific, not technical, and it's
9 basically an aspirational statement by Celgar as to
10 what they think might happen as one possibility in the
11 Mill.

12 Q. A possibility in the Mill. This is just a
13 possibility?

14 A. Well, it's a statement as to what could
15 happen, but it's not a firm commitment in my view,
16 that this is the way it will be.

17 Q. Okay.

18 A. I don't know how the company could have made
19 this statement with certainty without doing an energy
20 balance, energy benefit-cost analysis, technical
21 analysis. There were other fuels to be purchased,
22 natural gas, wood waste. They would need to know what

02:12:43 1 kind of contracts it would get, what price it would
2 pay, what volumes would be available, risk assessment
3 of fuel escalation. These are all technical and
4 business considerations that anybody would take into
5 account before making such a statement, and I don't
6 see any evidence on the record that that kind of work
7 was done.

8 Q. Okay. So, just to be clear, you think that
9 when you're looking at something from a technical
10 perspective, like a Ministers' Order or in the energy
11 sector, you should be cognizant of what type of fuel
12 is used?

13 A. No, I'm looking at the requirements of the
14 guidelines for the Energy Project Review Process, the
15 requirements of 388/80, a letter Mr. Ostergaard sent
16 to the company on October 3rd, telling the company
17 they have to fulfill these requirements for economic,
18 technical, financial analysis, and the company didn't
19 forward to the Ministry any of the required
20 information that would suggest that the requirements
21 of 388/80 were fulfilled.

22 Q. Okay.

02:13:51 1 A. That's my conclusion--sorry, I was just going
2 to finish. That leads to my conclusion that these are
3 general statements. They're not firm commitments
4 because they couldn't be because the analysis hadn't
5 been done as to whether or not a firm commitment could
6 be made as to whether or not the Mill would be
7 self-sufficient in energy.

8 Q. Sorry, I didn't want to talk over you there.

9 A. It's okay. I'm finished.

10 Q. You're done? Okay.

11 Could I get you to go back to the start of
12 the application, please. And this would be just right
13 after the title page, it starts with "Application for
14 an Energy Project Certificate" at the top, and it's
15 got the Applicant.

16 Do you see that?

17 A. Um-hmm, yes, yes, I do.

18 Q. You're there.

19 Okay. Can you read the bottom paragraph,
20 please.

21 A. "Celgar has engaged independent British
22 Columbian consultants internationally recognized

02:14:46 1 through achievements in mill process design, air
2 emission control and effluent discharge and
3 Environmental Impact Statement."

4 Q. Okay. Can you flip over to the next page,
5 please. Could you just read what they were instructed
6 to do, and the paragraph underneath, the bullets in
7 the paragraph underneath.

8 A. I guess referring to the consultants hired,
9 "were instructed to, one, design by the state of the
10 art by standards; two, incorporate the best available
11 technology; three, the final design has the
12 flexibility to allow Celgar to make future changes to
13 utilize, improve environmental control development;
14 four, ensure that the Mill design meets all
15 environmental requirements."

16 It goes on to say: "Work done by the team of
17 consultants has confirmed, that the proposed
18 modernization project will guarantee an extensively
19 rebuilt mill that under normal conditions complies
20 with all current and proposed Federal and Provincial
21 environmental requirements."

22 Q. Thank you. Just one minute.

02:16:06 1 (Pause.)

2 Q. So, this suggests that there was a fair
3 amount of technical analysis that went in, I believe
4 it was an engineering firm, HA Simons which is now
5 Amec Foster Wheeler, did all of this analysis prior to
6 submitting this application; is that right?

7 A. It would appear so, but this is the statement
8 by Celgar that this was going to be done or was in the
9 process. I don't think these studies that are
10 referred to are all the story that's required or all
11 the conditions that are required to meet the study
12 requirements of 388/80. It was very much focused on
13 the design of the Mill and reaching environmental
14 compliance. 388/80 is about much more than that.

15 Q. Okay. You've testified, though, that you
16 aren't able to give a legal opinion on this?

17 A. No. There is nobody in the project analysis
18 branch that were lawyers either. This is practical
19 common sense to me. You have to do an economic study,
20 you have to do a benefit-cost analysis, you have to do
21 a financial analysis, you have to do a technical
22 analysis. It's straightforward. It's not there.

02:17:27 1 Q. Okay. But you've also testified that you
2 didn't participate in an energy coordinating
3 Committee, in the Energy Project Coordinating
4 Committee, and that you didn't work in the Project
5 Analysis Branch?

6 A. No, but I was responsible for it.

7 Q. And this is--I know you were responsible for
8 it. I understand that, I understand you managed this
9 process, but you weren't directly involved in it, were
10 you?

11 A. No, I wasn't, but I haven't seen any
12 information in the documents I've been provided
13 for--through this last six months, that would suggest
14 that any of this work was done.

15 There is a letter attached to the Application
16 that basically has one sentence in it with some
17 Financial Statements attached that basically says the
18 Project will have lots of benefits from an regional
19 and economic perspective. That's not a benefit-cost
20 analysis. So I just don't understand why the Ministry
21 staff and the Energy Project Coordinating Committee
22 didn't go back to Celgar and say, look, we need more

02:18:29 1 information prior to reaching a decision to issue a
2 recommendation that the Ministers' Order be signed.

3 Q. Just one minute, Mr. Owen.

4 (Pause.)

5 Q. Let's just briefly go into what happened,
6 then. Can you take a look at Tab 5, which is R-96.

7 A. I'm there.

8 Q. This is a letter to Mr. Dick Wigen, Assistant
9 Project Manager, and if you flip over the page, it's
10 from Peter Ostergaard.

11 A. That's correct.

12 Q. And in the second paragraph of his letter,
13 and I think you've testified that this was Ministry
14 policy at the time, Mr. Ostergaard has indicated that
15 the Ministry and BC Hydro have identified pulp mill
16 expansions as a significant component of incremental
17 energy demand in British Columbia during the 1990s,
18 and the Ministry wants to ensure that load
19 displacement, i.e., through conservation, energy
20 efficiency measure and self-generation and
21 cogeneration is thoroughly explored before utilities
22 are forced to build expensive new generation resources

02:20:30 1 to serve expanded industrial loads, and I'm sure you
2 have seen that before.

3 A. Yes, that was policy at the time for
4 experiencing a significant interest in industrial
5 investment in British Columbia, and we had a long list
6 of potential energy demands that would have to be met,
7 if any or all of these interests came to fruition, and
8 we were concerned about expensive generation having to
9 come on stream to meet these new loads, and so the
10 policy was to, amongst other things, promote
11 cogeneration in the pulp mills.

12 Q. Sounds like it hasn't changed that much.

13 Let's flip over to the second page of the
14 letter, and here if you look at the second paragraph,
15 at the first and second paragraph, Mr. Ostergaard is
16 indicating that Mr. Sweeney of Celgar confirmed that
17 the expansion would be in the range of 48 megawatts,
18 and then he says--he informs the company--this is a
19 letter informing the company that it requires an
20 Energy Project Certificate Application; is that right?

21 A. That's correct.

22 Q. You didn't refer to this letter in your

02:21:47 1 Witness Statement, though?

2 A. No, I don't think so, but I referred to
3 Mr. Ostergaard's Witness Statement, as you know, and
4 my Witness Statement.

5 Q. Yes. You referred to his other letter, too,
6 that was part of the Major Project Review Process
7 which had a similar sort of concern identified.

8 I just to want go to Mr. Ostergaard's Witness
9 Statement for a second. He's testified that he was
10 concerned about this because Celgar was in the West
11 Kootenay Power region; is that right?

12 A. That's correct. It is in that region, now
13 known as Fortis.

14 Q. Yes. And that region at that time had the
15 same problem that it does today insofar as there
16 was--they don't have enough generation resources to
17 meet their own load. They rely on long-term Power
18 Purchase Agreements to sort of make up the balance; is
19 that correct?

20 A. That's correct. That utility from its very
21 inception has been deficient in generating capacity,
22 and one of my projects in my early days in the

02:23:00 1 Ministry was to try and enhance West Kootenay Power's
2 ability to add to assets, and I was part of a scheme
3 whereby some assets were transferred from Cominco,
4 Cominco was a lead smelter, industrial plant on the
5 Columbia River at Trail. They owned, as I recall,
6 four smaller hydroelectric dams, West Kootenay owned
7 two, and we were able to transfer some of the Cominco
8 dams over to West Kootenay and increased its rate base
9 and its ability to generate energy, but it's also
10 enjoyed very low electricity rates historically, so
11 it's a bit of a unique circumstance in the Province of
12 B.C.

13 Q. Okay. Thank you. And thank you for that
14 background. If I could urge you, and I know you will
15 respect this, John, to just keep your responses short
16 because I'm sort of on a tight timeframe, just like
17 Mr. Shor is. It's a chess clock.

18 A. I will do my best.

19 Q. Thank you very much.

20 So, Celgar at that time, and I think now is
21 the largest industrial customer in what was then West
22 Kootenay Power's region; is that right?

02:24:16 1 A. I can't say for certainty, but it makes
2 sense.

3 Q. Okay. Do you want to turn to Tab 21, please.

4 MR. WITTEN: Can you say an exhibit number,
5 please.

6 MR. OWEN: Certainly may.

7 R-407.

8 BY MR. OWEN:

9 Q. Could I get you to turn to the second-to-last
10 page. These are, just for the record, Minutes of the
11 Energy Project Coordinating Committee dated
12 August 29, 1990.

13 Have you seen this document, sir?

14 A. I don't think I have.

15 Q. The Claimant didn't give it to you for
16 review?

17 A. I don't think so.

18 Q. Okay. And on the second-to-last page, they
19 obviously are discussing a number of different
20 projects and different issues, but on the
21 second-to-last page there is a subtitle "Celgar".

22 Do you see that?

02:25:38 1 A. Yes, sorry.

2 No, I don't think I have seen it. That's
3 okay.

4 Q. Okay. And I just want to look here, can
5 you--so, the first sentence says it will be a
6 regulated project. Can you read the second sentence
7 starting with "therefore," please.

8 A. I'm sorry, Michael, what was your question?

9 Q. Would you mind--

10 A. I do recall--I'm sorry, I do recall seeing
11 this. I don't recall reading it more than once, so I
12 probably have seen it.

13 Q. Okay.

14 A. I remember this Bill Grant reference vaguely.

15 Q. Okay.

16 A. But go ahead, I'm sorry. Repeat your
17 question.

18 Q. Not at all. Not a problem.

19 Could you read the second sentence starting
20 with "therefore," please.

21 A. "Therefore, the Project will be reviewed
22 jointly under the Major Project Review Process and the

02:26:38 1 Energy Project Review Process."

2 Q. So, that's suggesting that the Project is
3 going to receive consideration under both processes,
4 and it indicates that there is a letter to that effect
5 has been sent to Celgar, and it indicates here that a
6 letter from MEMPR, that's Ministry of Energy and Mines
7 and Petroleum Resources, but the Ministry of Regional
8 and Economic Development was sent concerning the lack
9 of information on power generation and it was
10 identified that additional information was requested.
11 And this was paraphrased in a Stage 1 comments
12 concerning the Major Project Review Process because
13 the Major Project Review Process has Stage 1, and then
14 if you don't sort of get out at Stage 1 you have to go
15 on to a more detailed Stage 2; is that right? Is that
16 your recollection?

17 A. Yes.

18 Q. Okay. So, that concern, and it was
19 paraphrased at the Stage 1 point, and then it's likely
20 that a supplement to Stage 2 information request will
21 cover any concerns raised about the cogeneration
22 portion of this project; is that right? Are you

02:27:54 1 following me?

2 A. Yes, I follow you. It says "likely," so we
3 don't know for sure that it was.

4 Q. Okay. And it indicates here that there is
5 some sharing here going on. There is two different
6 review processes, and that the Project would be
7 reviewed under both the MPRP and the Energy Project
8 Certificate Process.

9 A. That's correct, keeping in mind the date of
10 these notes is August, and this refers to something
11 happening in January earlier that year, so I imagine
12 the initial interest in this project was under the
13 Major Project Review Process around the environmental
14 issues associated with the pulp mill, and the power
15 aspect of it probably came in later.

16 Q. No, you're quite right. It was initially
17 looked at in January of 1990 by the major--I think
18 actually the prospectus might have even been from
19 December 1989.

20 Now--so, this indicates that, you know, there
21 is sharing of information going on. This is
22 also--these minutes are occurring one week after

02:28:58 1 Mr. Ostergaard issued his letter; is that right?

2 Approximately?

3 A. Yeah, August 23rd, I guess, a week--six days
4 later, I guess.

5 Q. Okay. Thank you.

6 Just cognizant of the time here, I'm going to
7 move--I'm going to shift gears here and go to--could
8 you turn to Tab 49, please, and this is C-327.

9 A. Yes, Michael, I'm there.

10 Q. Okay. Here we have another Ministers' Order
11 for the McMahon--I think I've got that
12 right--cogeneration project. So, I just want to look
13 here at the different conditions. Can you turn to
14 Page 3, please. And I would like to direct your
15 attention to Condition 6. It says here--

16 A. Yes.

17 Q. Can you read out Condition 6 please.

18 A. "WESCUP shall hire, at competitive rates,
19 qualified local native and non-native people for
20 employment opportunities associated with project
21 construction and operation."

22 Q. Okay. And that's a condition of the Order,

02:30:43 1 is it?

2 A. It looks to be that because it is not a
3 "whereas" clause, yes.

4 Q. Okay. And who would have monitored that?

5 A. In this particular time period, the Ministry
6 of Energy, Mines and Petroleum Resources in
7 conjunction with the counter Ministry, in this
8 particular case the Minister of the Environment.

9 Q. Okay. And thank you.

10 And can you tell me about the staff that were
11 responsible for monitoring that?

12 A. Well, we had an office in Fort St. John, so
13 if this project required monitoring, it would have
14 been done by the staff in Fort St. John.

15 Q. Okay.

16 A. Every Ministry in the resource sector in B.C.
17 had regional staff because these projects, as you
18 would know, these natural resource-based projects were
19 scattered throughout the Province, and it's a big
20 Province.

21 Q. Okay.

22 A. So, regional staff would have the technical

02:31:46 1 expertise to monitor engineering-related issues. The
2 employment issue would be technical obviously, but it
3 would be the regional staff or in particular a letter
4 could have gone from headquarters to the proponent to
5 ask for an update on hiring practices.

6 Q. Okay. And could you tell me where the
7 monitoring conditions are on this?

8 A. I haven't read this order, so I would have to
9 take a while to read it.

10 Do you want me to do that?

11 Q. I would like you to just flip through quickly
12 and just tell me whether, you know, where the
13 conditions concerning monitoring these--with respect
14 to this condition are.

15 A. Well, the Utilities Commission Act allows for
16 compliance and enforcement. News reports required
17 under four.

18 Q. That report under four would be about--

19 A. I'm cognizant of your time constraint.

20 Nothing jumps out at me.

21 Q. Okay.

22 A. That's not to say the Ministry couldn't send

02:33:34 1 a letter to the company to ask for an update.

2 Q. Yeah, absolutely. And just like they could
3 have sent a letter to Celgar to ask for an update on
4 the self-sufficiency commitment.

5 A. And perhaps they should have.

6 PRESIDENT VEEDER: I think if you're short of
7 time, keep that at bay.

8 MR. OWEN: Keep moving. You're right. I'm
9 sorry.

10 BY MR. OWEN:

11 Q. Okay. And you touched on compliance just a
12 minute ago. And Ministers' Orders were regulated
13 under the Utilities Commission Act; is that right? As
14 we touched on?

15 A. Yes.

16 Q. And, so, were there--

17 A. It would have to have--for the Order to be
18 law, it would have to have a covering statute; in this
19 particular case, the Utilities Commission Act.

20 Q. And were there enforcement mechanisms under
21 that?

22 A. Under the Utilities Commission Act?

02:34:25 1 Q. Yes.

2 A. Yes. The Ministry could, for example, cancel
3 a certificate.

4 Q. Okay. And maybe let's just, because you
5 basically testified that there--and I just want to go
6 take you perhaps quickly to Paragraph 25 of your
7 Witness Statement, and just down towards the
8 bottom--top of the page, you say here there had to be
9 clear expectations set in advance, you know,
10 monitoring compliance and consequences for
11 noncompliance; is that right?

12 A. Yes, I said that.

13 Q. Okay. And in terms of consequences for
14 noncompliance, we have already seen that the Minister
15 could rescind the Order under the third condition or
16 the third section of the Order; right?

17 A. Right.

18 Q. Okay. And there were also enforcement
19 mechanisms we just mentioned under the Utilities
20 Commission Act; is that right?

21 I can help you.

22 (Overlapping speakers.)

02:35:49 1 Q. I'm sorry. I'm sorry. Go ahead.

2 A. No, you go ahead. Show me.

3 Q. Take you there? Okay. Tab 35, please.

4 R-504.

5 So, I'm going to take you to two provisions.

6 The first if you could just flip to Section 124(1).

7 A. Yes.

8 Q. Okay. And just at the very top here, and
9 this is a very long provision so I'll take you to the
10 relevant points, the following person--it starts with
11 "The following persons commit an offence," and then
12 could you go to G, please. And that says "a person
13 who contravenes Section 17 or 22," so those are
14 provisions that relate to Ministers' Orders; is that
15 right?

16 You can check by flipping back, if you would
17 like. Energy Project Certificate or Energy Operation
18 Certificate.

19 A. And removals. Going to his Energy Removal
20 Certificate.

21 Q. Yes, I'm sorry, you're right.

22 And 19(3), as we have seen, it indicates that

02:37:23 1 a condition in a Ministers' Order or a disposition
2 order has the same force as a condition in an EPC or
3 an EOC.

4 And let's just look the penalties for
5 noncompliance. If you could go back to Section 124
6 and go over to the one page, I would like to refer you
7 to Subparagraphs 4 and 5.

8 A. Sorry, repeat that again?

9 Q. So, I'm looking at Section 124 now, and this
10 would be Subparagraphs 4 and 5.

11 A. Oh, sorry.

12 Q. No problem.

13 A. Okay.

14 Q. So, Subparagraph 4 indicates a person
15 convicted of an offense under this section is liable
16 to penalty of \$10,000, and Subsection 5 indicates that
17 if there is an offense, each day the offense continues
18 is a separate offense. So, it's essentially a \$10,000
19 per day penalty; is that right?

20 A. Yes.

21 Q. Okay. And there were a lot of amendments,
22 and this is old-style legislation, so we had to go

02:38:33 1 through and get all of the amendments. I'm going to
2 bring something up on your screen, because if you try
3 to find this, it's going to take us a long time. But
4 this is an amendment from--let me just get the
5 relevant reference here--it's in the same exhibit, but
6 it is amendments from the Utilities Commission
7 Amendment Act 1982, Chapter 54.

8 Chris, can you bring that up, please? Okay,
9 can you put it on the screen, please? You will lose
10 me for a second.

11 Good? Okay.

12 A. Unfortunately, I can't read that, unless I
13 get out of my chair. Is that okay?

14 Q. Can you blow it up for him?

15 A. I only have my reading glasses with me. Or
16 you could read it out to me.

17 Q. Okay. You know what, let me try and do that.

18 A. It's restraining orders, is it?

19 Q. Yes. It's essentially a provision
20 indicating--now I will have to find it in the--

21 A. No; if I might be permitted to say this, I
22 think this part of the testimony sort of ignores a

02:39:48 1 major consideration in that these are black and white,
2 if you will, blunt instruments. And practice would be
3 to engage with the proponent if the Ministry thought
4 the proponent was not in compliance and figure out a
5 way to bring the proponent into compliance.

6 As well, a short time after the Ministers'
7 Order was released, we have the Environmental
8 Assessment Act coming into force in the mid-90s and a
9 whole sort of new regime, Compliance Reports,
10 Monitoring Reports, voluntary compliance was brought
11 into bear. And that didn't come out of the blue.

12 So, you know, we were a sophisticated
13 organization that didn't want to put businesses out of
14 business. And so, if compliance was an issue, it
15 would have been very strange to reach the point where
16 we were going to the Supreme Court or issuing \$10,000
17 fines. So, we very much wanted the resource sector to
18 be--in B.C.--competitive on a world scale. And so, we
19 went to extreme lengths to ensure that projects worked
20 as intended, but above all operated in the public
21 interest.

22 This project, as you know, received a lot of

02:41:07 1 public attention, and it would be our intention to
2 make sure that the proponent operated the Project in a
3 publicly acceptable manner. And indeed, the Major
4 Project Review Panel Report talks about liaison
5 committees with local communities, monitoring
6 committees and so forth and so on.

7 So, everybody wanted this project to work.
8 It was a major improvement in the regional economy and
9 the regional environmental conditions, and so it was
10 no secret that follow-up interest in the Project would
11 have been very, very much the order of the day.

12 Q. Right. And I'm certainly not contending
13 that. I'm just, you know, you indicated that there
14 were no consequences for noncompliance, so I'm just
15 trying to establish that the Utilities Commission Act
16 did provide for the enforcement of these.

17 A. Fair enough. I did say that in my Statement,
18 but as referring to the Order itself, not the Act or
19 the regulations. I was just pointing out that the
20 specific Order, the wording of the Order, did not have
21 any consequences for noncompliance.

22 Q. Okay. Well, you mentioned--

02:42:15 1 A. My remarks have been taken out of context.

2 Q. Okay.

3 Let's take a look it's Tab 31, quickly. That
4 is--let me get you the exhibit number--R-418.

5 A. The Waste Management Act?

6 Q. You know, I think I have given you the wrong
7 tab number, John. I apologize. One minute.

8 (Pause.)

9 A. I'm glad, because I haven't read this for
10 decades. Nor would I want to.

11 Q. Tab 44, please, and I will give you the
12 exhibit number as well in just a second.

13 MR. OWEN: For the record, that is Exhibit
14 C-295.

15 THE WITNESS: Okay.

16 BY MR. OWEN:

17 Q. So, these are Celgar's permits under the
18 Waste Management Act. So, this is something you've
19 compared the Ministers' Order to. These are permits
20 that control the discharge of effluent air emissions.

21 Now, they certainly have monitoring
22 provisions in them, but if you were to go through

02:43:44 1 them, they wouldn't have an enforcement mechanism in
2 them, is my understanding.

3 Now, subject to checking, my understanding of
4 the way that this typically worked is that you would
5 issue permits, you know, and they certainly might have
6 monitoring and they might have conditions and they
7 might be specific, more specific or less specific.

8 But typically enforcement and compliance
9 provisions were set out in the relevant statute
10 because that way you could refer back to the statute
11 no matter what; it's sort of the base.

12 Is that consistent with your recollection?

13 A. Yes, but to put the Celgar issue in context,
14 as we've discussed today, the policy incentive of
15 promoting cogen at pulp mills was new. It was a new
16 energy policy document released. It's in the
17 materials, "new directions for the Nineties."

18 The Celgar project had a lot of public
19 interest in the region and a lot of interest in the
20 Ministry, and all I'm suggesting is that, given the
21 total demand we had for new inquiries for energy and
22 supply, given policy development being dynamic at the

02:45:03 1 time--it was a time period where policy was changing
2 constantly because of largely the oil situation
3 globally, we had gone from the national energy program
4 in Canada ten years earlier to now deregulated energy
5 markets--I would have thought that the Ministry would
6 have put some monitoring compliance requirements in
7 the Ministers' Order in order to ensure that policy
8 development, energy and supply forecasts were more
9 accurate than the others that would be in the absence
10 of that requirement. That's all I'm suggesting.

11 Q. Okay. No, and I understand that you're
12 coming at this from that perspective, and I understand
13 that.

14 I just want to touch briefly on a couple more
15 things.

16 Could you go to Tab 13, please. We're almost
17 done. And this is R-310. 310.

18 A. I'm there.

19 Q. Now I am too.

20 So, this is from the Executive Director of
21 the Environmental Assessment Office to Sangra Moller
22 who were counsel to Celgar at the time--and still are,

02:46:33 1 I'm sorry--and here Joan Hesketh is indicating they
2 will look to Celgar, this is in 2005, for compliance
3 with the conditions of the Ministers' Order; is that
4 right?

5 A. That's correct.

6 Q. And then I just wanted to touch briefly on
7 energy exports. And I think, you know, there has been
8 some contention that--

9 A. Sorry, Michael.

10 Q. I'm sorry?

11 A. Sorry, could I just--you asked me a question
12 on this letter, and I said that's correct. And I'm
13 sorry to interrupt you, but I'd also add that at this
14 time this would have been an opportunity for the
15 Environmental Assessment Office and the Applicant, in
16 this case Sangra Moller, to go over the documents to
17 determine whether or not there was a self-sufficiency
18 requirement, and nothing of the kind was raised by
19 either Party. So, all I see in this letter is a
20 straightforward name mentioning the company.

21 Q. Perhaps it was a missed opportunity.

22 Can you--I would just like to touch briefly

02:47:33 1 on exports of electricity. And I think there has been
2 a contention that--and I think this is mostly
3 true--that there generally weren't that many exports
4 of electricity. Because pre-OATT, you didn't have
5 sort of this Open Access Transmission Tariff where you
6 could wheel electricity.

7 But I would just like to take you for your
8 recollection to Tab 36.

9 A. Yes.

10 Q. So, my understanding was this was sort
11 of--you know, and there were a few other provisions I
12 could take you to if you really want, but--oh, yes,
13 I'm sorry.

14 MR. OWEN: R-505 for the record.

15 BY MR. OWEN:

16 Q. This is the Jack Davis Statement On Power
17 Export Policy. And this was from 1989, and this was
18 stating that the Government was sort of going to move
19 towards encouraging exports of electricity; is that
20 right?

21 A. Yes.

22 Q. Okay. And my understanding was that it was

02:48:44 1 possible through bilateral negotiations, usually with
2 Powerex or BC Hydro, to move electricity in limited
3 circumstances. Again, not under the Open Access
4 Transmission Tariff, as that was a little bit more
5 cumbersome, but that did occur.

6 Is that consistent with your recollection?

7 A. Well, this is dated 1989.

8 Q. Yeah.

9 A. We had--

10 Q. Sorry, could you just--

11 A. Power--

12 (Overlapping speakers.)

13 Q. You're not very loud. I'm sorry, John.

14 A. Sorry, I sat back.

15 We had markets for power out of British
16 Columbia in the United States, but the frustrating
17 part was getting access through the Bonneville Power
18 Authority transmission network, where Bonneville was
19 the entity in Pacific Northwest that controlled all,
20 if not most of all the transmission access.

21 And we talked to, for example, the Los
22 Angeles Department of Water and Power about selling

02:49:47 1 firm power to them. They were interested. The price
2 was right. The Province had looked at building Site
3 C, and if it wasn't needed, exporting that power.
4 Minister Davis, the author of this statement, was
5 interested in the private sector developing projects.
6 He had a particular interest in a coal plant in the
7 Kootenays, thinking that power exports could be a way
8 of enhancing the economics of that project.

9 So, we were tippy-toeing into the electricity
10 export business, but we were largely frustrated from
11 achieving any contracts that were beneficial to the
12 Province.

13 Q. And because of constraints in Bonneville and
14 some of other problems you mentioned?

15 A. Largely.

16 And, of course, the markets change from time
17 to time, so you build for export at your peril, as we
18 have seen looking backwards how power prices can be
19 astronomically high in some periods of time and very,
20 very low at other periods.

21 Q. Sorry, I'm flipping ahead. I don't mean to
22 be rude. I'm just trying to see what else we need to

02:50:52 1 sort of cover off.

2 I would like to ask you something, John. As
3 former CEO of counsel of Forest Industries, would you
4 expect BC Hydro to divulge operational details of pulp
5 mill operations data, like what their generation data
6 is, how much pulp production they have, you know, in
7 terms of negotiating a Call for Power? Would that be
8 something that your members would be happy with,
9 divulging that type of information?

10 A. No, not if it was commercially sensitive
11 information, and I'm guessing it would be.

12 Q. And so, you know, if BC Hydro is in a
13 position where it's doing a Call for Power, it would
14 have good reason to ensure that, you know, one mill,
15 Domtar-Kamloops, for example, and another one, Celgar,
16 you know, they're not going to share all of the
17 information on its generation and the type of
18 information that they've submitted as part of that
19 Call Process, fuel plans and things like that?

20 A. No, and I don't see why they would. I mean,
21 these were competitive calls. We wanted the best
22 projects to come out at the other end of the process.

02:52:28 1 Q. Okay. Just one minute.

2 (Pause.)

3 Q. John, thank you very much. It was a pleasure
4 seeing you.

5 A. Thank you, Michael. All the best.

6 PRESIDENT VEEDER: And there will be
7 questions, I suspect, from the Claimants.

8 Do you have any redirect examination?

9 MR. SHOR: May we just take a five-minute
10 break?

11 PRESIDENT VEEDER: Of course.

12 We are going to take a five-minute break
13 while the Claimants consider what questions they may
14 want to put to you, so we will be away for five
15 minutes.

16 THE WITNESS: Okay, thank you.

17 (Brief recess.)

18 PRESIDENT VEEDER: Let's resume.

19 There will now be questions from the
20 Claimant.

21 MR. WITTEN: Thank you, Mr. President.

22 REDIRECT EXAMINATION

03:04:38 1 BY MR. WITTEN:

2 Q. Mr. Allan, I just have a couple of questions
3 to follow up on the cross-examination, and these are
4 intended to clarify some of the issues that Mr. Owen
5 raised in his cross.

6 To start, Mr. Allan, you were asked by
7 counsel for Canada about technical analysis that was
8 before the Ministers in relation to the application,
9 and you explained that you didn't believe the
10 technical analysis was done adequately.

11 Could you please explain to the Tribunal,
12 based on your experience with other project
13 applications, how the analysis in Celgar's application
14 materials compared to those of other applications with
15 which you're familiar?

16 A. Yes. Thank you, Mr. Witten.

17 As a starting point, I just want to
18 re-emphasize that thinking on this issue has as its
19 core the requirements of 388/80, and the Witness
20 Statements from Ms. Mullen and Dr. O'Riordan who refer
21 to that section and the need for not only technical
22 analysis but economic and financial analysis, and

03:05:51 1 specifically in Dr. O'Riordan's statement in
2 Section 55, a benefit-cost analysis.

3 So, when I look at the Celgar application, I
4 don't see appended to it any analysis, I don't see any
5 reference to any of that analysis, despite the fact
6 that consultants were engaged, but I would say they
7 were more engaged to design the Mill, the pulp mill,
8 rather than were engaged to look at project
9 feasibility and economic studies and matters of that
10 type.

11 So, when there is nothing in the application,
12 and the application runs under 30 pages and a cover
13 letter says there will be benefits to the project in
14 one sentence, I don't conclude that that is an
15 analysis consistent with the requirements of 388/80.

16 Well, Ostergaard wrote to Celgar on October
17 the third, and that is Exhibit R-411, and specifically
18 asked for that analysis and quoted the requirements of
19 388/80.

20 I then looked at Canfor's application some
21 few years later--I think it was around 1995 for a
22 cogen project in Prince George at the Intercon Pulp

03:07:08 1 Mill, and the application with the attached analysis
2 runs to 238 pages. So, I looked at that application
3 as being consistent with the requirements of 388/80,
4 and the Celgar application as being in compliance with
5 that requirement.

6 And so, in my view, the Ministry should have
7 written back to Celgar to request the analysis yet
8 again, but--and in doing so and in proceeding with
9 their recommendation up the line through me to the
10 Minister to approve the Ministers' Order, I think the
11 Ministry staff made a bit of a rush to judgment and
12 saw Celgar's general statements in its application
13 about energy production and consumption as being
14 consistent with the policy of the day, and they
15 quickly tried to enshrine that in this generally
16 worded Ministers' Order that says you must design,
17 build, plan and operate the Mill consistent with their
18 application. And there is just no foundation from an
19 engineering perspective or an economic perspective for
20 a self-sufficiency requirement to be imposed on the
21 company.

22 Q. Thank you, Mr. Allan.

03:08:24 1 My second question goes back to, you were
2 asked by counsel for Canada a few questions about
3 Celgar's application, and counsel noted that in the
4 application that there is a statement that refers to
5 100 percent, and counsel asked you whether that
6 statement was specific.

7 Mr. Allan, he also--counsel also directed you
8 to R-100, which is the actual Ministers' Order, and
9 noted--which I know you have studied--that there are
10 three different sources that the Ministers took into
11 account; is that correct? The application, the stage
12 two reports, and additional material in the expansion
13 Review Panel? Is that accurate?

14 A. Yes, yes. But the primary source document,
15 in my view, would have been the application. This was
16 for the thermal electrical energy generating power
17 plant. It was not for the pulp mill. The Ministers'
18 Order was exempting the power-plant component of the
19 pulp mill.

20 So, in looking at the--that component of the
21 Mill and the legislation around energy projects, in my
22 view, the application would have been the primary

03:09:46 1 source document.

2 Q. Can I ask--let me just follow up with one
3 brief question from that, Mr. Allan.

4 The Ministers' Order was issued following a
5 review of a variety of documents. Are you aware that
6 there are figures other than 100 percent in some of
7 the other materials that the Ministers referred to?

8 A. Yes. There's 100 percent, there's up to 90,
9 I think, there's 90 percent. The numbers are all over
10 the map. And when I look at the sequence of
11 statements that Celgar has made around energy
12 production and consumption in the Project, I come to
13 the conclusion that this is not a firm commitment.

14 Two reasons: One, the statements vary,
15 they're not consistent; and, two, as Mr. Wigen has
16 said in his Witness Statement, Celgar would have had
17 to have undertaken a large economic--sorry, a large
18 engineering energy balance study to ensure that the
19 right quantities of energy would have been available
20 for the process--natural gas, wood waste, steam in the
21 mill, black liquor. This is a technical, a very
22 complex technical process of producing pulp while

03:11:19 1 you're producing energy.

2 And so, in the absence of that information, I
3 just don't see how Celgar would have come forward and
4 made a firm commitment in its application without all
5 those variables, to the best of their ability doing
6 some sensitivity analysis to determine whether it was
7 economic to pursue that venture in that manner.

8 Q. Thank you, Mr. Allan.

9 And one last question, and it's a very brief
10 question. Counsel for Canada asserted that the
11 Ministry of Energy "could have sent a letter to Celgar
12 to ask for an update on the self-sufficiency
13 commitment."

14 Mr. Allan, to your knowledge, did the
15 Ministry of Energy ever send such a letter?

16 A. Not that I'm aware of, but they should have.

17 Q. Okay. Thank you very much.

18 A. And I should have said they should have if
19 they thought a self-sufficiency commitment was in
20 place.

21 Q. Thank you for that clarification, Mr. Allan.

22 I'm finished, Mr. President.

03:12:28 1 PRESIDENT VEEDER: Thank you very much.
2 The Tribunal has no questions, Mr. Allan.
3 It's for us to thank you that you took part,
4 and we thank you for your testimony, and wish you and
5 your wife our very best wishes.

6 THE WITNESS: Thank you, Mr. President.
7 Might I be permitted to make one closing
8 comment?

9 PRESIDENT VEEDER: As always, it depends what
10 it is.

11 (Laughter.)

12 THE WITNESS: Well, it's to do with my--it's
13 to do with Canada's submission and my Witness
14 Statement.

15 PRESIDENT VEEDER: Is there any objection to
16 that?

17 THE WITNESS: And a question I was asked. I
18 will be very brief.

19 PRESIDENT VEEDER: It's an unusual procedure,
20 so we just have to check with the Parties, so I'm
21 looking first to the Respondent.

22 MR. OWEN: I think--I'm sorry, Mr. Allan, I

03:13:19 1 think at this point your examination is over, from our
2 perspective.

3 PRESIDENT VEEDER: I think the difficulty is
4 that you're there to answer questions, and you've
5 answered questions, and I think to introduce a new
6 topic now might lead to the reopening of questions
7 from both sides. But if it's not evidence--

8 THE WITNESS: I respect the process. It was
9 a clarification on some assertions Canada has made
10 about my lack of independence as a consultant and my
11 participation in the task force. I very much did not
12 appreciate those comments.

13 PRESIDENT VEEDER: They've not been raised
14 today, and I don't think you should worry about it.

15 THE WITNESS: It was raised today in the
16 context of my membership in the task force. But I
17 will leave it at that. Thank you.

18 PRESIDENT VEEDER: I think it is best left
19 there. Thank you very much.

20 (Witness steps down.)

21 PRESIDENT VEEDER: We will take a 10-minute
22 break.

03:14:42 1 (Brief recess.)

2 PETER FOX-PENNER, CLAIMANT'S WITNESS, CALLED

3 PRESIDENT VEEDER: Let's resume.

4 We have the next Witness before us.

5 Sir, if you would, please state your full
6 name and, if you will, read the words of the
7 Declaration for Expert Witnesses on the table before
8 you.

9 THE WITNESS: Thank you, Mr. President.

10 Peter Fox-Penner.

11 I solemnly declare upon my honor and conscience
12 that my statement will be in accordance with my
13 sincere belief.

14 PRESIDENT VEEDER: Thank you. There will be
15 questions first from the Claimant.

16 MR. SHOR: Yes, Mr. President.

17 MR. DOUGLAS: Mr. President, just before we
18 get to that, the Claimant had filed requests to
19 conduct direct examinations of various Witnesses and
20 Experts on last Thursday, and Dr. Fox-Penner was not
21 on that list. So pursuant to the Procedural Order,
22 the Claimant has not sought the permission of the

03:28:18 1 Tribunal to do a direct examination of Dr. Fox-Penner.

2 MR. SHOR: We just didn't seek permission to
3 do more than five minutes.

4 PRESIDENT VEEDER: Yeah, that was the
5 position regarding the Application--

6 MR. DOUGLAS: Okay. Fair enough. I just
7 wanted to be sure.

8 PRESIDENT VEEDER: A very extended--

9 MR. DOUGLAS: So long as the rules are clear.
10 That's fair.

11 PRESIDENT VEEDER: --direct examination.

12 MR. DOUGLAS: My apologies.

13 (Overlapping speakers.)

14 PRESIDENT VEEDER: So there is still a direct
15 examination available. As you say, it won't exceed
16 five minutes.

17 MR. SHOR: Before we begin, Mr. President, I
18 just want to make clear that this is a closed session.

19 PRESIDENT VEEDER: It is closed now.

20 (End of open session. Confidential business
21 information redacted.)

22

03:28:54 1

CONFIDENTIAL SESSION

2 PRESIDENT VEEDER: What we are trying to do
3 is not to close the session when the Witness is being
4 sworn. We don't see that as appropriate, but it is
5 now closed.

6 MR. SHOR: Thank you.

7 PRESIDENT VEEDER: So please start.

8 DIRECT EXAMINATION

9 BY MR. SHOR:

10 Q. Could you please state your name for the
11 record.

12 A. Peter S. Fox-Penner.

13 Q. Mr. Fox-Penner, did you submit testimony in
14 this proceeding?

15 A. Yes, sir.

16 Q. Would you like to make any corrections to
17 your Statement?

18 A. Yes, sir. In Paragraph 43, Line 1, the word
19 "rates" should be "rights." In Table 2--

20 PRESIDENT VEEDER: Paragraph--

21 THE WITNESS: 43, Line 1, the word "rates"
22 should be "rights."

03:29:53 1 PRESIDENT VEEDER: That's Paragraph 44.

2 THE WITNESS: Oh, I'm sorry, Mr. President.

3 MR. SHOR: Another correction.

4 PRESIDENT VEEDER: That's another correction,

5 is it?

6 THE WITNESS: Yes, thank you. Yes.

7 MR. DOUGLAS: I am still having difficulties

8 locating it. Sorry.

9 THE WITNESS: I'm sorry. Paragraph 44,

10 Line 1.

11 MR. DOUGLAS: I see. Thank you. Pardon me.

12 PRESIDENT VEEDER: Have you got the wrong

13 one? It does look as though the Tribunal has got two

14 different versions of your Expert Report. We look to

15 the Claimant for guidance. Why is that?

16 MS. GEHRING FLORES: I believe that the copy

17 that Mr. Fox-Penner is referring to is a highlighted,

18 redacted and bracketed version which can change the

19 lines, but I believe that all of the text is the same.

20 And the Tribunal, I believe, has the official version,

21 which doesn't necessarily have any of the brackets and

22 the highlighting. We've provided those to Witnesses

03:30:54 1 during the Hearing to make sure that they are aware of
2 when they're divulging confidential or restricted
3 access information.

4 PRESIDENT VEEDER: Okay. Thank you very
5 much.

6 Sorry about that. So, it's "rights," not
7 "rates"?

8 THE WITNESS: Yes, Mr. President.

9 BY MR. SHOR:

10 Q. Do you have any other corrections?

11 A. Yes, sir. Under the "Total Load" column in
12 Table 2, the total should be "1,200" rather than
13 "1,250." So the correction is to change the sum in
14 the "Total Load" column in Table 2 from "1,250" to
15 "1,200," making it the same total as in Table 1.

16 Q. Is there a correction to Entity A as well,
17 not just the total?

18 A. Yes. Entity A becomes 50 in order to make
19 the column add to 1,200.

20 Q. Does that change your conclusion in any way?

21 A. No, sir, it doesn't.

22 Q. Could you please explain?

03:32:07 1 A. Well, Column A is really for information
2 only. My conclusion is based on column--the final
3 column talking about the gains and losses between the
4 two scenarios in Table 1 and 2. And as you can see,
5 the gains and losses are computed using a formula
6 that's listed immediately below the dollar sign.

7 That formula doesn't involve Table 2--I'm
8 sorry, Column 2. And so the fact that I added up
9 numbers wrong in the "Total Load," Column 2, which I
10 apologize to the Tribunal for doing, but that math
11 error in Column 2 is inconsequential to the remainder
12 of the table, which remains correct and reaches an
13 unchanged conclusion.

14 MR. SHOR: Thank you, Dr. Fox-Penner. I have
15 no further questions.

16 PRESIDENT VEEDER: Thank you very much.
17 There will now be questions from the Respondent.

18 MR. DOUGLAS: Yes, please. Thank you very
19 much.

20 CROSS-EXAMINATION

21 BY MR. DOUGLAS:

22 Q. My apologies for keeping you this long,

03:33:17 1 Dr. Fox-Penner. I think you were scheduled to go a
2 bit earlier. As compensation, you only have one
3 binder to deal with today.

4 A. Thank you.

5 Q. Rather than some of the others who have some
6 more.

7 Can you hold on for one second, please.

8 (Pause.)

9 Q. Could you turn--maybe we can make use of this
10 version of your Expert Report, which you have beside
11 you. If you could turn to Paragraph 94 for me,
12 please.

13 A. Yes, sir.

14 Q. You state there that none of the treatment at
15 issue in this Arbitration was governed by any
16 BCUC-approved GBL Guidelines?

17 A. Yes. Yes, that's correct.

18 Q. Okay. And at Paragraph 100 you state that
19 there were repeated requests by stakeholders to adopt
20 a consistent policy?

21 A. Yes. Yes.

22 Q. Stakeholders like the Claimant?

03:35:05 1 A. I am not aware of the Claimant making a
2 request for--specifically stating a request for a
3 consistent policy. They may have.

4 Q. Okay. Your view is that there should have
5 been a consistent policy?

6 A. Yes, sir, that is my view.

7 Q. And is that a reflection of the Claimant's
8 desire to have a consistent policy?

9 A. No.

10 Q. Okay. So, you do not know whether or not the
11 Claimant wishes to have a consistent policy?

12 A. That's correct.

13 Q. But you state that without any monitoring or
14 transparent rules, the BCUC allowed for discriminatory
15 treatment?

16 A. I'm sorry. Are you--

17 Q. We're back at Paragraph 94. Sorry.

18 A. If you're referring to the last two sentences
19 of Paragraph 94, yes, I did say that.

20 Q. And if you look to Paragraph 95, you state
21 that the BCUC should have standardized the GBL
22 methodology for customers?

03:36:39 1 A. Yes, so that it could be applied consistently
2 to both BC Hydro and other utilities within the
3 Province.

4 Q. Okay. Could be applied in a manner that is
5 fair and equitable?

6 A. I would agree with that.

7 Q. Okay. But instead of adopting a
8 Provincial-wide GBL policy, BCUC proceeded on a
9 case-by-case basis?

10 A. Yes, sir. I would agree with that
11 characterization.

12 Q. And in your view, it is unusual for a
13 regulatory policy to be administered on a case-by-case
14 basis?

15 A. Yes. The degree to which this was a
16 case-by-case administration in the absence of
17 published guidelines was, in my experience, unusual.

18 Q. Okay. Could I turn you to Paragraph 100 of
19 your Expert Report. You state at the top, "In my
20 experience it is quiet unusual for a regulatory policy
21 to be administered entirely on a case-by-case basis"?

22 A. Yes, that's correct. That's my statement

03:37:37 1 there.

2 Q. Now, you've been in the hearing room and you
3 have heard some other testimony. You may have heard
4 discussion about how the Claimant sought a GBL from
5 the BCUC?

6 A. I've heard testimony over the past two days
7 on that topic.

8 Q. Okay.

9 A. Quite a bit.

10 Q. And you recall that it sought GBL from the
11 BCUC in the G-156-10 proceedings?

12 A. I can't--I can't attest to that number in the
13 proceeding, but I do clearly recall it's requesting a
14 GBL.

15 Q. Okay. Why don't we turn to R-371. My
16 apologies, I am actually not sure this is in your
17 binder. This should be the only one, but, perhaps, we
18 can bring it up for you on the screen in front of you.

19 MR. SHOR: If we just look at Page 1 down in
20 the middle, it says this is a letter written by the
21 Claimant to the BCUC, and it states in the middle in
22 this letter, We are seeking a decision from the

03:38:42 1 Commission Panel that the appropriateness and
2 determination of a Generator Baseline, the GBL, for
3 Celgar's Castlegar Pulp Mill is within the scope of
4 the RDA and providing certain procedural directions
5 for establishing the GBL within the RDA hearing
6 process.

7 Do you see that?

8 A. Yes, sir.

9 Q. And then at the top of the next paragraph, it
10 states: Celgar wishes to establish a GBL in order
11 that it may sell self-generated power that exceeds
12 such baseline while purchasing electricity from
13 FortisBC. Is that correct?

14 A. I think you might have said the word "such";
15 but, yes, basically.

16 Q. Sorry. And so this is an Application which
17 culminated in the end with BCUC Order G-156-10. But
18 you don't need to tell me whether that's true.

19 A. Good, because I can't.

20 Q. Fair enough. Would you turn to Tab 5 for me,
21 please. This is Respondent Exhibit 372. Do you have
22 it there?

03:39:58 1 This is in--

2 A. Yes, sir. Mine says Exhibit C-13-10, but
3 that may be irrelevant.

4 Q. Oh, that's a different proceeding, that
5 reference. So I'm sure the exhibit number is actually
6 referenced on the document itself. I'm reading it
7 into the record.

8 But this is an information request sent by
9 the BCUC to the Claimant in the G-156-10 proceedings.
10 If you could turn to Page 16 for me, please.

11 A. Yes, sir.

12 Q. The BCUC at Q.6.1 is asking the Claimant
13 whether there should be common treatment of all
14 self-generators?

15 A. I'm sorry. Is there a question--is it a
16 question?

17 Q. It is. I'm just asking you to confirm what
18 the document states.

19 A. The question does ask whether there should be
20 a common treatment of self-generating customers, and
21 then continues on to the remainder of the sentence.

22 Q. Okay. And just to give it the proper

03:41:26 1 context, if we look up, the BCUC is quoting Celgar's
2 evidence which states that Celgar accepts that it
3 should be subject to the same rights and restrictions
4 as ratepayers in the BC Hydro service area and that
5 the establishment of an appropriate GBL, taking into
6 account historical consumption or output, is an
7 appropriate method to effect such objective?

8 A. Yes. I do see those words quoted in this
9 document from Celgar's evidence.

10 Q. Okay. And in response to the Tribunal's
11 question, Celgar's view is that there should be common
12 treatment of all self-generating customers within the
13 Province with respect to the appropriateness of a GBL?

14 A. Well, I can't substantiate this document
15 personally but I can say that this document says
16 pretty clearly that Zellstoff Celgar's view--I'm just
17 quoting--Zellstoff Celgar's view is that there should
18 be a common treatment of all self-generating customers
19 in the Province with respect to the appropriateness of
20 a GBL and then continues on for another sentence.

21 Q. Okay. And then the next paragraph states
22 that Celgar believes that BC Hydro determines GBLs for

03:42:34 1 its self-generation customers on a case-by-case basis.

2 A. Yes, I agree the document says that.

3 Q. Okay. And if you flip the page, on Line 2 it
4 says that Celgar does not believe that a common
5 methodology or formula has been adopted by BC Hydro or
6 that one should be adopted by FortisBC?

7 A. I see and agree that the document says this.

8 Q. Okay. So the Claimant disagreed with your
9 Expert Report that a case-by-case basis was not
10 appropriate?

11 A. Well, the Claimant agrees that there does not
12 exist an adopted common methodology or formula. They
13 do appear to disagree with my conclusion that best
14 regulatory practices would call for the adoption of
15 such a policy.

16 Q. And the Claimant here is suggesting that a
17 case-by-case basis is the best approach?

18 A. The Claimant is suggesting it believes in a
19 so-called case-by-case approach.

20 Q. Okay. So when you said earlier in your
21 Expert Report that there has been repeated requests by
22 stakeholders to adopt a consistent policy, that would

03:44:00 1 not include the Claimant?

2 A. As I said in my other answer, I don't have
3 any knowledge of that including the Claimant.

4 Q. But what you read here would suggest that it
5 does not include the Claimant?

6 A. That is correct, sir.

7 Q. Okay. In your view, the BCUC should have
8 standardized the GBL methodology so that it could be
9 applied consistently in both BC Hydro and FortisBC
10 territory? It's at Paragraph 95 of your Report.

11 A. Well, I don't need to read the report. Yes,
12 that's essentially my view. I think we have to
13 understand what "standardization" means, but, yes, it
14 is my view.

15 Q. So, GBLs should be set with the same set of
16 considerations in both utility jurisdictions, BC Hydro
17 and FortisBC?

18 A. Well, not only with the same set of
19 considerations, since that's a rather broad term,
20 although I certainly think it should be set with the
21 same set of considerations. But beyond that, with
22 greater transparency and a methodology that is

03:45:17 1 understandably common to all self-generators in the
2 Province.

3 Q. Okay. Could you turn again at Tab 5--this is
4 R-372, and this is Page 18.

5 A. Yes, sir.

6 Q. Could you read Q.6.3. This is a question
7 from the BCUC to the Claimant.

8 A. "Is Zellstoff Celgar proposing to use the
9 same method, parameters, and data to establish a GBL
10 with FortisBC as were used for establishing a GBL with
11 BC Hydro? If not, how are the two procedures for
12 establishing a GBL different?"

13 Q. And the Claimant answers at A.6.3. Could you
14 read the last sentence of their answer for me, please?

15 A. The last sentence of the answer reads as
16 follows: "For the purpose of the FortisBC GBL,
17 Zellstoff Celgar is requesting that consideration be
18 given to broader circumstances than those relevant to
19 the determination of the BC Hydro GBL."

20 Q. So, the BCUC is asking whether a BC Hydro GBL
21 and FortisBC GBL should be set in the same way?

22 A. I'm sorry. Could I hear that question again?

03:46:47 1 Q. Oh, yes. The BCUC is asking the Claimant
2 whether a BC Hydro GBL should be set in the same way
3 as a FortisBC GBL?

4 A. Yes. That's essentially what they're asking
5 here.

6 Q. And the Claimant says that a consideration be
7 given to broader circumstances in the context of a
8 FortisBC GBL rather than a BC Hydro GBL?

9 A. Yes, sir. That is what is written here, and
10 that is what they said, assuming the authenticity of
11 the document.

12 Q. Okay. And, again, this would be contrary to
13 your Expert Report, which states that the BCUC should
14 have standardized a GBL methodology?

15 A. As I said, we have to understand what
16 "standardization" means, but this may well be contrary
17 to my opinion, but I do understand the purpose of
18 these two GBLs to be a little different. So, that
19 could have played into their Opinion.

20 Q. In your Expert Report, at Paragraph 100, you
21 stated that the Claimant asked the BC Hydro--asked the
22 BCUC to--oh, pardon me. I'm misreading that.

03:48:11 1 I think I'm referring, again, to-- in your
2 Expert Report, when you mentioned that there were
3 repeated requests by stakeholders to adopt a
4 consistent policy, again, this would be evidence that
5 the Claimant does not fall into that category; is that
6 correct?

7 A. Well, I'm not sure. I think the prior
8 example, instance you showed me was clear. As I said,
9 I think these--the two GBLs here are used, if they
10 will, as I understand it, in a little different way,
11 and, thus, that's a factor that could affect the
12 proper application of any GBL methodology.

13 Q. Okay. On November 27, 2009, the BCUC wrote
14 to BC Hydro requesting that BC Hydro file GBL
15 Guidelines with the BCUC?

16 A. I can't answer that question from memory.

17 Q. Sure. You want to turn to Paragraph 100 of
18 your Expert Report.

19 You state the documents I reviewed suggest
20 that it was not until November 2009, eight years after
21 G-38-01, that the BCUC recognized that BC Hydro might
22 not have written guidelines for determining GBLs?

03:49:50 1 A. That's correct. That's my statement.

2 Q. Okay. And so the BCUC asked BC Hydro to file
3 those guidelines with its next major EPA filing that
4 involves a GBL?

5 A. It asked BC Hydro to file guidelines. I
6 don't recall from memory whether it was in connection
7 with that particular next filing that you mentioned.

8 Q. Okay. Could we turn to Tab 6, please. This
9 is R-202.

10 A. Yes, sir.

11 Q. If you turn to--this is a letter from the
12 BCUC to BC Hydro, and if you turn to Page 2, the last
13 paragraph. In the second sentence, it states, "The
14 Commission requests that as part of its next major EPA
15 filing that involves GBLs or the next long-term
16 acquisition plan filing, BC Hydro include draft
17 guidelines for the determination of GBLs."

18 A. Yes. I see that written here.

19 Q. Okay. So the BCUC asked BC Hydro to file
20 guidelines with its next major EPA filing that
21 involves a GBL?

22 A. Or its next long-term acquisition plan

03:51:26 1 filing.

2 Q. That was my next question, yeah.

3 And BC Hydro did not reply to the BCUC's
4 request until June 2012. This is at Paragraph 102 of
5 the report.

6 A. Yes. Yes. I thought I recognized that
7 sentence, and that is what I say in the first sentence
8 of Paragraph 100.

9 Q. And that is because there not been a major
10 EPA filing or long-term acquisition term filing until
11 then?

12 A. I can't attest to that fact.

13 Q. Okay. But you do not mention that in your
14 Expert Report?

15 A. That is correct.

16 Q. Okay. But you state in your Expert Report
17 that this was an extremely long period of time?

18 A. It is correct that I used the phrase
19 "extremely long period of time," but I use that phrase
20 to refer not only to the period of time between when
21 this request was made of BC Hydro and they filed
22 something in response to it but, rather, to talk about

03:52:49 1 the whole gestation period of setting GBLs beginning
2 with G-38-01 and extending, really, to the present, if
3 you will.

4 Q. And you state in Paragraph 102 of your Expert
5 Report that the BCUC did not use its power to compel
6 BC Hydro to act more promptly.

7 A. I do say this in Paragraph 102, correct.

8 Q. So, would you have expected the BCUC to ask
9 relevant Parties whether guidelines would be
10 appropriate sooner than June 2012?

11 A. Well, yes, I would.

12 Q. Because this would be consistent with, in
13 your view, good regulatory practice?

14 A. Yes, sir. Correct.

15 Q. Okay. If you still have tab--turn back to
16 Tab 5 for me, please. This is R-372. If you could
17 turn to Page 19.

18 A. Okay. Yes, I have it.

19 Q. Okay. And you see at the top on
20 Line 1--again, this is the BCUC asking the Claimant
21 information requests, and it refers to the letter
22 dated November 27, 2009; is that correct?

03:54:40 1 A. Yes. It is referring to--that's correct.

2 Q. And they quote the paragraph the Commission
3 believes that it may be helpful and timely to develop
4 guidelines for the establishment of GBLs?

5 A. Yes, that's the quotation, correct.

6 Q. And in Q.6.4, the BCUC asked the Claimant,
7 Does Celgar believe that GBL Guidelines approved by
8 the commission for BC Hydro should also be approved
9 for FortisBC?

10 A. Yes, that's Question 6.4, the first sentence.

11 Q. And the answer given by the Claimant, at A
12 .6.4 is that Celgar believes that, if GBL Guidelines
13 are approved by the Commission for BC Hydro, then the
14 same GBL Guidelines should be approved for FortisBC"?

15 A. Yes, I see that answer in this document.

16 Q. Okay. And then at Q .6.5, it asks, "Are GBL
17 Guidelines appropriate for the FortisBC service area?"

18 A. Yes, sir, I see that question.

19 Q. And at A .6.5, it states that Celgar does not
20 believe that GBL Guidelines are necessary to determine
21 a fair and equitable FortisBC GBL for the Claimant in
22 these proceedings?

03:55:56 1 A. Yes. Yes. It says that, except it does not
2 use the terms "Claimant." It says Zellstoff Celgar.

3 Q. So, I asked you at the outset of your
4 testimony whether the BCUC should have standardized
5 the GBL methodology to ensure that GBLs would be set
6 in a fair and equitable manner, and you agreed. But
7 that would not be the position of the Claimant here?

8 A. I think it's fair to say that that is not the
9 position of the Claimant in this document.

10 Q. Okay. Could you look to Footnote 86 of your
11 Report, please. This is at Page 36.

12 A. If I could just have a moment.

13 Q. Yes, please.

14 PRESIDENT VEEDER: Give us that reference
15 again. Footnote?

16 MR. DOUGLAS: Pardon me. Footnote 86. It is
17 on Page 36 of the Expert Report.

18 PRESIDENT VEEDER: Thanks.

19 (Pause.)

20 THE WITNESS: Yes. I see that, thank you.

21 BY MR. DOUGLAS:

22 Q. Okay. So, just to put this footnote in

03:57:46 1 context, there's a heading called "BCUC's Regulatory
2 Process was Insufficiently Proactive and Lacked
3 Province-wide Policy Implementation"?

4 A. Yes, sir.

5 Q. Could you read just the sentence, of which at
6 the end is Footnote 86.

7 A. "There was no notice of proposed rulemaking,
8 nor any policy statement to govern self-generators in
9 the Province. That was issued by the BCUC."

10 Q. In Footnote 86, you comment that the Ministry
11 of Energy Mines actually made a submission to the BCUC
12 stating that the BCUC needed to issue consistent
13 regulatory principles for governing customers with
14 self-generation throughout BC?

15 A. That's a correct quoting of my Footnote 86.

16 Q. Thank you. So, I can read.

17 And this would have been during the G-202-12
18 proceedings?

19 A. Well, I'm referencing G-188-11 in this
20 footnote. From memory, I don't know which of the two
21 proceedings that document would have been filed in.

22 Q. That's fine. It is--G-202-12 were the

03:59:18 1 compliance filings to Order G-188-11. But you don't
2 cite G order--or BCUC Order 202-12 in your Expert
3 Report?

4 A. I don't recall citing that.

5 Q. Okay. Could you turn to Tab 7 for me,
6 please?

7 A. Yes, sir.

8 Q. You see on the--pardon me, this is R-499.
9 You see this a letter from the Claimant to the BCUC,
10 and it states in the subject matter that this is part
11 of the compliance filing to Order G-188-11?

12 A. Yes, it states that in its subject.

13 Q. Could you turn to Page 3 for me, please?

14 A. Yes, sir.

15 Q. And you see at the bottom there's a heading
16 called "The Need Four Common Principles Governing
17 Self-generation in British Columbia"?

18 A. Yes, sir.

19 Q. And right below that, they quote the Ministry
20 letter, where the Ministry "asserts that consistent
21 regulatory principles governing self-generation,
22 including the requirement to mitigate arbitrage,

04:00:45 1 should apply throughout British Columbia"?

2 A. Yes, you're correctly reading the quote.

3 Q. And that's a reference to the submission of
4 the Ministry that you make at Footnote 86 in your
5 Report?

6 A. Yes, sir.

7 Q. Okay. If you could flip to Page 7 for me,
8 please.

9 A. Yes, I have it.

10 Q. Okay. Apologies in advance, but could you
11 read the first two sentences of the paragraph
12 beginning with "in any event"?

13 A. "In any event, recent commission Orders
14 G-156-10 and G-188-11 have resulted in the recognition
15 of certain rights afforded Celgar to utility service
16 within the existing Regulatory Framework, without the
17 need for a broader policy review. The Ministry and
18 BC Hydro chose not to seek reconsideration of or
19 appeal of those Orders."

20 Q. And could you read the last sentence for me,
21 please?

22 A. "They should not now be entitled to question

04:02:03 1 or impede the implementation of these decisions in
2 these compliance proceedings on the premise that a
3 broader province-wide policy is now required,
4 particularly as they have had years to promote such a
5 policy and have failed to do so."

6 Q. Okay. So, the Claimant, in this submission,
7 is stating that there is no need for a broader policy
8 review?

9 A. Well, actually, that's not quite how I read
10 this paragraph.

11 Q. Okay.

12 A. I read this paragraph as their frustration
13 over trying to resolve this issue and saying for the
14 purpose of resolving their issues, there is no need
15 for a broader policy review, and they don't want to
16 undo these orders. I don't see this particular
17 paragraph as standing for them saying there's no value
18 or use or point to doing a broader policy review, in
19 general.

20 Q. That is fair. But the Ministry did write to
21 the BCUC suggesting that a broader policy review take
22 place, and the Claimant is saying--and if I understood

04:03:32 1 what you just said, Dr. Fox-Penner--is that it has
2 these Orders, and it does not want to disrupt its
3 rights that it has pursuant to those Orders by having
4 a broader policy review.

5 Would that be an apt characterization?

6 A. Well, that's a reasonable characterization of
7 the answer that I just gave, but I would hope the
8 answer stands for itself.

9 Q. Okay. In your Expert Report, you state that
10 the BCUC should have engaged a province-wide review
11 process?

12 A. Yes. Yes, sir. I'm sure I say that in
13 there, that that would have been best regulatory
14 practice.

15 Q. But the Claimant obviously is not advocating
16 for that in this context?

17 A. Well, as I said, if you mean "in this
18 context" the paragraph that we've been talking about,
19 as I said, this paragraph, I think, is about them not
20 wanting to disrupt some particular findings as of
21 2011. Earlier you showed me some answers to data
22 requests propounded by the BCUC, where they, as we

04:05:00 1 have discussed now a couple times, express a view that
2 that--I can't remember the exact words--but common
3 methodology, whatever words they used, is not, in
4 their view, necessary.

5 Q. Okay. Could you just look at the first page
6 of the document for me, please.

7 A. "The document" being this August 10, 2012
8 letter?

9 Q. So, you--I was going to ask you for the date,
10 which is August 10, 2012. Are you familiar with the
11 date on which the Claimant filed its NAFTA claim in
12 this arbitration?

13 A. No, sir.

14 Q. Okay.

15 A. No, I'm sorry. I don't know the date.

16 Q. You can take my word for it and state that
17 it's April 30, 2012?

18 MR. SHOR: Is that a question?

19 MR. DOUGLAS: Should we look it up?

20 PRESIDENT VEEDER: I think it was for our
21 benefit. Thank you, but can you go on.

22 BY MR. DOUGLAS:

04:06:04 1 Q. So, the Claimant made this submission to the
2 BCUC four months after it filed its NAFTA claim?

3 A. Assuming as a hypothetical that they made
4 their NAFTA claim in April, I would agree August is
5 four months after April.

6 Q. Okay. And this is--

7 A. I hope that's four months.

8 Q. My math is the same.

9 That would be--so the NAFTA claim where you
10 now testify as an expert that the BCUC should have
11 implemented a provincial-wide policy comes just a bit
12 of overlap with the letter in which the Claimant says
13 that no provincial policy is necessary in light of
14 G-188-11 and G-156-10?

15 A. I'm sorry. I lost the question in there.

16 Q. So did I.

17 So the Claimant made these statements about
18 four months after it filed its NAFTA claims?

19 A. Again, accepting the NAFTA claim date as a
20 hypothetical and the authenticity of this document,
21 yes. Everything in this document postdates the
22 assumed-April NAFTA claim by four months.

04:07:37 1 Q. This is the same NAFTA claim where you now
2 testify as an expert that the BCUC should have
3 implemented a provincial-wide policy?

4 A. To the best of my knowledge.

5 Q. Okay. It seems a bit odd to complain about
6 the lack of a provincial-wide policy in one
7 proceeding, stating that there is no need for a
8 broader policy review in another.

9 A. Well, as I said, I don't read the particular
10 paragraph in this document as rejecting the need for a
11 broader policy review. Furthermore, I'm not
12 testifying here about the Claimant's view of what's
13 best regulatory policy. I'm testifying about my view
14 of what's appropriate regulatory policy.

15 Q. Okay. In your Expert Report, you state that
16 the BCUC should have considered, but did not, whether
17 self-generation policies should depend on the specific
18 service area. It's Paragraph 110 of your Expert
19 Report.

20 A. Well, it is correct that the consideration
21 that you raise is contained within Paragraph 110, but
22 I think I must say that Paragraph 110 is a long

04:09:09 1 paragraph that talks about a number of things that I
2 think are appropriate for the BCUC to take into
3 account or would be appropriate for them to take into
4 account in establishing a fair and consistent policy.

5 Q. Okay. And one of those factors that you
6 state that the Commission should have considered, but
7 did not, is whether policy should depend on the
8 specific service area or customer arrangement?

9 A. Yes. I would count those even, if necessary,
10 as two considerations, but, yes, they would be
11 included in the list of considerations that I think
12 would be relevant.

13 Q. Could you turn to Tab 8 for me, please. I
14 won't ask you to confirm this document, but for the
15 record, it is BCUC Order G-202-12 and that is R-65.

16 If you could turn to Page 11 for me, please.
17 You see a heading there entitled "The Need for Common
18 Principles Governing Self-generation in B.C."?

19 A. Yes, sir.

20 Q. At Paragraph 21 the BCUC states that the
21 Ministry of Energy and Mines requested province-wide
22 regulatory principles governing self-generation.

04:10:55 1 A. I'm sorry; are you referring to a specific
2 spot on Page 11?

3 Q. Oh, yeah, Paragraph 1. I know the paragraphs
4 aren't identified by number, but we'll be going
5 through a couple of them, but it's the first one on
6 the page.

7 A. Yes. I see the first paragraph saying "the
8 Ministry"--and then I'll insert an
9 ellipsis--"suggested the Commission adopt the GBL
10 approach across the Province."

11 Q. And the BCUC in the next paragraph states
12 that it has upheld a consistent regulatory principle
13 that self-generators should not arbitrage power to the
14 detriment of others?

15 A. I see the Commission writing those words.

16 Q. And it states that it has applied different
17 mechanisms to achieve that result?

18 A. I see this Order and, thus, the BCUC also
19 saying those words.

20 Q. And at Paragraph 3, the BCUC states that the
21 Ministry's position for a provincial-wide policy fails
22 to account for the differences between BC Hydro and

04:11:55 1 FortisBC?

2 A. I'm sorry; where are you?

3 Q. You're right; I'm paraphrasing.

4 So in Paragraph 3, the BCUC states that
5 FortisBC's obligations regarding Heritage Contract
6 energy is addressed through the PPA and that FortisBC
7 has unique obligations under the APA for Eligible
8 Customers?

9 A. It's sort of a compound question. I would
10 agree that the second part of your compound question
11 is an accurate reading of the text here. The first
12 one is interpretational, and I would need to hear it
13 again.

14 Q. Okay. It's the last line of the Paragraph 3,
15 it states that "FortisBC has unique obligations under
16 the APA for Eligible Customers including
17 self-generating Eligible Customers."

18 A. I would agree that you have read that
19 correctly.

20 Q. And in the fourth paragraph--excuse me one
21 moment. The last sentence states that "different
22 mechanisms are appropriate in this case because of the

04:13:26 1 different relationships, utility to customer or
2 utility to utility, and the different service
3 characteristics of the utilities, namely the Heritage
4 Contract for BC Hydro and the APA for FortisBC"?

5 A. I see those words, that sentence here.

6 Q. Would these words suggest that the BCUC is
7 considering the different self-generator policies
8 depending on the utility FortisBC versus BC Hydro?

9 A. Yes. It would suggest both different
10 policies and different--to use their
11 term--"mechanisms." So, yes. Yes, to both of the
12 those terms.

13 Q. So when you stated in your Expert Report that
14 the BCUC should have considered whether policy should
15 depend on the specific service area or customer
16 arrangement, that's what the BCUC did here?

17 A. That is what the BCUC is in the midst of
18 doing here but quite late in the process. In 110, you
19 know, as in most of my Expert Report, I'm referring to
20 the long period that led up to the BCUC in 2012
21 finally doing what I think it should have done much
22 earlier.

04:14:53 1 Q. Okay. What does "APA" stand for?

2 A. I'm not sure.

3 Q. So you didn't consider the APA relevant to
4 your Expert Report?

5 A. I'm pretty sure I did look it up back then
6 because in the U.S., it stands for the Administrative
7 Procedures Act, and that threw me, but I can't recall
8 the translation of it. That is the meaning of that
9 acronym in this context, but I did look it up and
10 conclude that it did not affect my opinion.

11 Q. So you did look at the APA and concluded that
12 it did not affect your opinion?

13 A. Yes, sir.

14 Q. You do not recall what the APA stands for?

15 A. That's correct.

16 Q. And you do not cite it in your Expert Report?

17 A. I don't recall citing it in my Expert Report.
18 I don't think I did.

19 Q. Okay. Could you turn to Page 4 of this
20 document. Again, it is the 202-12 Decision.

21 A. Yes, sir.

22 Q. The bullet at the top defines the APA as

04:16:13 1 the--I can tell you they're the Access Principles
2 Application, and it states that "the Access Principles
3 encompassing fair treatment, the obligation to serve,
4 and re-entry provisions led FortisBC to the conclusion
5 that treating a self-generator as an Eligible Customer
6 means that the treatment of that self-generating
7 customer must be consistent with that of any Eligible
8 Customer under the Access Principles."

9 A. Yes. I see those words written here.

10 Q. The next bullet states that "Celgar is not
11 the only customer meeting the definition of 'Eligible
12 Customer' under the Access Principles"?

13 A. That's correct, that is the next sentence.

14 Q. If you could turn back to Page 11 for me,
15 please.

16 A. Yes, sir I'm there.

17 Q. And the BCUC states at Paragraph 3 that
18 FortisBC has unique obligations under the APA for
19 Eligible Customers?

20 A. Yes. I see those words in here.

21 Q. Okay. Which would include the Claimant?

22 A. According to Page 4, yes.

04:17:32 1 Q. Okay. If you look at Paragraph 5 or the
2 fifth paragraph down on Page 11, the BCUC states that
3 preventing arbitrage by self-generators is a balancing
4 act. I should complete the sentence. Pardon me.

5 "Preventing arbitrage by self-generators
6 which will result in detriment to other ratepayers is
7 a balancing act."

8 A. Oh, I'm sorry, yes. I see that sentence.
9 I'm sorry, yes. That's the first sentence of
10 Paragraph 5.

11 Q. If you look down to the middle of the
12 paragraph, the BCUC's view--FortisBC's proposal for
13 entitlement and appropriate rate design achieves a
14 similar balance as to the GBL mechanism?

15 A. Yes, I see those words later in the
16 paragraph.

17 Q. Okay. In the following paragraph, it states
18 "GBLs exist between BC Hydro and its self-generating
19 customers because they have been able to reach an
20 agreement on their GBLs. FortisBC and Celgar have
21 been unable to reach such an agreement,
22 notwithstanding the repeated encouragement by the

04:19:17 1 Commission to do so."

2 Do you see those words?

3 A. Yes, sir.

4 Q. It states: "There is currently no basis on
5 which the Commission is able to force such an
6 agreement or dictate what a GBL should be"?

7 A. Yes, sir, I see those words there.

8 Q. So the BCUC in its Decision, coming back to
9 the Claimant's submission, agreed that a
10 provincial-wide GBL framework should not be set?

11 A. I can't--I can't agree with that blanket
12 statement. Clearly they are saying there are special
13 considerations, but--I'm sorry; we've gone through
14 many pieces of this. If there is that blanket
15 conclusion by them, then please show it to me.

16 Q. I just was reading that last paragraph. It
17 seemed to suggest that because FortisBC and the
18 Claimant could not reach an agreement on a GBL, that
19 wouldn't be the appropriate mechanism, and as an
20 alternative, FortisBC's proposal for entitlement, an
21 appropriate rate design achieves the same balance of
22 preventing arbitrage to the detriment of other

04:20:33 1 ratepayers?

2 A. I do agree that is a reasonable paraphrasing
3 of what the BCUC decided to do here.

4 Q. Okay. And that's because, I think as you
5 mentioned, there are different circumstances
6 applicable to FortisBC territory?

7 A. I mentioned that they point out different
8 circumstances applicable and that those different
9 circumstances appear to have entered into their
10 thinking, but I can't attest to the thinking of the
11 BCUC beyond what's written here.

12 Q. But you did review the APA?

13 A. I did seek to understand the Access
14 Principles to determine whether they affected my
15 overall analysis and conclusion.

16 Q. So you disagree with the BCUC that different
17 circumstances as a result of the APA should apply in
18 FortisBC territory?

19 A. No, I don't think that's what I said. I'm
20 sorry; could I hear the question again?

21 Q. Yeah. The BCUC here is stating that these
22 unique circumstances to FortisBC territory, such as

04:21:56 1 the APA, is not applicable to BC Hydro territory. In
2 your Expert Report, you say that the BCUC should have
3 regulated things on a uniform basis, and by that you
4 reviewed the APA and still came to that conclusion.
5 So, I'm just asking whether you disagree with the BCUC
6 stating that there is different circumstances
7 applicable to FortisBC territory that should be taken
8 into account.

9 A. No. In fact, you pointed me to my own
10 Report, which says that an appropriate inquiry by the
11 Commission would include whether policy should depend
12 on specific service areas or customer arrangements,
13 "customer arrangements" being a broad category that
14 would include the APA. So, obviously my Opinion is
15 that these kinds of considerations are relevant and
16 should be taken into account.

17 I think buried in your question was the use
18 of the term "uniform," and I think that's a pretty
19 strong term. I believe that greater consistency and
20 transparency were appropriate. By the time they start
21 even--here in 2012, they are finally starting, I
22 think, to ask themselves and answer precisely the

04:23:20 1 questions they should have been asking all along.

2 Q. So, you referred me to your Expert Report
3 where you were precisely exactly that, discussing
4 that, whether policy should depend on the service
5 area. So you agree that that's what the BCUC is doing
6 here?

7 A. Well, it's--yeah, it certainly appears to be
8 taking that into consideration here in its own
9 regulatory decision making.

10 Q. Okay. But in your Expert Report at
11 Paragraph 110, that's where you criticize the BCUC for
12 failing to do that?

13 A. Well, as I think I've said, 110 and my Report
14 as a whole looks back over the period and concludes
15 that what the Commission started to get around to
16 doing, really, in 2012 was more than a decade after it
17 should have started to do those things.

18 Q. You mentioned earlier different GBLs can
19 serve different purposes?

20 A. I mentioned that in the particular paragraph
21 you were referring me to where Celgar was talking
22 about a GBL in its EPA with BC Hydro versus a GBL set

04:24:48 1 in connection with the--well, its sales and purchases
2 with FortisBC, that those--that it viewed those as
3 potentially different. I think that--I'm trying to
4 paraphrase my prior testimony to the best of my
5 recollection.

6 Q. That's fine.

7 You may have heard here in the room talk of
8 the Arbitrage Project.

9 A. Yes, sir, I did.

10 Q. So just by way of context, you've heard that
11 BC Hydro issued a Request for Proposals for
12 procurement of electricity?

13 A. Yes, I did hear that.

14 Q. And there was a target of about
15 1,000-gigawatt hours of electricity per year?

16 A. Yes, sir, I did hear that.

17 Q. And the Claimant submitted a project into
18 that Call called the Arbitrage Project?

19 A. I believe that comports with my recollection.

20 Q. Okay. And that included electricity the Mill
21 had historically been generating for self-supply?

22 A. Again, that comports with my understanding.

04:25:59 1 Q. Okay. And BC Hydro informed the Claimant
2 that it would not accept the Arbitrage Project in the
3 Call for Power?

4 A. That's my understanding.

5 Q. Okay. I'd like to turn to Tab 13.

6 PRESIDENT VEEDER: If you're--I didn't mean
7 to startle you.

8 MR. DOUGLAS: That's okay.

9 PRESIDENT VEEDER: If you're turning to a new
10 topic, we may need a short break. Would this be a
11 good time?

12 MR. DOUGLAS: Yes, that would be great.

13 PRESIDENT VEEDER: Let's have a 10-minute
14 break.

15 MR. DOUGLAS: Okay.

16 PRESIDENT VEEDER: We say this to all the
17 Witnesses, please don't discuss the case or your
18 testimony away from the Tribunal.

19 THE WITNESS: Yes, sir. Thank you,
20 Mr. President.

21 (Brief recess.)

22 PRESIDENT VEEDER: Let's resume.

04:40:45 1 BY MR. DOUGLAS:

2 Q. Hi, Dr. Fox-Penner.

3 I believe we were discussing the Claimant's
4 Arbitrage Project.

5 A. Yes, sir.

6 Q. And I had just asked you--I think we had just
7 established that they had submitted this into the
8 Bioenergy Call for Power and that BC Hydro had
9 informed the Claimant that that Project would not be
10 eligible under the Call.

11 A. Yes, that's my recollection.

12 Q. Okay. And then I think I asked you to turn
13 to Tab 13, if you could, please, which is R-279.

14 A. Yes, sir.

15 Q. I just want to confirm this document. This
16 is an e-mail from Mr. Merwin to Jimmy Lee and David
17 Gandossi, and they are discussing BC Hydro's response
18 to the Arbitrage Project.

19 If you could just read out the first two
20 sentences of the e-mail, please.

21 A. After "Jimmy and David," "Today BC Hydro sent
22 us a letter stating that our 'Arbitrage Project' was

04:42:09 1 an ineligible project under their guidelines. It is
2 very clear that they do not like the fact that we
3 would be buying power from Fortis, who is buying from
4 them, and then we are turning around and selling them
5 the power."

6 Q. Okay. Let's play a game of hypotheticals, if
7 you can follow me. If you'll assume with me for a
8 second that I'm a mill and that I generate electricity
9 and that you are my utility. And let's say we decide
10 to make a deal one day where I will buy all of my
11 electricity from you at a low-cost and sell you all of
12 my self-generation at a higher price back to you. And
13 let's just say, for the sake of argument, that I'm
14 buying from you and selling back to you the same
15 amount of power. Let's assume--there's a lot of
16 assumptions, but for the sake of argument, I'm not a
17 physicist, but let's assume that there are actually no
18 electrons that flow between us in this transaction,
19 that it would be just an accounting transaction.

20 In your view, would this result be
21 economically efficient?

22 A. It's ambiguous.

04:43:55 1 Q. Ambiguous how?

2 A. You can't reach any efficiency conclusion
3 from this. It's a purely distributional--first of
4 all, it's a purely distributional question, and,
5 second of all, I'm not sure what we're comparing this
6 alternative to, but my answer is that the efficiency
7 implications of this are ambiguous.

8 Q. But if there is no change in production, how
9 could it be economically efficient?

10 A. Okay. Relative to an alternative
11 hypothetical that had a different arrangement, the
12 total cost and application of society's economic
13 resources would be unchanged; therefore, the
14 efficiency implications of this would be unchanged.
15 Efficiency is all about generating aggregate economic
16 output subject to Pareto conditions, and that
17 efficiency condition would be unchanged in this
18 relative to what I think of as the alternative. The
19 only difference is wealth: who has how much money?

20 So, back to answering your question, there is
21 no efficiency implication that I understand in your
22 hypothetical.

04:45:38 1 Q. So hypothetically speaking, if the example I
2 gave you was the Claimant's Arbitrage Project, there
3 would be no efficiency implication?

4 A. Correct. Correct.

5 Q. The BCUC was created by statute?

6 A. To the best of my knowledge, yes, sir.

7 Q. And that statute is called the Utilities
8 Commission Act?

9 A. That's consistent with my recollection.

10 Q. Okay. And the BCUC derives its powers from
11 that Act?

12 A. Well, my recollection is it derives at least
13 some of its powers from that Act. I can't attest to
14 all of them.

15 Q. So you can't attest to whether the
16 Act--whether the BCUC is created by the Act?

17 A. No. That is consistent with my
18 understanding. It may derive its powers from Acts
19 beyond simply the Act you are mentioning.

20 Q. Okay.

21 A. I'm not a lawyer.

22 Q. Fair enough. But it does derives some powers

04:46:42 1 from the UCA?

2 A. That is my understanding, yes, sir.

3 Q. Okay. And it's created by the UCA?

4 A. That's my understanding.

5 Q. So it's a create of statute?

6 A. That is my understanding.

7 Q. And you criticize the BCUC in your Report?

8 A. Well, I certainly criticize it for not having
9 a more proactive and transparent approach to setting
10 GBs, yes, sir, I do do that. Beyond that, I wouldn't
11 agree with a broad--you know, your broad statement.

12 Q. As an example of one of the criticisms,
13 though, you state that the BCUC remained passive
14 rather than taking a proactive stance toward
15 implementing energy policy?

16 A. Yes, I do say that at--I believe you're
17 quoting me pretty accurately at one point in my Expert
18 Report.

19 Q. Okay. Do you cite the Utilities Commission
20 Act in your Report?

21 A. I don't recall whether I cite the Act.

22 Q. Okay. So you don't recall whether you

04:48:01 1 conducted an analysis of the powers of the BCUC under
2 the Utilities Commission Act for the purpose of your
3 Expert Report?

4 A. I do recall whether I looked into the powers
5 of the BCUC in connection with my Expert Report.

6 Q. But you did not conduct an analysis of those
7 provisions in your Expert Report?

8 A. I'm sorry. Which provisions are we talking
9 about?

10 Q. The provisions of the Utilities Commission
11 Act.

12 A. That--the provisions that do what?

13 Q. Do you cite the Utilities Commission Act in
14 your Expert Report?

15 A. I think I've said, from memory, I don't
16 recall citing the Act.

17 Q. I can state affirmatively that you do not
18 cite the Utilities Commissions Act in your Expert
19 Report.

20 So, I'm just asking you whether, in your
21 Expert Report, you conducted an analysis of the powers
22 of the BCUC that exist under the Utilities Commissions

04:48:55 1 Act.

2 A. Well, if by "in your Expert Report" you mean
3 written in the words of the Expert Report, the answer
4 would be no.

5 Q. Okay.

6 A. If you mean in the analysis and thinking that
7 led up to the creation of my Expert Report, my answer
8 would be, yes.

9 Q. Under which provision of the UCA does the
10 BCUC review energy procurement contracts?

11 A. I can't give you a number like that from
12 memory.

13 Q. Okay. And pursuant to which part of the UCA
14 does BCUC regulate sales for export?

15 A. I can't give you a number, but I do recall
16 that sale--depending on whether you mean export to the
17 United States or export to another province, I think
18 the--as I understand the regulatory regime in Canada,
19 those exports are jurisdictionally different.

20 Q. Okay. Could you turn to Paragraph 29 of your
21 Report.

22 Actually, we'll look at Table 1, if we could

04:50:13 1 please, which is--at least on my copy here--Page 12.

2 A. Yes, sir.

3 Q. Okay. What you are trying to model here is
4 someone who cannot sell any of its power?

5 A. Well, I wouldn't agree with that
6 characterization of Table 1.

7 Q. That is not--sorry. The letter A, that does
8 not define somebody who cannot sell any of their
9 power?

10 A. In this example, Entity A is not allowed any
11 external sales. Entity B is given 100 percent, all of
12 the opportunity to make external sales, and that's the
13 scenario illustrated here rounded out with also
14 BC Hydro's role in this scenario.

15 Q. You have suggestively labeled the native
16 utility as "BCH"?

17 A. Yes. It's not just suggestive. BC Hydro is,
18 in these simple hypotheticals, the utility I'm
19 referring to.

20 Q. Okay. So I wasn't actually meaning to--I was
21 meaning to make a joke. I apologize.

22 (Comments off microphone.)

04:51:48 1 PRESIDENT VEEDER: It's all right. No jokes.

2 MR. DOUGLAS: No jokes allowed, at least not
3 bad ones.

4 (Comment off microphone.)

5 MR. DOUGLAS: That's right.

6 BY MR. DOUGLAS:

7 Q. You make some assumptions in this model?

8 A. I would call this a scenario. I wouldn't--or
9 kind of a hypothetical example. It's absolutely the
10 case that I make a number of assumptions. It's
11 essential to create any sort of simple example or
12 hypothetical, and, thus, I had to and did so.

13 Q. Okay. Could you turn to Paragraph 26.

14 A. Yes, sir. I was just saying yes, I have it.

15 Q. Okay. And you stated there that, suppose for
16 simplicity, that the required return is \$10 a megawatt
17 hour for BCH?

18 A. Yes, that's correct.

19 Q. Okay. And if you look back at Table 1, you
20 see that BCH generates 1,000 megawatts?

21 A. Yes, sir.

22 Q. And makes a profit of \$10,000?

04:53:06 1 A. Yes, sir.

2 Q. So in this scenario, they are making up the
3 required return of \$10 a megawatt hour?

4 A. Yes, sir.

5 Q. Okay. And a required return is necessary so
6 that BCH can attract capital to make investments to
7 meet its services obligations?

8 A. Well, that's true of an investor-owned
9 utility. It's not quite that simple for a State-owned
10 utility.

11 Q. Okay. And if we turn to Table 2, you have a
12 second case?

13 A. Yes, sir.

14 Q. And in this scenario, Mill A now gets to
15 sell?

16 A. Yes. In this scenario, both A and B are each
17 allowed to sell, yes, sir.

18 Q. And if I understand your table correctly, BCH
19 now has to generate 1,050 megawatts per hour?

20 A. Yes, sir.

21 Q. And you compute the profit for BCH at 9,500?

22 A. Yes, sir. In this simple example, yes, sir.

04:54:30 1 Q. So what would their return per megawatt be in
2 this scenario?

3 A. Per megawatt hour, \$9.50.

4 Q. Okay. So that would be less than the \$10 per
5 megawatt hour required Rate of Return?

6 A. Yes, sir, that would be less than \$10. \$9.50
7 would be 50 cents less than the \$10 target or the
8 so-called required Rate of Return in Paragraph 26.

9 Q. Okay. So BCH isn't making their return in
10 this scenario. How would they make up the different?

11 A. If they concluded they needed to make up the
12 difference, they would raise rates to--in some manner
13 across their customer base, or they would find
14 alternative sources of revenues from some other
15 activity or from an appropriation from the Province.
16 There are many options for making up these revenues,
17 and their ability to access those options is, you
18 know, a subject of further inquiry.

19 (Pause.)

20 Q. So, they would make it up either from
21 ratepayers or taxpayers?

22 A. Ratepayers, taxpayers, or customers for some

04:56:04 1 other service.

2 Q. Okay. And in your direct, you corrected the
3 figure in Scenario 2 from 1,200--I'm sorry, 1,250 to
4 1,200.

5 A. Yes, sir.

6 Q. And you stated that that had no impact on any
7 other part of your Report but the last column of the
8 table?

9 A. No, I don't agree with your question as I
10 understood it.

11 Q. Nope, then I misunderstood the direct.

12 Perhaps you could clarify.

13 A. My answers in the direct were intended to say
14 that I made an arithmetic error in Column 2. Column 2
15 is not used in any way to compute the gains or losses
16 to each of the Parties, if you will, the A, B, and BC
17 Hydro that are shown that are shown in Column 9, so
18 since Column 9 doesn't use Column 2 in any way, shape,
19 or form, the arithmetic error in Column 2 didn't
20 affect Column 9, and all of the figures in there, the
21 gains and losses. Thus, the point of Table 2, which
22 underlies my conclusion; that is, the comparison of

04:57:42 1 Column 9 in Tables 1 and 2 is unaffected by the
2 arithmetic error in Column 2.

3 Q. Okay. Is there any other--thank you for
4 clarifying that.

5 Does this change have any impact on the
6 remainder of your assessment in the Report?

7 A. No, sir.

8 Q. Okay. Could you turn or just look at Page 15
9 for me, please.

10 A. Yes, sir.

11 Q. There's a bold portion there, where you state
12 that there is another important point illustrated by
13 this example, Scenario 2; the total load supplied in
14 the second alternative is 1,250 higher than the 1,250
15 in Table 2?

16 A. Yes.

17 Q. I think that's supposed to say Table 1.

18 A. Yes.

19 Q. Okay. And, in Paragraph 39, you state then,
20 and conclude that the alternative scenario produces
21 more total electric power at a lower total cost to
22 society than the first?

04:58:45 1 A. Yes, sir.

2 Q. And is, therefore, more economically
3 efficient?

4 A. Yes, sir.

5 Q. But with the correction that you made then,
6 that conclusion would not be correct?

7 A. Yes. It would be--you are correct that this
8 statement should read "the alternative scenario
9 produces the same total electric power at a lower
10 total cost to society and is, therefore, more
11 economically efficient."

12 And I apologize, I should have corrected this
13 point when I corrected Table 2.

14 Q. That's okay.

15 PRESIDENT VEEDER: And the heading to this
16 paragraph, would you correct that?

17 THE WITNESS: Yes, Mr. President.

18 PRESIDENT VEEDER: How would you correct it?

19 THE WITNESS: I would simply delete it.

20 MR. DOUGLAS: I have no further questions.

21 PRESIDENT VEEDER: Thank you.

22 Are there any questions by way of

04:59:58 1 re-examination from the Claimant?

2 MR. SHOR: Yes, I have just a few questions.

3 REDIRECT EXAMINATION

4 BY MR. SHOR:

5 Q. Dr. Fox-Penner, do you recall your
6 questioning by Mr. Douglas when he asked about
7 differences between your position on GBL guidelines,
8 consistency, transparency, and Celgar's position in
9 2010 and the G-156-10 proceeding?

10 A. Yes, I recall them.

11 Q. Was your analysis based on restricted access
12 information concerning the treatment of other mills
13 that was not available to Celgar?

14 A. I believe so. I'm not--I don't--I can't
15 testify as to what was available to Celgar, but my
16 analysis is based on all the information in this
17 proceeding.

18 Q. So, assuming restricted access information
19 was not available to Celgar, how would you respond?

20 A. Well, then, yes. I had much more information
21 than they would have had.

22 Q. And could you explain whether in the various

05:01:07 1 post-G-48-09 BCUC proceedings Celgar was seeking a
2 timely solution to its particular problem or a broad
3 policy review of Provincial Self-Generator Policy?

4 A. I think, as I said, I read that paragraph
5 that I think you are referring to as them wanting to
6 preserve a particular outcome that they had received
7 and not even really commenting on a broad--whether
8 there should or shouldn't be a broad Provincial
9 policy.

10 Q. And, in your experience, which would take
11 longer: Solving a particular company's problem or
12 moving toward an overall policy review requiring
13 consistent policy Province-wide?

14 A. Well, my answer to that question would vary
15 to a degree, I think, by the particular kind of
16 proceeding we're talking about, and the jurisdiction.
17 From everything I understand about British Columbia, I
18 think it would take a lot longer to do a Province-wide
19 policy than decide something for an individual Party.

20 MR. SHOR: I have no other questions,
21 Mr. President.

22 PRESIDENT VEEDER: Thank you.

05:02:31 1 The Tribunal may have questions.

2 QUESTIONS FROM THE TRIBUNAL

3 ARBITRATOR DOUGLAS: Just a very minor
4 question. At Page 865 to 6 of the Transcript, you
5 mentioned that the purposes of the BC Hydro and the
6 Fortis GBLs may have been different. Would you
7 elaborate on that a little bit.

8 THE WITNESS: Yes. As I understand their
9 thinking, the GBL with BC Hydro was part of their 2009
10 EPA, so it affected their ability to sell and their
11 rights under that contract; whereas they viewed, as I
12 understand it, the GBL that they would set with
13 FortisBC as affecting their access to embedded-cost
14 power sold by Fortis and relating to this. They were
15 in the midst of negotiating this NECP, rider, and all
16 of this complicated rate machinery, there was an RDA
17 and a bunch of other ratemaking issues.

18 So, one's a power sales agreement with what
19 we call an off-taker in the power business. The other
20 one's essentially a negotiation with their supplying
21 utility in a complicated rate proceeding.

22 ARBITRATOR DOUGLAS: Criteria to set it

05:04:10 1 should be different or should it be the same? What's
2 your view?

3 THE WITNESS: I haven't, you know--I must
4 say, Professor, I'm not so sure that the criteria
5 should be different, sitting here, so I can't endorse
6 that, but I must say the complications of the tiered
7 rate and the NECP rider and all of that could have
8 introduced things that may have warranted differences.

9 But the basic principles that govern GBLs and
10 the basic approach methodology, I think, wasn't really
11 adopted, I would, sitting here today, say it would be
12 the same, should be the same.

13 ARBITRATOR ORREGO VICUÑA: One also short
14 question, I guess, more on the hypothetical side than
15 the practical one. Since we are in hypothetical
16 scenarios, that is always very attractive.

17 First, a point that I think might be relevant
18 for the question: Would you regard the fact that
19 there is electricity at a low cost sold to some
20 company as opposed to other companies, would that be
21 regarded as a transfer of funds from the provider, the
22 authority, the one who is giving out that lower cost?

05:06:00 1 Could that be regarded as a transfer of funds? That's
2 the first part of the question.

3 THE WITNESS: If the power--there's two parts
4 to my answer, Professor, and forgive me, I think it
5 can be brief.

6 There is an equity question, and then there
7 is an overall transfer-of-wealth question. If the
8 prices are differential to those--than are offered to
9 other customers that are different and there is no
10 real basis in cost or policy, then that is a transfer
11 to that particular customer. There can be good
12 reasons for doing it, but, absent those good reasons,
13 there is an equity component.

14 Then, as to the overall level, if the overall
15 charge being made to that customer doesn't cover the
16 cost of supplying that customer allocated fairly, then
17 there is an overall transfer of wealth or transfer of
18 resources.

19 ARBITRATOR ORREGO VICUÑA: And the second
20 part of the question: In that case, could that be
21 considered a subsidy, governmental or public subsidy,
22 to a private producer of some sort?

05:07:29 1 THE WITNESS: Professor, yes. We are sitting
2 here in the World Bank. There is one of the world
3 authorities on energy subsidies just in the other
4 building, Shanta Devarajan. He has written
5 extensively on this. And there are many countries in
6 the world where energy is sold below market cost and
7 sometimes even below the cost of production, and those
8 are, I think, fairly considered subsidies.

9 ARBITRATOR ORREGO VICUÑA: And what's--I'm
10 not familiar with our colleagues across the tunnel.
11 What is the consequence of that? Generally speaking,
12 I mean for say, World Bank policy?

13 THE WITNESS: Oh, it's quite harmful. That
14 harms global economic efficiency. Customers who get
15 those low energy prices, those below cost energy
16 prices are induced to use too much energy, and
17 inefficiently use society's resources, and you see
18 this in countries that do have well-established energy
19 subsidies. They're very inefficient in their use of
20 energy, so it encourages the overuse of energy and it
21 takes revenue away from whatever entity is selling
22 that energy. For example, in Saudi Arabia where

05:08:57 1 domestic energy prices are very low, the domestic
2 electricity sales entity, the domestic utility, has
3 trouble getting adequate revenues because it's selling
4 at such low prices.

5 ARBITRATOR ORREGO VICUÑA: I see. And one
6 related question that comes to mind, is that wealth or
7 funds or benefit ultimately something that belongs to
8 the taxpayers? Would the taxpayers, through their
9 taxes, fund authorities of different sorts or public
10 functions of different sorts, and one part of those
11 taxes and then direct it to these lower costs
12 supplied? Would that be a connection, or not at all?

13 THE WITNESS: It really depends on the
14 utility ownership and governance regime in the
15 countries, or in some cases the subnational region.
16 In some regions, the taxpayers are explicitly or
17 implicitly the funder of last resort for the utility.
18 So, shortfalls in utility revenues are collected in
19 effect directly from the taxpayers. In others,
20 investors assume some of that risk, and so shortfalls
21 in utility revenue aren't collected directly from
22 taxpayers. They may--some of it may be collected from

05:10:49 1 taxpayers, but there is no direct link where
2 investor-owned utilities are the norm.

3 Similarly, cooperatives are different.

4 ARBITRATOR ORREGO VICUÑA: Okay. Thanks very
5 much.

6 THE WITNESS: You're welcome.

7 PRESIDENT VEEDER: I just have one topic to
8 pick up from what you've just said.

9 If we were in the European Union, and we
10 identified such a subsidy, are we in the area of
11 unlawful State aid?

12 THE WITNESS: We would be in the general--we
13 would certainly be in the general neighborhood of
14 State aid, Mr. President. I'm not reaching--I'm not
15 trying to cast any aspersions on activities in Canada
16 or the United States for that matter, but, yes,
17 the--selling a State-supported enterprise, selling
18 below its true costs of operation and obtaining State
19 subsidies to do that would be very much in the realm
20 of the EU State aid prohibition.

21 PRESIDENT VEEDER: Now, your experience seems
22 to be mostly in the United States by professional

05:11:59 1 background. Would that be lawful or unlawful under
2 U.S. law, that kind of State subsidy?

3 THE WITNESS: It is not unlawful--to the best
4 of my knowledge--I'm not a lawyer, Mr. President, but
5 to the best of my knowledge, it is not unlawful in the
6 energy industry domestically in the United States.

7 PRESIDENT VEEDER: Thank you.

8 Are there any questions from the Parties
9 arising from the Tribunal's questions?

10 We ask the Claimant first.

11 MR. SHOR: No, Mr. President.

12 PRESIDENT VEEDER: And the Respondent?

13 MR. DOUGLAS: No, Mr. President.

14 PRESIDENT VEEDER: We've come to the end of
15 your testimony. Thank you very much for coming to
16 testify.

17 THE WITNESS: You're welcome.

18 PRESIDENT VEEDER: Please leave the table.

19 (Witness steps down.)

20 PRESIDENT VEEDER: Now, we have 15 minutes
21 left, just time enough I think for direct examination
22 of the next witness. Is the next witness ready?

05:13:00 1 (Pause.)

2 MRS. DI PIERDOMENICO: Mr. President, a small
3 point of order.

4 PRESIDENT VEEDER: Yes.

5 MRS. DI PIERDOMENICO: Canada is wondering if
6 we can reopen the proceedings?

7 PRESIDENT VEEDER: Is there any reason why we
8 shouldn't?

9 MRS. DI PIERDOMENICO: Not from our side.

10 MR. OWEN: I think the public feed is what
11 she's referring to.

12 MRS. DI PIERDOMENICO: Yes, I was referring
13 to the public feed.

14 PRESIDENT VEEDER: I thought you were.

15 MRS. DI PIERDOMENICO: Yes.

16 PRESIDENT VEEDER: We're going to reopen the
17 proceedings anyway to swear in the Witness, and then
18 the direct examination will be done by the Claimant.

19 Is it closed or open?

20 MR. WITTEN: Open is fine.

21 PRESIDENT VEEDER: Open, so we will go open.

22 (End of confidential session.)

05:15:16 1

OPEN SESSION

2 PRESIDENT VEEDER: We have the next witness
3 before us.

4 DAVID AUSTIN, CLAIMANT'S WITNESS, CALLED

5 PRESIDENT VEEDER: Sir, if you could state
6 your full name, and if you will, read the words of the
7 Declaration for the Expert Witnesses on the piece of
8 paper before you.

9 THE WITNESS: My name is David Arthur Austin.

10 I solemnly declare upon my honor and
11 conscience that my statement will be in accordance
12 with my sincere belief.

13 PRESIDENT VEEDER: Thank you very much.

14 There will be first questions from the
15 Claimant.

16 MR. WITTEN: Thank you, Mr. President.

17 DIRECT EXAMINATION

18 BY MR. WITTEN:

19 Q. And welcome, Mr. Austin.

20 Mr. Austin, I just have a couple of
21 questions. First of all, you submitted one Expert
22 Report in this proceeding, dated December 15, 2014.

05:15:59 1 Do you have any corrections you wish to offer
2 to your Statement?

3 A. No, I do not.

4 Q. Okay. Thank you.

5 And just a couple of questions:

6 Mr. Austin, in Canada's Rejoinder and through
7 the Expert Report of David Bursey, Canada argues that
8 the Ministers' Order triggered a commitment to first
9 use the 1993 turbine solely to displace the pulp
10 mill's load and secondly, that the Ministers' Order
11 prohibited Celgar from making any sales of
12 self-generated electricity to third parties. Could
13 you please explain your view on these arguments?

14 A. In the Counter-Memorial, Canada's position
15 was 100 percent of the energy sales sufficiency under
16 normal operating conditions.

17 In the Rejoinder, there is discussion
18 about--this is Mr. Bursey's Expert Report--it's
19 operate the power generation facilities for the
20 purpose of supplying power to Celgar pulp mill, and no
21 permission of sales of self-generation power to third
22 parties.

05:17:05 1 And as pointed out in Mercer's Opening
2 Statement, Canada clarified that both Parties--

3 MRS. DI PIERDOMENICO: If I could just
4 object, I have no idea what the Witness is reading
5 from, and it would be nice to know.

6 THE WITNESS: They're just some handwritten
7 notes. I just wanted to make sure that the
8 clarifications for the purposes of what was said were
9 as clear as possible on the record. If you don't want
10 me read the notes, then that's fine.

11 MRS. DI PIERDOMENICO: That's not a
12 clarification. That's an answer to a direct question.

13 PRESIDENT VEEDER: Are you asking to see the
14 notes?

15 MR. DOUGLAS: It's not the usual practice,
16 Mr. President, that witnesses who testify do not have
17 notes while they are providing testimony.

18 PRESIDENT VEEDER: Well, there are different
19 cultures. I'm not saying to which one I belong, but
20 there are cultures certainly not far from here where
21 if you go into a witness box with notes they can be
22 called for by the cross-examining party.

05:19:23 1 request. That wasn't, I think--

2 MR. OWEN: Is that permissible, Mr.

3 President?

4 PRESIDENT VEEDER: Is there an objection to

5 that? That was not on offer.

6 MR. WITTEN: Mr. President, this is getting

7 more complicated than it needs to be. As I understand

8 it, Mr. Austin wanted to be sure that he was

9 accurately quoting a couple of things and handwrote

10 notes. The materials are--we could have taken the

11 additional time, which we don't have, and have him

12 look at these documents. He was concerned about

13 mischaracterizing or misquoting and he's--as you say,

14 it's not a memory game.

15 MR. OWEN: I'm sorry, I would just like to

16 make a point here. While there are two quotes on here

17 and there are quotations, I then have a third page and

18 then a fourth page which just seems to be a

19 presentation.

20 PRESIDENT VEEDER: They're only the Witness's

21 notes. We don't know what he's going to make of them.

22 And if you had my notes you couldn't read a single

05:20:20 1 word, so you're lucky.

2 (Laughter.)

3 MR. OWEN: Mine, too.

4 (Tribunal conferring.)

5 PRESIDENT VEEDER: In the circumstances, we
6 don't accede to the request for the notes to be
7 copied. They can be returned to the Witness. He is
8 an expert witness, not a factual witness, and we think
9 it's a legitimate purpose that he's seeking to give
10 his evidence as accurately as possible.

11 So, please proceed.

12 MR. DOUGLAS: Mr. President, sorry, and I
13 don't mean to continue the point. When he's being
14 cross-examined, will he have notes there? I notice
15 there is another binder that he's sitting over as well
16 in addition to the notes that is not a binder.

17 THE WITNESS: There are no notes in the
18 binder. What it is is some of the exhibits that
19 Canada--I expect Canada would cross-examine me on, and
20 I have just highlighted sections so that we could
21 speed up the cross-examination process rather than
22 having me rummaging around to try and find the

05:21:32 1 material in, say, for example, the Ministers' Order
2 and Attachment Number 1 to the Ministers' Order.
3 That's all they are.

4 If you want to look at them, you're more than
5 welcome to it.

6 MR. DOUGLAS: If it would be all right, I
7 think our preference would be we could take you to
8 those relevant portions as we go through the
9 cross-examination, if that would be okay with you.

10 PRESIDENT VEEDER: Let's stop this. Let's
11 continue with the direct examination, and we'll come
12 to the cross-examination when we come to it, which I
13 suspect will be tomorrow.

14 And you may wish to use your own notes as
15 well.

16 THE WITNESS: I think it was at the point
17 where I was just trying to say what Mercer's Opening
18 Statement was in relation to Canada's position in
19 terms of a change because of a letter that was written
20 and a response that was received. And it seems
21 Canada's position now is that their surplus sales have
22 been periodically allowed.

05:22:32 1 And the thrust of my direct examination is
2 none of this makes any difference in relation to my
3 expert opinion because my expert opinion is based on
4 the fact that, in Canadian law, you need a clear
5 statement of restricting sales, so none of this makes
6 any difference whatsoever.

7 BY MR. WITTEN:

8 Q. Thank you, Mr. Austin.

9 Just one additional question. Are you aware
10 of any agreements or frameworks that would permit
11 Celgar to make below-load sales of the kind that
12 Canada says are not permitted under the Ministers'
13 Order?

14 A. I am, and it's B.C. Utilities Commission
15 Order Number G-15-01, and that is Exhibit C-344, and
16 this is an order of the B.C. Utilities Commission, and
17 it was signed by Mr. Peter Ostergaard, who is a lead
18 witness for Canada. And attached to this Order, which
19 was approved retroactively, is something called the
20 Curtailment Agreement and a General Service Power
21 Contract. And the General Service Power Contract
22 allows sales of surplus electricity from Celgar to, as

05:23:57 1 it then was, West Kootenay Power and Light.

2 And the Curtailment Agreement, which is
3 Exhibit C-272, allows below-load sales from Celgar to
4 West Kootenay.

5 MR. WITTEN: Mr. President, we have no
6 further questions.

7 PRESIDENT VEEDER: Thank you very much.

8 And I suspect the Respondent would rather we
9 stop now and start clean tomorrow morning?

10 MRS. DI PIERDOMENICO: Indeed, Mr. President.

11 PRESIDENT VEEDER: Well, we will stop now
12 then and we will resume at 9:00 tomorrow.

13 MRS. DI PIERDOMENICO: Okay.

14 PRESIDENT VEEDER: And if they do want to
15 look at your file with the highlighting, sir, would
16 you mind showing it to them tomorrow morning?

17 THE WITNESS: Absolutely not. That means I'm
18 willing to show it to them.

19 (Laughter.)

20 PRESIDENT VEEDER: I was going to say, it's
21 slightly ambiguous answer. Thank you very much.

22 THE WITNESS: I think that you prefaced it

05:25:00 1 with do I mind, and I absolutely do not mind.

2 PRESIDENT VEEDER: Absolutely. You're quite
3 right.

4 So until 9:00 tomorrow. And again, although
5 you're not being cross-examined, please don't discuss
6 the case or your testimony until you come back before
7 the Tribunal at 9:00 tomorrow. Okay?

8 MR. SHOR: Mr. President, if I may, one
9 housekeeping matter.

10 PRESIDENT VEEDER: I just need an answer.
11 Sorry. Yes?

12 THE WITNESS: Yes, I'm not discussing it with
13 anybody, the cat, the dog, fish.

14 PRESIDENT VEEDER: Thank you.

15 MR. SHOR: Yes. During Mr. Switlishoff's
16 cross-examination, he admitted that he had made an
17 error in his colored charts, leaving off one small
18 Bear Lumber. He's corrected the chart to add it in,
19 so I have corrected copies for everyone. I'm happy to
20 distribute it.

21 PRESIDENT VEEDER: Can we give that a number
22 or identification?

05:25:53 1 MR. SHOR: That would probably be a good
2 idea.

3 We will call it C-345. We will write it on
4 each one.

5 MR. DOUGLAS: Mr. Shor? Just, sorry, out of
6 curiosity, would there be any changes to the
7 underlying spreadsheet as well?

8 MR. SHOR: No. It was just he didn't copy
9 the last column in it, and that's why it didn't get
10 put in the chart.

11 MR. DOUGLAS: Okay.

12 MR. SHOR: His data didn't change at all.

13 MR. DOUGLAS: Okay. I just wanted to make
14 sure. Thank you.

15 PRESIDENT VEEDER: We will stop. That could
16 be done informally. You can stop now. Thanks very
17 much.

18 (Whereupon, at 5:26 p.m., the Hearing was
19 adjourned until 9:00 a.m. the following day.)

20

21

22

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAWN K. LARSON