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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 7

HEARING ON JURISDICTION AND THE MERITS

MAY CONTAIN RESTRICTED ACCESS AND CONFIDENTIAL
INFORMATION

Wednesday, July 29, 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

1955

Also Present:

MS. ALICIA MARTÍN BLANCO
Secretary to the Tribunal

Court Reporter:

MS. DAWN K. LARSON
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporters
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903

APPEARANCES:

On behalf of the Claimant:

MR. MICHAEL SHOR
MS. GAELA GEHRING FLORES
MR. SAMUEL WITTEN
MS. CATHERINE KETTLEWELL
MR. ANDREW TREASTER
MR. PEDRO SOTO
MS. SHEPARD DANIEL
MR. KELBY BALLENA
MS. AIMEE REILERT
MS. BAILEY ROE
MR. CLAUDIO MATUTE
Arnold & Porter, LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
United States of America

MR. KIM C. MOLLER
Sangra Moller, LLP
1000 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2

Party Representative for Mercer International:

MR. BRIAN MERWIN

1957

APPEARANCES: (Continued)

On behalf of the Respondent:

MR. MICHAEL OWEN
MR. ADAM DOUGLAS
MR. STEPHEN KURELEK
MS. LORI DI PIERDOMENICO
MS. KRISTA ZEMAN
MR. LOUIS-PHILIPPE COULOMBE
MR. ANDREW MASON
MS. DIANE KISSICK
MRS. CHERYL FABIAN-BERNARD
MS. SHAWNA LESAUX
MS. ANH NGUYEN
MR. ALEX MILLER
Department of Foreign Affairs,
Trade and Development, Canada
Trade Law Bureau (JLT)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

Party Representatives:

MR. JONATHAN EADES
Government of British Columbia

MS. VICKI ANTONIADES
British Columbia Hydro and Power Authority

MS. JENNIFER CHAMPION
Lawson Lundell

MR. NATHANIEL GOSMAN
Government of British Columbia

1958

APPEARANCES: (Continued)

On behalf of the United States of America:

MS. ALICIA CATE
MR. JOHN BLANCK
Attorney-Advisers
U.S. Department of State
Office of the Legal Adviser
2430 E Street, N.W.
SA-4 South, Suite 203
Washington, D.C. 20037-2851
United States of America

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1960

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

2 PRESIDENT VEEDER: Good morning. We'll start
3 Day 7, the 29th of July.

4 As always, we ask our Secretary to announce
5 the timing.

6 MS. MARTÍN BLANCO: Thank you, Mr. Veeder.

7 The Claimant has 4 hours and 58 minutes left,
8 and the Respondent has 3 hours and 18 minutes left.

9 PRESIDENT VEEDER: Is there any housekeeping
10 we need to address?

11 We ask the Claimants first.

12 MR. SHOR: Yes. I just want to seek one
13 clarification based on the time that Alicia just read
14 out.

15 So my understanding is that Canada has 3
16 hours and 18 minutes left and that encompasses both
17 today and their Closing tomorrow. So that if they
18 intend to use the full 2 hours and 20 minutes allotted
19 for Closing tomorrow, they have less than an hour
20 today; and if they are going to use 20 minutes for the
21 direct of Dr. Rosenkrantz, that leaves them--I
22 apologize for that--Dr. Rosenzweig. I knew it was

1961

09:02:19 1 going to come out once--that they have less than 40
2 minutes for the cross-examination of Mr. Kaczmarek.

3 I just don't want to get in a situation where
4 Canada goes over on its time today and then asks for
5 an additional allocation of time for their Closing, so
6 I want to be clear on what the limitations are today.

7 PRESIDENT VEEDER: What's Canada's position?

8 MR. DOUGLAS: He is quite correct. I think
9 it's to our discretion how much time we would like to
10 use today, but we recognize that there was 19.5 hours
11 provided to Canada and 20.5 to the Claimant, and to
12 allocate that as we like. So if we want to take a bit
13 of time from our Closing, we'll choose to do so.

14 But I think he's right, there isn't a lot of
15 time, and our intention is to stick within that.

16 PRESIDENT VEEDER: That's your answer. It is
17 very clear. Thank you.

18 There was another timing issue that we needed
19 to confirm. We had originally said 20 minutes for
20 direct examination of the two Damage Experts. Because
21 there was an argument about the direct examination of
22 non-Damages Experts, we held that over to be confirmed

1962

09:03:22 1 later, but it is 20 minutes, isn't it? That's what
2 you agreed originally.

3 MR. SHOR: I think we had asked for a half
4 hour, they had asked for 20 minutes, and I think it
5 was deferred until consideration.

6 PRESIDENT VEEDER: Do you still need more
7 time?

8 MR. SHOR: Brent, would you like 25 minutes?

9 Could we have 25 minutes? I think he's
10 thinking he might go a little over 20. So if we could
11 get 25, that would solve our problem.

12 PRESIDENT VEEDER: He either talks very, very
13 fast or he talks fast.

14 MR. DOUGLAS: I know. So if it's 25, that's
15 fine, but I don't recall there being a question about
16 whether it was going to be 30. In my head it was
17 always 20 and it wasn't technically a direct, it was a
18 presentation.

19 PRESIDENT VEEDER: It is really for our
20 purposes.

21 MR. DOUGLAS: There is not going to be any
22 questions to--the Expert is just going to be speaking

1963

09:04:10 1 for 20 minutes. If the Claimant wants to use some
2 additional 5 minutes for that purpose, that's fine.

3 PRESIDENT VEEDER: Okay. So they're saying
4 absolutely not a second over 25 minutes.

5 MR. SHOR: Because we've been very strict on
6 all the time deadlines so far.

7 PRESIDENT VEEDER: Okay. Anything else the
8 Claimants need to raise?

9 MR. SHOR: Nothing further.

10 PRESIDENT VEEDER: The Respondent?

11 MR. DOUGLAS: No, Mr. President.

12 PRESIDENT VEEDER: Let's move straightforward
13 to the next Witness.

14 BRENT KACZMAREK, CLAIMANT'S WITNESS, CALLED

15 PRESIDENT VEEDER: I feel silly saying this,
16 but if you could state your full name and also if
17 you're willing to read the words of the Expert
18 declaration on the piece of paper before you.

19 THE WITNESS: Absolutely.

20 My full name is Brent Charles Kaczmarek. I
21 solemnly declare upon my honor and conscience that my
22 statement will be in accordance with my sincere

1964

09:04:51 1 belief.

2 PRESIDENT VEEDER: There will be first
3 questions from the Claimant.

4 MS. GEHRING FLORES: Just an introduction,
5 Mr. President.

6 Members of the Tribunal, I introduce to you
7 Brent Kaczmarek. He's the Managing Director--he is a
8 Managing Director at Navigant, and he's the lead of
9 Navigant's International Arbitration Group.

10 Brent Kaczmarek is a Chartered Financial
11 Analyst, and he has testified in over 100
12 international arbitrations as a Damages Expert. He's
13 also submitted two Expert Reports in this arbitration.

14 DIRECT PRESENTATION

15 THE WITNESS: So, I guess that's my cue, so
16 here we go. I will stick to the 25 minutes.

17 So I have three sections I want to address to
18 you. First, just a quick summary of Mercer's claims,
19 a summary of our damages calculations, and then a few
20 comments on Dr. Rosenzweig's Reports.

21 So, you've heard it. It may not need to be
22 repeated, but, of course, Mercer claims that G-48-09

1965

09:06:12 1 and the GBL in the EPA with BC Hydro effectively apply
2 a net-of-load standard to Celgar, meaning they cannot
3 sell electricity while they are also self-supplying.
4 Only excess electricity over their 2007 load could be
5 sold.

6 They don't have access to embedded-cost power
7 as a result of these Measures to sell their
8 self-generation, which has been referred to as the
9 arbitrage here. But, of course, as you've heard,
10 other mills did have GBLs set below their loads and
11 were able to engage in some arbitrage, and that has
12 effectively distorted competition for pulp mills in
13 British Columbia. So, that's effectively the Measures
14 they complain about.

15 Slide 5. I just put together a diagram to
16 help you just understand the basics of the claim. If
17 you look at the bar on the left, at the very top
18 you'll see it's a total generation of 525.5-gigawatt
19 hours for a year. That was our projection for 2015.
20 So this first bar is the Actual Scenario.

21 The red portion of the bar is effectively the
22 GBL, 349-gigawatt hours, and that is self-generation

1966

09:07:41 1 by Celgar. It produces it and consumes it.

2 Then there's a small blue portion which we've
3 referred to as seller-consumed energy. This is a
4 result of the Mill's load increasing over the past few
5 years. So this is produced by Celgar, and effectively
6 an accounting adjustment is made with BC Hydro. Then
7 the green portion is electricity sold to BC Hydro
8 under the EPA.

9 The next bar is what we would call the
10 but-for bar. This is an example if the GBL had been
11 set at zero. So you see there's no red portion now in
12 this bar. Everything produced by Celgar would be sold
13 to BC Hydro, and they would purchase electricity from
14 their utility, FortisBC. And then the remainder, the
15 green stays the same, that portion also being sold to
16 BC Hydro.

17 And then the third bar is basically a
18 different But-For Scenario with the GBL set similar to
19 Howe Sound's. And there, there is some
20 self-generation that goes to load. And then the blue
21 portion again sold to BC Hydro and purchased from
22 FortisBC.

1967

09:09:10 1 So, effectively you can think of the
2 difference in the size of the blue box as being the
3 amount of the arbitrage opportunity that had been
4 denied to Celgar.

5 Slide 6. This is just a quick summary of
6 Canada's claims. I won't claim to be able to put them
7 all in their own words as they would put it, but they
8 say these Measures are not discriminatory, they are
9 justified by a policy to procure incremental
10 generation. They don't prevent the sale of Celgar's
11 self-generation below the load. They say they haven't
12 been harmed; and, in fact, they actually say, as I
13 understand it, they have opportunities to do arbitrage
14 through this NECP Rate Rider.

15 MR. SHOR: While you're pausing for a second,
16 I just want to make sure that we're in closed session
17 because we're going to get--

18 PRESIDENT VEEDER: No, we're not. We're in
19 open session. So we should be in closed session?

20 MR. SHOR: Yes.

21 PRESIDENT VEEDER: Let's go into closed
22 session.

1968

09:10:18 1 (End of open session. Confidential business

2 information redacted.)

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09:10:18 1

CONFIDENTIAL SESSION

2

3 PRESIDENT VEEDER: Thank you. We're in
4 closed session.

5 THE WITNESS: Thank you.

6 So, Slide 8. This is just a simple
7 calculation I put together to show you how the damages
8 arise. As in any damage calculation--and I'll talk
9 about it a bit more in the next slide--you have a
10 But-For Scenario and an Actual Scenario. So in our
11 But-For Scenario, we assume away the Measures. So
12 there would never have been--this 349 doesn't exist.
13 BC Hydro would have come up with something different.

14 So this calculation assumes they came up with
15 zero instead of 349. So here then Celgar would have
16 349-gigawatt hours, or 349,000-megawatt hours, to sell
17 and to arbitrage.

18 You see the BC Hydro EPA price of ██████>, the
19 cost to procure from FortisBC, under Rate Schedule 31,
20 50, so a difference of 60. So it's simply the volume
21 of additional electricity times the differential in
22 the price would produce a loss, annual loss, of

1970

09:11:32 1 [REDACTED] > here. So that's actually the issue we're
2 talking about.

3 Now, on Slide 9, I've shown effectively this
4 framework. As I explained it in my Report, we have a
5 historical period and we have a future period. And as
6 I said, the losses are simply the but-for cash flows,
7 assuming away the Measures, less the actual cash
8 flows.

9 Those historical cash flows get brought
10 forward with interest, and the projected cash flows
11 are discounted at the Weighted Average Cost of
12 Capital.

13 So, that's effectively the basic model; it's
14 the basic kind of damages model you'd see in
15 99 percent of the cases I'm sure you've been in.

16 Now, when we did these cash flow projections,
17 we did them for the whole Mill, for all of Celgar.
18 This was something that Dr. Rosenzweig took issue
19 with, saying this really could be four lines, it
20 doesn't have to be as complex as this. And he even
21 suggested that I may be trying to mislead people
22 reading my Reports about the complexity and the rigor

1971

09:12:47 1 of the model.

2 But as I explained in my Second Report, what
3 I wanted to do is give you some appreciation of the
4 impact the Measures have on Celgar, and so I wanted to
5 do a full valuation so you had that appreciation.

6 And as I also said, it isn't as simple as
7 four lines. I did do a condensed model. It still is
8 a fairly complicated model.

9 And you'll see on Slide 11, this was from my
10 First Report. I explained to you that the Measures
11 were anywhere--depending upon the GBL, anywhere
12 between << [REDACTED]

[REDACTED] So, in my view,
14 the impact of the Measures is significant in certain
15 cases and certainly not trivial in any case.

16 Now--

17 PRESIDENT VEEDER: Just tell me, you said

18 [REDACTED] [REDACTED]

19 THE WITNESS: << [REDACTED] > Sorry. Yes.

20 PRESIDENT VEEDER: Thank you.

21 THE WITNESS: Those have been slightly
22 modified, and I will show you some of that today.

1972

09:14:10 1 That was just from my First Report. Dr. Rosenzweig's
2 response to this is he thought it was suspect, my
3 explanation about how I did the modeling. But as I
4 think you know, we're here because there was an
5 investment by Mercer, and that investment is
6 undoubtedly the Celgar Mill. It's uncontested that
7 pulp production and electricity are related, so
8 obviously we wanted to project two related variables.

9 And, of course, it is quite common in
10 investor-State arbitrations, this is not my maiden
11 voyage in investor-State arbitrations, but it is
12 common to measure the impact of Measures on the value
13 of investments because, in fact, as my experience has
14 shown, the impact, the quantitative impact of a
15 Measure may be a relevant factor for you in terms of
16 liability. If I were to tell you the Measures had
17 one-tenth of 1 percent of an impact on the value, you
18 might think, well, this is trivial and not really an
19 issue. And that's not the case here.

20 Slide 13, just a graph. This also kind of
21 shows the operational impact on cash flows from year
22 to year, not just the impact on value. This is the

1973

09:15:41 1 zero GBL. Most of my slides are going to focus on the
2 Zero GBL Scenario because that's what Dr. Rosenzweig
3 and I have traded and talked about in our Reports.

4 And then on Slide 14, here are all the
5 different scenarios that we've run damages for, so
6 different GBLs or effectively load displacement, which
7 is equivalent to the zero GBL, generation to load
8 ratios, or other EPAs with other mills. We've given
9 you all the different effective GBLs and the
10 calculation of damages that flow under each of these
11 scenarios.

12 And you'll see that on Slide 15. That
13 carries on for each GBL. You see the historical loss
14 cash flows, the diminution in value, and then
15 pre-award interest under two different interest rates.
16 So, this is an updated calculation. I should note it
17 is up to June 30, 2015, with interest. I did make, as
18 Dr. Rosenzweig had pointed out, there was a formula
19 error on part of the interest calculation. That has
20 been remedied. So, that's fixed and updated to the
21 end of last month.

22 So, the last section here on Dr. Rosenzweig's

1974

09:17:19 1 Reports: It was said yesterday that he has offered
2 Expert Opinions on several matters in this case, and I
3 would agree. I think he is, indeed, wearing many
4 hats, and I think the many hats that he is wearing has
5 put him on a bit of a slippery slope, and I think it
6 has clouded some of the issues about damages in this
7 case. And I just want to walk you through some of
8 that to see if I can help lift this cloud, because I
9 don't really think that there is all that much in
10 dispute when it comes to quantum.

11 But what you can see from a couple of these
12 quotes--and this is his Report. I think he is
13 effectively arguing the Merits of Claimant's case when
14 he makes opinions about whether they were
15 disadvantaged or treated unfairly. Clearly, that is
16 your domain to determine whether the treatment is,
17 indeed, in breach of NAFTA.

18 He made several Legal Arguments, such as
19 stating that Claimant relies on the Expert Report of
20 Mr. Switlishoff to support its claims of
21 discrimination and less favorable treatment. However,
22 this is an unreliable foundation upon which to build a

1975

09:18:43 1 case. So, he's addressing the case here, not really
2 the quantum.

3 He has, as you see on Slide 18, criticized us
4 for not independently assessing the Claims here. And
5 again, claims are for Claimant, as I always say. I'm
6 calculating the effect of the Claims, not judging the
7 merits of them. And you can see he seems to suggest
8 that I should be judging merits when he says that
9 there are a number of flaws in Claimant's rationale
10 justifying the alleged discriminatory treatment, as
11 "Mr. Kaczmarek ignores these issue, his damages
12 assessment, assuming a zero GBL is also flawed."

13 So, well, again, I'm not here to test or even
14 decide on in some sort of summary judgment way
15 Claimant's case. I accept their case of what they're
16 pleading, and I calculate the damages from that. And
17 I think it's because Dr. Rosenzweig is approaching
18 this case completely differently, he's judging my
19 calculations in a completely different way than the
20 way I think they should be looked at.

21 Slide 19: What I can basically put it to
22 you--and this is as succinctly as I could think to put

1976

09:20:09 1 it to you is, Dr. Rosenzweig is effectively arguing
2 Respondent's case, carrying on their arguments and
3 using those arguments to criticize our damages
4 calculations, which I think is inappropriate. If
5 Canada has different legal and factual submissions to
6 make, that is the basis upon which a different
7 calculation of damages might be made. It's not the
8 basis upon which to criticize the calculation of
9 damages that conforms to Claimant's case.

10 So, when you peel all that away--and I'm on
11 Slide 20 now--you actually get to a pretty simple
12 situation where we are with the numbers. Again, this
13 is a Zero GBL Scenario, our damage calculation of
14 \$225 million. Dr. Rosenzweig has offered an
15 alternative at 132. This is the typical waterfall
16 chart showing you the differences. There is five in
17 total, but you can see two of them have the biggest
18 impact, and I just want to walk through these with
19 you.

20 So, the Discount Rate, we have put forward a
21 Weighted Average Cost of Capital. That is the
22 Standard Discount Rate that I would say 99.9 percent

1977

09:21:41 1 of valuation professionals would use to value an asset
2 such as the Celgar Mill. But Dr. Rosenzweig disagrees
3 with it. He says the Cost of Equity ought to be used,
4 and he actually gets that Cost of Equity from an IRR
5 calculation performed by Pöyry and CIBC.

6 Now, I thought it was fairly well understood
7 that the Cost of Capital and an IRR are two different
8 concepts. And as you've probably seen in several
9 other cases or heard when you're looking to undertake
10 a project, if the IRR, which is your average rate of
11 profitability, is greater than the Cost of Capital,
12 it's economic. You go ahead and you do the project.
13 If the IRR is lower than the Cost of Capital, you
14 don't do the project. That's the basic use of the
15 IRR. You don't use the IRR as a Discount Rate, but
16 that's what he is proposing here, and I would have
17 thought we could have agreed on the WACC in this case.

18 And you'll see--if you look at one of
19 Dr. Rosenzweig's own exhibits, this is NERA-94. This
20 is a CIBC presentation on the valuation of Celgar, I
21 think, back in around 2005, you'll see that they,
22 indeed, use the Weighted Average Cost of Capital to

1978

09:23:17 1 value Celgar. And you see they came up with 9.08, not
2 too different from the WACC that I had calculated for
3 2014.

4 So, Slide 23, moving to terminal value: So,
5 this is the damages that extend beyond 2020, and
6 Dr. Rosenzweig says that we should stop damages at
7 that point because that's when the BC Hydro EPA
8 expires. And as I've explained to you, I don't think
9 we should do that. I think we should continue do it
10 because I think, one, it's an effective way of
11 resolving this case. You stop the damages at the end
12 of the EPA, certainly if you find damages and Awards,
13 and if Canada can pay them. If we get to the end of
14 the EPA and any renewal is discussed, we still have
15 the GBL at 349. If you extend it to perpetuity, it
16 effectively leaves Canada with options, which could be
17 modifying the EPA, adjusting the GBL downward to what
18 you say it should be. And the terminal value damages
19 would go away at that point. So, we said there is
20 options of restitution that Canada can provide and so
21 not necessary, we think, to remove the terminal value
22 damages calculation.

1979

09:24:53 1 You've also probably seen Dr. Rosenzweig has
2 said that this was also a very speculative assumption
3 on our part because they don't know if BC Hydro will
4 need the energy, but you have also seen that there is
5 a large expected increase in demand in British
6 Columbia for energy and a widening gap in the deficit
7 between supply and demand. So, I think it's very much
8 clear that there will be demand for Celgar's mills for
9 energy in the future.

10 And as we also showed you, Slide 25, the
11 prices are very competitive, not only with other green
12 energy offers, but with thermal energy new-builds as
13 well.

14 Slide 26, under delivery penalties, this
15 is--as you see, it's a small amount. This is more of
16 a technical operational matter beyond my expertise,
17 but we do have a small difference in penalties between
18 our But-For and Actual Scenario. Dr. Rosenzweig
19 believes it should be the same. Again, I would say
20 that's a technical operational issue, but I agree on
21 his quantification of it. Here, in the waterfall, it
22 is 3 million. If you had made this change first, it

1980

09:26:19 1 is only about 4 million in the Zero GBL Scenario, and
2 for every other GBL scenario, it is much less, so not
3 a very big issue.

4 These are transmission tariffs. This came
5 from Mr. Swanson, in his latest report, saying we
6 missed some charges that FortisBC would impose on
7 Celgar. Again, this is a factual matter. I don't
8 know if this is true as the FortisBC PSA never took
9 effect, but we agree the quantum of it, so 7.6 million
10 in the waterfall chart. By itself, I believe the
11 change is about 17 million.

12 And then, lastly, "Other." This is really--I
13 think, actually, Dr. Rosenzweig made a change in the
14 working capital that was wrong, that we fixed, and he
15 pointed out a formula issue and a Discount Factor
16 calculation that we changed. So, total increase,
17 actually, if you fix both, of 654,000, so nothing,
18 very minor.

19 Frankly, most of the issues I think that are
20 really relevant for you are fairly minor. We are
21 talking on the fringes here of the core numbers. And
22 so here, finally, is Dr. Rosenzweig's summary of his

1981

09:27:52 1 damages under all the GBL scenarios. And that
2 concludes my presentation.

3 PRESIDENT VEEDER: Thank you very much.

4 There will now be questions from the
5 Respondent.

6 MR. KURELEK: We would prefer to have a
7 10-minute break just to converse amongst ourselves.

8 PRESIDENT VEEDER: Okay. A 10-minute break.

9 MR. KURELEK: Thank you.

10 PRESIDENT VEEDER: Again, please don't
11 discuss the case or your testimony until you come back
12 before the Tribunal.

13 (Brief recess.)

14 PRESIDENT VEEDER: Let's resume.

15 We're still in closed session. As soon as
16 you want to--

17 MR. KURELEK: That's my understanding, yes.

18 PRESIDENT VEEDER: As soon as you want us to
19 be in open session, let us know.

20 MR. KURELEK: I shall.

21 CROSS-EXAMINATION

22 BY MR. KURELEK:

1982

09:41:32 1 Q. Good morning, Mr. Kaczmarek.

2 You might recall we worked together a number
3 of years ago for Canada on the Chemtura NAFTA case?

4 A. I recall, yes.

5 Q. The good old days. My recollection is that
6 you were up against three Damages Experts in that
7 case.

8 A. That may be, yeah.

9 Q. Today we only have Rosencrantz and
10 Guildenstern and Mr. Rosenzweig.

11 I'm going to start out with some preliminary
12 questions and then I have a couple questions about
13 your handout, your PowerPoint presentation.

14 You have, I believe, on your desk two
15 document binders, and if you need to--Core Legal
16 computer expert is going to do his best to keep up
17 with me in terms of putting documents up on the screen
18 for you.

19 So you have two choices there, one right in
20 front of you and the big one right in front of the
21 Tribunal. But also there are hard copies of all the
22 materials in this arbitration.

1983

09:42:32 1 So we're talking about pleadings and Witness
2 Statements, Expert Reports, behind you, and they are
3 the ones on the right of the shelf. I think the ones
4 on the left you don't have to worry about. I think
5 those are the redacted versions. So, those are your
6 options if you want to look at the hard copies. But
7 like I say, Chris will try to keep up with me and put
8 things on the screen for us.

9 Now, your counsel began by noting that you
10 submitted two Expert Reports in this case. Can you
11 tell me, did you write both of those Reports?

12 A. Yes.

13 Q. Okay. And is it true that those Reports rely
14 on a series of assumptions?

15 A. Sure, that's quite true, yes.

16 Q. And you say as much in Paragraph 116 of your
17 First Report. So let me go to your PowerPoint
18 presentation and look at one of the assumptions that I
19 think you're making here.

20 On Page 5, it's called "Mercer's Claimed
21 Impact on Celgar's Electricity Sales 2015." Am I
22 correct that the assumption there is that BC Hydro

1984

09:43:39 1 would be the buyer of that power?

2 A. Yes. Our primary But-For Scenario is that
3 BC Hydro would be the buyer.

4 Q. Okay. A related question on
5 Paragraph 15--sorry, Page 15--is that the same
6 assumption applies to this damages summaries? That's
7 your latest calculation, I think, chart of June 30,
8 2015. Again, BC Hydro would be the buyer?

9 A. Yes. Obviously, in a But-For Scenario where
10 they don't set the GBL at 349, as I said, 349 would
11 have never come into existence. It would have been
12 something else.

13 I don't understand on what basis BC Hydro
14 would have decided to buy at some other level of power
15 other than everything above the GBL.

16 Q. Very good.

17 Moving on to another assumption, is it true
18 that the assumption you make for Celgar's cost of
19 replacement energy is based on the numbers that were
20 arrived at in the PSA between FortisBC and Celgar?

21 A. Correct.

22 Q. Okay. And when we're talking about the

1985

09:44:53 1 energy pricing formula, we're talking about Rate
2 Schedules 31 and 33; is that right?

3 A. That's correct.

4 Q. Okay. Now just before we move on, is it true
5 that that PSA has never actually been approved by the
6 BCUC because the Parties mutually agreed to withdraw
7 it before issuance of BCUC Order G-48-09?

8 A. That's my understanding, yes. So absent
9 G-48-09, it is our assumption that the PSA would have
10 been put forward and approved as no objection would
11 have been made to it.

12 Q. Okay. In fact, since then that PSA has not
13 since been resurrected by the Parties and brought
14 before the BCUC for approval, has it?

15 A. That's correct. That's the Actual Scenario,
16 not the But-For Scenario.

17 Q. Right.

18 Moving along to another assumption, is it
19 true that one of your assumptions is that Celgar's
20 below-GBL energy could be sold on the renewable
21 markets in the Pacific Northwest and elsewhere in
22 Canada?

1986

09:46:10 1 A. Yes. And I think that this Scenario needs
2 some context. Because, again, if the GBL was set
3 lower at a different level, I don't see why BC Hydro
4 wouldn't have bought everything above it. So, we're
5 not talking about below GBL in the But-For Scenario.
6 Everything is above GBL in the But-For Scenario.

7 But because of this argument--which I don't
8 frankly understand that BC Hydro wouldn't buy it, even
9 though they would be the one setting the lower GBL in
10 the But-For Hypothetical--we did some research into
11 seeing whether or not Celgar could sell some of
12 the--what would be below their 349 GBL to third
13 parties, because that was originally one of their
14 plans.

15 Q. And I'm talking about a narrower subset of
16 third parties, and that's the third parties that admit
17 renewable energy into their jurisdictions.

18 I assume you're aware of Mr. MacDougall from
19 Powerex, that his conclusion that it was highly
20 unlikely that Celgar's energy would have been able to
21 be eligible in those jurisdictions as renewable
22 energy?

1987

09:47:22 1 A. I'm aware that he says so. As I've
2 indicated, the prices of their renewable energy were
3 very competitive, even with thermal energy. But
4 Mr. Friesen, who is appointed by Claimants, has argued
5 just the opposite, that they could sell power into the
6 Northwest market.

7 Q. Right. So am I correct in assuming that you
8 did not do any independent investigation into whether
9 Celgar's power could be--would be eligible in various
10 markets as renewable energy in the Pacific Northwest?

11 A. Other than looking at the transmission
12 capacities at Bonneville, I didn't do anything other
13 than that, no.

14 Q. Okay. So I'd like you to make a couple of
15 assumptions here, and one of them is let's assume that
16 Mr. MacDougall is correct and so that Celgar's
17 below-load GBL--sorry--below-GBL power is not eligible
18 for the various renewable markets for the reasons he
19 sets out. There are various statutory requirements
20 about the date of the turbine and whether black liquor
21 is eligible and what have you. So, let's assume that
22 it is not eligible for renewable there.

1988

09:49:16 1 And let's also assume that, contrary to what
2 you've written in Pages 5 and 15 of your handout, that
3 BC Hydro would not procure Celgar's below-GBL energy.
4 Would you agree that another option for Celgar in
5 selling this particular power, the below-GBL power,
6 would be to third parties at Mid-C prices?

7 A. If that would be another option that they
8 would sell at Mid-C prices?

9 Q. Right. In fact, Mr. Friesen in his statement
10 at Paragraph 7 points out that he was actually looking
11 for sales based on those prices; is that correct?

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

13 Q. Okay. Now, we'll see how far we have to go
14 with this. But would you agree that by the end of
15 2008 and following, that there was what I would call a
16 precipitous and sustained decline in spot and forward
17 prices in the Mid-C market?

18 A. Yes. I think we've seen that evidence, yes.

19 Q. Okay.

20 So then, Chris, if you could call up Figure 3
21 on Page 70 of NERA's Second Report.

22 What I'm about to show you here--and I think

1989

09:50:30 1 we saw at least one of these in Canada's Opening.
2 We've got NERA's graphs comparing Mid-C spot prices
3 against the FortisBC-Celgar PSA rate of--Rate Schedule
4 of 31. So we've got Rate Schedule of 31 plus the
5 transmission costs associated with Rate 31. And as
6 NERA pointed out, they didn't include--to be
7 conservative, they didn't include the charges that
8 would come with Rate Schedule 33. But we have here a
9 comparison of the Mid-C prices for spot which are in
10 blue, which are below what the replacement cost would
11 be at Rate Schedule 31.

12 Do you see that there?

13 A. I do.

14 Q. Is there any reason for you dispute what
15 you're looking at there? This is, by the way, for the
16 record, the period is January 1 of '09 to October 17,
17 2013.

18 A. I don't have any basis to dispute the data.

19 Q. Okay.

20 Chris, if you could turn to the next one,
21 Figure 4.

22 And we're looking at something very similar,

1990

09:51:49 1 but now these are forward prices for Mid-C, so this is
2 going into the future. And I apologize for this, the
3 colors have changed. So what was Rate Schedule 31
4 before is now--it was orange before and now it's blue,
5 and Mid-C prices are orange. But still the point
6 remains that Mid-C prices were far below Rate Schedule
7 31 prices or costs.

8 Again, I'll ask you the same question: Do
9 you have any reason to dispute what you see portrayed
10 in that figure?

11 A. I don't.

12 Q. Okay. Would you agree with me that you are
13 not a qualified Expert on the transmission capacity of
14 electricity?

15 A. I certainly don't hold myself out to be.

16 Q. Then let me ask you this question: Is it
17 your position that Celgar could have secured firm
18 transmission out of B.C. in the 2008-2009 period?

19 A. Based on the evidence that we looked at, we
20 didn't draw a conclusion about whether it was firm,
21 short-term, long-term; but it looked like there was
22 capacity that they could secure, and that was

1991

09:53:17 1 confirmed by Mr. Friesen.

2 Q. Right. In fact, Mr. Friesen in
3 paragraph--sorry. In Paragraph 77 of your Second
4 Report, you cite Mr. Friesen, Paragraph--I think it is
5 11 and 1--where he says that until the present
6 day--which would have been December 2014--there has
7 always been firm transmission access available out of
8 British Columbia for periods of up to 12 months;
9 correct?

10 A. I believe that's what he says, yes.

11 Q. Okay. Now, is it your evidence that Celgar
12 could also have secured long-term transmission as
13 well?

14 A. I think--again, we didn't draw any
15 distinction between the technical terms of "long-term"
16 firm or "short-term" firm. We, I think, if I recall,
17 said that over a long period we think they could have
18 been able to secure some transmission capacity.

19 Q. Okay. Let me take you--Chris, if you could
20 go to Navigant 2, the Second Navigant Report,
21 Paragraph 76. I don't know if you have that there in
22 front of you--where you say, "As adequate transmission

1992

09:54:27 1 capacity appears to have existed for Celgar to export
2 40 megawatts of below-load self-generated electricity
3 during 2008-2009, we think it is reasonable that
4 Celgar could secure long-term transmission capacity to
5 export its below-load electricity generation."

6 So, again, is that still your position today,
7 or have you changed that position?

8 A. No. It is still my position today. I'm not
9 using--just as I had previously answered--the phrase
10 "long-term" in a technical sense as Mr. MacDougall and
11 Mr. Friesen have been using it in describing the
12 technical products of capacity. I'm just saying over
13 a long term they could secure transmission, and
14 Mr. Friesen is the one who is indicating what
15 technical form it could be acquired.

16 Q. Okay. So you agree that the transmission
17 could have been firm and it could have been long term,
18 but not in the technical way that Mr. Friesen was
19 referring to it?

20 A. No. What I'm saying is I didn't come to any
21 conclusion about the type of transmission. I'm not
22 using the word--you noticed "firm" is not in there.

1993

09:55:36 1 It says, "long-term transmission." I'm not meaning to
2 imply "long-term firm." I'm meaning to say over a
3 long period of time.

4 Q. Sure. But I just took you before the "long
5 term" part to the Mr. Friesen part, where he says
6 there's "firm." And you referred to that in your
7 report, and so I thought you said that you agree with
8 Mr. Friesen that there was firm, and now it looks like
9 you were saying explicitly there was also long-term.
10 So, it seems to me--that's why I asked you whether you
11 think that there was "long-term firm transmission"
12 available.

13 A. I haven't made an opinion one way or the
14 other as to whether there was long-term firm capacity
15 available.

16 Q. Okay. So let's go to, Chris, if you could,
17 the hearing transcript for July 24, and this is
18 Page 965. And this was one of those rare
19 opportunities where it's very clear on the transcript
20 what's being asked and what's being said, or what's
21 being answered. You don't have to tease it out, with
22 one minor exception here.

1994

09:56:37 1 If you could look at the question, I guess,
2 right in about the middle: "Do you think that Celgar
3 could have secured enough short-term firm and non-firm
4 transmission to make such a contract viable?"

5 Now, this is a question of Mr. Friesen and he
6 said, "Yes, I do."

7 And, Chris, maybe you could just call up the
8 page before to give you some context because what--the
9 question was made in the context of a reference to
10 Mike MacDougall's paragraph in his Report,
11 Paragraph 66, where he's talking about "long-term"
12 means about three years.

13 So, Mr. Friesen is saying for one of those
14 type of energy contracts, the long-term, three-year
15 deal, Mr. Friesen said, "We could have sold that--we
16 could have executed a contract of that nature with
17 just that type of transmission, the short-term firm."

18 Now, is that a position that you share?

19 A. Mr. Friesen is the one who's obviously
20 commented technically on what type of transmission
21 capacity they could secure, and, yes, he does say
22 "short-term firm capacity."

1995

09:57:54 1 Q. In fact, are you aware of any contracts
2 where--of this nature, a long-term energy contract,
3 say, a year, 3 years, 10 years, where the buyer would
4 be willing to accept short-term firm transmission?

5 A. I haven't done any such investigation, no.

6 Q. Okay. Are you aware that Celgar's own
7 documents reveal a concern about transmission at this
8 time?

9 A. I'm not aware of any, no.

10 MR. KURELEK: Okay. Chris, if you could turn
11 to R-566. This is a Celgar memo on Page 4. It's
12 hidden, but it is in that (b) paragraph, and it's
13 talking about BC Hydro and contracts, and I think it's
14 the last--no, sorry. You're going to have to pull
15 that back. It's not that one. Oh, it's just above
16 that in (a).

17 BY MR. KURELEK:

18 Q. So, it's "company's view that a market
19 mechanism does not exist in B.C. for producers to sell
20 their power into. Further, trying to sell significant
21 volumes of power outside of the Province has
22 substantial challenges because of the lack of

1996

09:59:20 1 transmission space."

2 So, am I correct that you didn't consider
3 that observation in your Expert Reports?

4 A. No, I didn't particularly focus on that, but,
5 again, I think it's--just for the Tribunal, on context
6 of our discussion, when we started this, you referred
7 to Page 15 in my damage calculation summary. All of
8 those calculations are assuming BC Hydro buys above a
9 GBL. What we're talking about in this is a scenario
10 where--let's assume that's not a breach, that the GBL
11 was fine and BC Hydro said it's 349. Perfect. It
12 still doesn't allow Celgar to sell below that, but
13 there's a Side Letter that said that they would, but
14 it hasn't been activated.

15 So, we're in a scenario now where we're
16 talking about the breach being BC Hydro's not
17 activating the Side Letter and allowing Celgar to sell
18 below its GBL, which is a different liability scenario
19 entirely from the calculations I've given the
20 Tribunal.

21 Q. Right. So, in a sense, you haven't
22 quantified Mercer's damages due to Celgar's inability

1997

10:00:48 1 to sell its below-GBL power?

2 A. Correct, I have not.

3 Q. Okay. And also you've only quantified
4 damages associated with a lower GBL, or various
5 scenarios with a lower GBL?

6 A. Correct.

7 Q. Okay. Now, earlier you had said that one of
8 your assumptions was that BC Hydro would purchase that
9 same power from Celgar. So, I think I saw you here
10 earlier in week. I don't know if you were here for
11 the evidence of Les MacLaren and Jim Scouras. Did you
12 happen to be in the room for those?

13 A. I don't believe I was, no.

14 Q. Okay. So, just a reminder, Les MacLaren, in
15 Paragraph 19 of his Second Witness Statement--Chris,
16 if you could call that up--his position is, in fact,
17 that BC Hydro would not, in fact, buy this power
18 because "Only incremental or new generation would be
19 acquired. In effect, BC Hydro was policy-barred from
20 acquiring existing self-generation."

21 Sorry, Paragraph 19 of Les MacLaren's Second
22 Statement. And then sorry, Chris, I'm going to ask

1998

10:02:04 1 you to jump right into Paragraph 53 of Jim Scouras'
2 Second Statement.

3 And, again, he gave oral evidence, but he
4 says something similar, if you could jump to that,
5 Paragraph 53. "BC Hydro is not interested."

6 Can you see that?

7 "BC Hydro is not interested in buying
8 existing self-generated electricity. This would be
9 completely contrary to our GBL-based procurement
10 practice for existing self-generators and would
11 contravene government policy and BCUC rulings dealing
12 with arbitrage."

13 Do you see that?

14 A. I see that. I don't know if he has any
15 experience in putting together damages calculations,
16 but it seems he's confusing like the But-For Scenario
17 and Actual Scenario.

18 Q. Right.

19 A. And our But-For Scenario assumes a different
20 GBL would have been established, so there's no basis
21 of making a statement that they wouldn't buy this
22 additional energy because they themselves were

1999

10:03:15 1 assuming would have set the GBL at a lower amount, and
2 their policy was to buy everything above that GBL.

3 Q. In fact, I recall Mercer's counsel
4 establishing that Mr. Scouras was not a lawyer and he
5 wasn't an accountant either. And so--and he agreed
6 that he was neither, but then counsel took
7 Mr. Scouras--and this is Pages 1211-1213 of the
8 July 24 transcript to the point where she described
9 Mr. Scouras as taking umbrage with your damages
10 calculation. And he confirmed his earlier testimony
11 in Paragraph 52 and 53 of his Second Statement to say
12 that, yes, his position was still that it would have
13 been contrary to BC Hydro policy to procure Celgar's
14 below-GBL energy.

15 So, just let me conclude. Am I correct that
16 you disagree with Mr. Scouras and Mr. MacLaren
17 regarding BC Hydro's inclination to purchase Celgar's
18 below-GBL power?

19 A. Again, I think they're confused as to the
20 calculations. I've put no calculations whereby
21 BC Hydro would be buying below-GBL power. Every one
22 of them involves BC Hydro buying above-GBL power.

2000

10:04:48 1 It's that the GBL would have been set and calculated
2 differently. So, I think they are just confused.

3 Q. I suspect that they don't believe they are,
4 but we can save that for argument.

5 In your slide presentation, I believe--no,
6 maybe it wasn't. It wasn't in the slide. It was
7 something you said. You confirmed your assumption,
8 which I understood to be your assumption, that
9 Celgar's damages--or Mercer's damages would continue
10 into perpetuity, is that correct, because the Measures
11 would continue into perpetuity. Is that correct?

12 A. Yes.

13 Q. And then you, I think, referred to the 2008
14 BC Hydro LTAP, or Long-Term Acquisition Plan, to say
15 that, you know, BC Hydro's needs would increase as the
16 years went on.

17 A. That's correct.

18 Q. And, in fact, in your Second Report, you also
19 refer to an IRP, the 2013 Integrated Resource Plan of
20 BC Hydro's; is that correct?

21 A. I believe so.

22 MR. KURELEK: Okay. Chris, if you could call

2001

10:06:02 1 up R-567, which is that IRP or a portion of it. If
2 you could go to Page 9-25.

3 BY MR. KURELEK:

4 Q. And there is a line there where--I don't
5 believe you quote this portion. Right at the top
6 there, "The combined Independent Power Producer, IPP,
7 supply and targeted DSM results in BC Hydro having an
8 adequate supply of energy supply until Fiscal
9 Year 2028 and an adequate capacity supply until fiscal
10 2019," as shown in an earlier section.

11 Now, you didn't quote that part in your
12 Report, did you?

13 A. I don't recall.

14 Q. Okay. And one of the assumptions is that in
15 your--well, in the Claimant's Reply at Paragraph 585
16 is that in every case BC Hydro has renewed its
17 Bioenergy EPAs, the price has been higher. Is that a
18 position that you share as well?

19 A. I don't believe I've independently verified
20 that, but that's been my understanding, yes.

21 Q. Okay.

22 Chris, if you could turn to R-569.

2002

10:07:49 1 And this is the SEEGEN EPA, and it's Page 7
2 of 10. And in that EPA, the original EPA in 2003
3 was--achieved the levelized price of \$60 per megawatt
4 hour, and in 2014 it was renegotiated at \$43 per
5 megawatt hour.

6 Did you consider that issue in your Second
7 Report?

8 A. No.

9 Q. Okay. Now, I just want to jump back for a
10 second. Is it your assumption that, at the end of the
11 EPA, BC Hydro would renew its same GBL with BC Hydro?

12 A. In the Actual Scenario, my assumption is that
13 they would renew it and maintain the 349 GBL. In the
14 But-For Scenario, I assume they renew it at whatever
15 but-for GBL level we've modeled.

16 Q. At the zero GBL?

17 A. So, in the Zero GBL Scenario, yes, I assume
18 they renew it at zero GBL.

19 Q. Okay. Now, very quickly, Ministerial Order,
20 you make--in your Second Expert Report, you create a
21 scenario where you calculate damages based on Mercer's
22 interpretation of the Ministerial Order; is that

2003

10:09:36 1 correct?

2 A. I don't recall.

3 Q. Right. Okay. Well, it's a bit confusing
4 because in Paragraph 25 of your Second Report, you say
5 damages calculate--your damages calculation don't
6 consider the impact of those allegations, but then if
7 you go to the Tables 12 and 13, closer to
8 Paragraph 178 of your Report, you do actually seem to
9 create a damages scenario based on the Ministerial
10 Order.

11 A. Sorry; which page are you on?

12 Q. Well, I've got Paragraph 178 in your
13 Tables 12 and 13. If you go to Page 63, look at the
14 fourth one up from the bottom on that Table 12, the
15 Ministers' Order.

16 A. Yes.

17 Q. So, you have calculated damages on that
18 basis, but in a restricted manner; right? You stop
19 before Blue Goose; is that right?

20 A. Right.

21 Q. Right.

22 A. It's based on the generation to load back at

2004

10:10:55 1 that time; that's correct.

2 Q. So, in NERA obviously has a different view
3 where the Ministerial Order cuts out all of Mercer's
4 damages, but would you admit that at least if we take
5 Celgar's view--sorry, Mercer's view and your view that
6 the damages that would in here, if there was a finding
7 of liability here, would be at least capped at the
8 amount that you list there?

9 A. That it would be capped?

10 Q. Capped, yes. I use that word advisedly
11 because it was brought up by your counsel during
12 Opening, and it's also brought up in the materials,
13 that it wouldn't go higher than what's there.

14 A. You mean the GBL would somehow be capped?

15 Q. No. The damages would be capped by the
16 amount of self-supply obligations under your version
17 of the Ministerial Order, in other words 1994-2006.

18 A. I don't recall how counsel for Claimant
19 phrased this, so I can't really--I can't really say.
20 I would leave that for counsel to address.

21 Q. Okay. And then, finally, in terms of errors,
22 is it true you have admitted to a variety of errors

2005

10:12:09 1 in--that you committed in your First Report,
2 calculation errors and otherwise?

3 A. I agree that there were some errors. I don't
4 admit them like it's some confession. When there
5 is--an expert points out an error in a calculation,
6 I'm happy to fix it, and did I so in both reports.

7 Q. Right. And we refer to these errors in
8 Footnotes 899, 900 and 901 in Canada's Rejoinder, but
9 is it true, Mr. Kaczmarek, that in all of those errors
10 that are listed, the damages were increased for Mercer
11 as a result? And when you corrected the errors, the
12 damages went down?

13 A. Yes. I think in the Zero GBL Scenario, the
14 total adjustment was something slightly over 4 percent
15 downward.

16 Q. Okay.

17 MR. KURELEK: Thank you, Mr. Kaczmarek, for
18 your time. Those are my questions.

19 PRESIDENT VEEDER: Will there be any
20 reexamination from the Claimant?

21 MR. SHOR: Can we have five minutes?

22 PRESIDENT VEEDER: Of course. Yeah. Let's

2006

10:13:26 1 take five minutes.

2 (Brief recess.)

3 PRESIDENT VEEDER: Let's resume.

4 MS. GEHRING FLORES: Just a bit of brief
5 redirect.

6 REDIRECT EXAMINATION

7 BY MS. GEHRING FLORES:

8 Q. Mr. Kaczmarek, I believe you explained why
9 the issue of Celgar's third-party sales is not
10 particularly relevant to your damages scenario. But
11 there was a question about green energy prices and
12 whether or not Celgar could receive green or renewable
13 energy prices for its electricity in the United
14 States.

15 Could you please explain your understanding
16 of green energy prices versus the prices in long-term
17 electricity contracts?

18 A. Sure. Certainly long-term electricity
19 contracts don't price against spot, which is what we
20 were looking at, at Mid-C. They're typically based
21 upon new builds of electricity to a system, and that's
22 what I tried to show you on Page 25 of my slide, where

2007

10:16:04 1 I not only compared the bid Celgar had made for green
2 energy with other green energy bids, but also with
3 combined cycle turbine gas, your basic thermal power
4 plant and the prices of those types of plants.

5 So, you can see the levelized price of
6 Celgar's at 111; whereas, the range for a CCGT was 105
7 to 149. So, basically, it doesn't matter whether you
8 label it green or not. It's a competitive source of
9 energy, a competitive price with standard thermal
10 energy.

11 Q. Thank you, Mr. Kaczmarek.

12 MS. GEHRING FLORES: No further questions.

13 PRESIDENT VEEDER: Good morning,
14 Mr. Kaczmarek.

15 QUESTIONS FROM THE TRIBUNAL

16 ARBITRATOR ORREGO VICUÑA: Good morning,
17 Mr. Kaczmarek.

18 One small problem of clarification. On
19 Page 29, the last of your slides, you have there three
20 columns of Table 1 while, if you look at Page 86 of
21 Mr. Rosenzweig's Rebuttal Report, where Table 1 is,
22 there is actually five columns. The fourth says the

2008

10:17:36 1 overstatement in damages, and the fifth, "percentage
2 overstatement."

3 Is that simply an omission or not necessary?

4 THE WITNESS: Well, I think--I don't have it
5 in front of me, but I recall--

6 PRESIDENT VEEDER: Let's take it out. Could
7 you be given Table 1? It's NERA Second Report,
8 Page 86.

9 MS. GEHRING FLORES: Table 1.

10 PRESIDENT VEEDER: Table 1.

11 MS. GEHRING FLORES: Page 86.

12 PRESIDENT VEEDER: Yes.

13 THE WITNESS: Yes. So, this is the source
14 for his numbers. You're correct. I did not put the
15 overstatement in the damages or the percentage because
16 that's based on his own view of some of those
17 variables, which I walked through and showed you where
18 I disagree. But that's the source.

19 ARBITRATOR ORREGO VICUÑA: Okay. I have a
20 second point.

21 In your second, I assume--no, First Expert
22 Report, you referred to the Capital Assessment Pricing

2009

10:19:25 1 Model formula at Page 68 and following. And the last
2 item in your formula is the Country Risk Premium. We
3 have had many other occasions in which we have met,
4 and that has determined to be a very difficult issue.

5 THE WITNESS: Yes.

6 ARBITRATOR ORREGO VICUÑA: Now, here you say,
7 a bit further on, that it is not something to be
8 considered in respect of Canada. And my question is
9 this: The complaint by the Claimant is that they're
10 facing a kind of regulatory tortured situation that
11 things turn to be very wrong because of that
12 regulatory element. I'm not sure whether that extends
13 to legal aspects as well, but whatever it is, those
14 two are aspects that pertain to the Country Risk
15 Premium normally.

16 Would you not think that there is a relation
17 between that concern about regulatory problems and the
18 formula? And in connection with the same, we have
19 also discussed the part about Professor Damodaran, who
20 keeps throwing Country Risk around the world. Does he
21 not say anything about Canada or even the U.S.? I
22 would assume that it's not always very clear.

2010

10:21:16 1 THE WITNESS: I don't recall what
2 Professor Damodaran says about Canada. I know,
3 obviously, we think of the United States as a place
4 with zero Country Risk, but I would think that most
5 valuation practitioners would not, as I had not,
6 entered in any kind of Country Risk for Canada.

7 Where I would differentiate what you're
8 talking about, in regulatory sort of disputes, one
9 could say that those pop up from time to time in all
10 sort of developed countries, and I would say that
11 that's typically captured in the Equity Market-Risk
12 Premium. What we're talking about, Country Risk, is
13 really when we start to move to the developing and
14 undeveloped economies where you have safety concerns
15 and a high degree of political instability, et cetera,
16 which I don't think I would characterize Canada as
17 being.

18 ARBITRATOR ORREGO VICUÑA: Right. Okay.
19 Thank you.

20 ARBITRATOR DOUGLAS: I just wanted to be
21 certain that my understanding of the but-for test is
22 the same as yours.

2011

10:22:36 1 My understanding is that it's a test of
2 causation. So, the question I'm asking is, but-for
3 the existence of the Measures which the Claimant says
4 is in breach, would particular harm have occurred?
5 And if the answer is yes, then we can say that the
6 Measures are an actual cause of the harm.

7 Is that your understanding?

8 THE WITNESS: Absolutely. 100 percent.

9 ARBITRATOR DOUGLAS: Okay. Because in your
10 first Expert Report, you've got a section that--you
11 might want to bring it up. It's at Paragraph 100.
12 And it says the "impact of the Measures on Celgar."

13 So, applying that formulation there, are you
14 saying that but for the Measures, these two impacts
15 that you mentioned would not have occurred?

16 THE WITNESS: Yes. Absolutely. Obviously,
17 if the GBL had been calculated in a way which would
18 have allowed access to below-load power, which is
19 essentially what Mercer is claiming should have
20 happened fairly with other mills, just as they had had
21 their GBLs calculated, then clearly, they would have
22 had additional power to arbitrage, and that's the harm

2012

10:24:02 1 we calculated.

2 ARBITRATOR DOUGLAS: Sorry to interrupt. The
3 harm you list is, one, Celgar was unable to secure
4 additional contracts to sell some or all of its
5 self-generated green energy below its load, and two,
6 Celgar's position on the cost curve of pulp mills is
7 adversely affected because it cannot use the profits
8 from additional energy sales to offset its pulp
9 production costs.

10 THE WITNESS: Yes.

11 ARBITRATOR DOUGLAS: So, my question is, if
12 that's the harm but for the Measures, why haven't you
13 assessed that harm?

14 THE WITNESS: That's a fantastic question.

15 ARBITRATOR DOUGLAS: Good.

16 THE WITNESS: So, let me take it from the
17 second part, where I said yes. It's affected Celgar's
18 position on the cost curve. So, a completely
19 different way of, perhaps, calculating the harm to
20 Celgar from the Measures would have been to increase
21 the Discount Rate associated with the fact that it's
22 now more exposed to being shut down, so it's a riskier

2013

10:25:01 1 investment.

2 So, I could have done a but-for with a lower
3 discount rate and an actual with a higher Discount
4 Rate and taken the Delta in value. But you can't do
5 that calculation, claim that and claim the difference
6 of having the lower GBL and the additional profits,
7 putting them back on the cost curve where they think
8 they should be fairly positioned and giving them the
9 additional profits.

10 It's two difference ways of potentially
11 calculating the harm for the same Measures. And I
12 think I explained somewhere in my First Report that
13 once they have compensation, equivalent to being able
14 to sell additional power below their load, the risk
15 goes away. They have financial compensation. That's
16 been remedied. No, risk, additional risks exist now
17 for that, that issue. If that helps explain.

18 ARBITRATOR DOUGLAS: It does a little. The
19 thing that confuses me slightly is the idea that we
20 build in assumptions which we ask the but-for test.
21 Because at least my understanding, the but-for test is
22 just a question of fact. So, but for the

2014

10:26:15 1 discrimination, would X have happened? And answering
2 that question seems slightly problematic, to build in
3 assumptions as to what might have happened in a
4 different scenario. We're just asking a question of
5 fact: But for the discrimination, what would have
6 happened?

7 THE WITNESS: I think I'm with you. The
8 GBLS, as I understand it, got assessed as part of the
9 negotiation with the EPA. And so, obviously, if
10 BC Hydro had come up with something else, used a
11 three-year period or average like they did for others,
12 it seems quite factual that they would have had an EPA
13 with a lower GBL, and they would been able to
14 arbitrage more electricity than they can. So, to me,
15 I think the causation question has gotten very
16 muddled. I always thought it was quite
17 straightforward in this case. I didn't think it was
18 that complex of a question.

19 ARBITRATOR DOUGLAS: Okay.

20 PRESIDENT VEEDER: Questions from the Parties
21 arising from the Tribunal's questions? We ask the
22 Respondent first?

2015

10:27:25 1 MR. KURELEK: None.

2 PRESIDENT VEEDER: And the Claimant?

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

4 PRESIDENT VEEDER: Thank you very much.

5 We've come to the end of your testimony.

6 THE WITNESS: Thank you.

7 (Witness steps down.)

8 PRESIDENT VEEDER: Let's take a 15-minute

9 break.

10 (Brief recess.)

11 PRESIDENT VEEDER: Let's resume.

12 MICHAEL ROSENZWEIG, RESPONDENT'S WITNESS, CALLED

13 PRESIDENT VEEDER: We have the next Witness

14 before the Tribunal.

15 If you could state your full name, sir, and

16 if you will read the words of the declaration for

17 Expert Witnesses before you.

18 THE WITNESS: Michael Rosenzweig.

19 I solemnly declare upon my honor and

20 conscience that my statement will be in accordance

21 with my sincere belief.

22 PRESIDENT VEEDER: Thank you very much.

2016

10:45:49 1 There will first be questions from the Respondent.

2 MR. KURELEK: And the question is,
3 Mr. Rosenzweig, would you like to begin your
4 presentation?

5 THE WITNESS: I would.

6 DIRECT PRESENTATION

7 THE WITNESS: And so in recognition of the
8 limited time, let me just get into the presentation
9 directly. I take seriously my role to assist the
10 Tribunal, so let me set what I think is the real
11 situation in this case, and it's the Claimant's
12 arguments here are an effort to ignore a forest and
13 get you to focus on the trees.

14 The sum and substance of this case is, I
15 think, pretty straightforward. This is an issue of
16 procurement. Their damages have been computed on, as
17 Mr. Kaczmarek just stated several times, on the basis
18 of BC Hydro procurement of energy. Celgar is asking
19 for certain treatment for its resources that were not
20 eligible for the incentive EPA that BC Hydro was
21 offering in 2007 and 2008 and then later.

22 What Claimant does is it starts to argue

2017

10:47:07 1 about some very specific things its focal points are.

2 It argues about BLAP. It argues about load
3 displacement--not clear Load Displacement Agreement,
4 load displacement service. And then it asks you to
5 consider a menu of GBLs. That's the case.

6 What I'm urging is don't lose sight of the
7 forest, which is the heart of this case, when
8 considering these trees, which are really man-made
9 trees.

10 This case, as we've just heard before and
11 heard over the last two weeks, is based on three
12 Measures that the Claimant argues has caused it harm.
13 G-48-09, which it argues variously precluded from
14 getting embedded-cost power, replacement power that
15 would allow it to sell its below-GBL energy and,
16 therefore, it's forced to provide uncompensated load
17 displacement services.

18 Exclusivity Clause in the EPA, which they
19 claim prevents them from selling to third parties, and
20 the GBL that BC Hydro set for it--not set for it. Let
21 me not fall into that trap.

22 The GBL that Claimant or Celgar and BC Hydro

2018

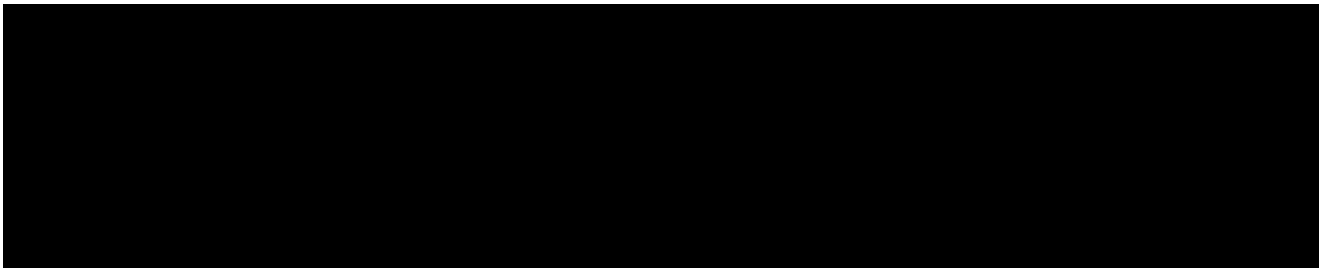
10:48:35 1 agreed to in its EPA is incorrect; and it's incorrect
2 in a way that disadvantages Celgar, and it
3 disadvantages it in way that only apply to it and to
4 no one else.

5 The question, which I think you may have
6 already cottoned on to, is these--this is in the
7 context of a damage case. And damages in the cases
8 I've always been in--and I believe this is the subject
9 of Professor Douglas' last question--is there's an act
10 and as, a result of that act, there's harm. And then
11 if that's the finding of the Tribunal, then the harm
12 is determined--the cost of that harm, or the
13 quantification of that harm, is then awarded to
14 compensate the harmed Party and make them whole.

15 The problem with the case that--the damages
16 case that's been presented here is the Measures aren't
17 related to the quantum. Let's start with G-48-09.

18 Even the Claimant agrees that G-48-09 doesn't
19 cause any damages. There's a quote from their Reply
20 Memorial where they say, < [REDACTED]
21 [REDACTED] there is no harm here. And
22 Mr. Kaczmarek agrees.

2019



5 [REDACTED] So, G-48-09
6 is not linked to quantum.

7 The exclusivity clause: We know that
8 BC Hydro will not buy below-GBL generation and that's
9 because they are not allowed to. They are not allowed
10 to by their own policy. They are also not allowed to
11 by B.C. policy. So the Exclusivity Clause must deal
12 with third-party sales, but they are fantasy sales.
13 There is--what we've heard is that that's not really
14 feasible.

15 What is Celgar offering for sale? They are
16 offering 40 megawatts over 10 or 20 years, firm, 24/7,
17 365 days a year of power. But that kind of power
18 can't be sold without supporting transmission. What
19 we've heard, and as far as I can tell it hasn't been
20 rebutted, there is no transmission available like that
21 and certainly Celgar has never acquired that
22 transmission. What they've argued is, Well, we could

2020

10:51:46 1 patch together maybe as long as three-month firm
2 transmission, and we'll just do that for 10 years.

3 I worked at the Federal Regulatory
4 Commission. We dealt with Power Purchase Agreements.
5 What I can tell you is I've never seen a Firm Power
6 Purchase Agreement that didn't have a firm
7 transmission supporting it for the entire term of the
8 transaction, and there's a good reason for that.

9 Most firm purchases are to meet resource
10 requirements. Most regulatory processes that deal
11 with the reliability of an electric utility will not
12 give you credit for purchases like that, purchases
13 from outside your service territory, unless you can
14 demonstrate that it can be reliably delivered, and
15 that is unless it can be shown that it's net
16 dependable capacity.

17 So, three-month--patching together the
18 three-month firm transmissions won't matter, won't
19 meet that standard.

20 We've also heard that--ignoring the
21 transmission limitations, what we've heard is that
22 Celgar's power wasn't even eligible for green power

2021

10:53:12 1 sales in the U.S. No one seems to have rebutted that.
2 And what we looked at--and Mr. Kaczmarek agrees that
3 he doesn't see any reason to disagree--is that sales
4 at market prices that are available would not be
5 profitable for Celgar.

6 And I won't repeat these. I'll just put them
7 up since they already were put up. But it shows that
8 on whatever basis that you want, whether looking at
9 the liquid market at Mid-C or looking at the forward
10 market at Mid-C, it is just not profitable for Celgar
11 to try to sell that power there when it has to pay a
12 higher price to replace it.

13 So what are we left with? We are left with
14 that the GBL is wrong. Mr. Dyck did a bad job. He
15 either did a bad job because, well, look at BLAP;
16 right? The BLAP shows that there is something wrong
17 here.

18 But the BLAP is another man-made tree.
19 Mr. Switlishoff devised it. He may have tried to hint
20 that he was inspired by Jennifer Champion, but it's
21 his construct, and it is one that he doesn't point to
22 any other place that it's used.

2022

10:54:35 1 But in my First Report, I said there are lots
2 of problems I see with this. It doesn't do the job
3 that you're claiming it does. In particular, it
4 doesn't take into account the differences between
5 different mills.

6 So, for example, if you look just at the
7 difference between "load" and "generation" for a
8 utility like Howe Sound--which is a very different
9 mill, it has got a TMP, a mechanical process which
10 takes immense amounts of electricity--and you compare
11 that to Celgar which doesn't, well, you're going to
12 get a different answer. But that answer, a different
13 BLAP, but that doesn't take into account the
14 differences in the plant, in the mills, which is
15 relevant to deciding what BC Hydro would buy.

16 And Mr. Switlishoff agrees in his Second
17 Report that, Well, yeah, the BLAP really doesn't show
18 discrimination, but that's what they are saying, that
19 the GBL was set in a way that discriminated against
20 Mercer.

21 In the second round the argument went, Well,
22 okay, so maybe BLAP isn't right and maybe there was a

2023

10:55:56 1 consistent process; but even if there was, that's not
2 what they did to Celgar. Mr. Dyck sitting in his
3 office, he decided, No, I'm not going to put that
4 process, I'm not going to treat Celgar the same. It's
5 not clear why he would do that. Maybe he doesn't like
6 Mr. Merwin, I don't know, but it's not clear why he
7 would do that.

8 But the resulting bases on which they
9 calculate damages make no sense. They are illogical
10 and they are non sequiturs, and as we understand, they
11 don't grasp what the GBL is in the context of the
12 BC Hydro procurement.

13 There is obviously a lot of opportunity for
14 confusion over GBL. It's been used and misused and
15 confused. But the GBL that we're talking about here
16 is the GBL in the BC Hydro EPA process. BC Hydro
17 under the policies of B.C. and the BCUC needed to
18 distinguish between existing and incremental resources
19 and it came up with this metric, the GBL, as a way to
20 distinguish between the two. And what you're being
21 asked to consider is a bunch of different GBLs. And
22 you're given a menu and say, Well, pick one, and, you

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10:57:27 1 know, that will resolve our issues.

2 Well, there are two things--three things:

3 One, if you do that, if you set a different GBL,
4 recognizing that the GBL is the metric to distinguish
5 between existing and incremental resources, you are
6 deciding that the energy resource between your lower
7 GBL and BC Hydro's GBL must be incremental because
8 that's what the GBL is about.

9 So, if you say, Oh, it's 160 for whatever
10 reason, then the difference between 160 and 349, you
11 are declaring, you are deciding, is incremental. And
12 this is an unstated error in what Mr. Kaczmarek told
13 you. He said, "I assume that you set a GBL and they
14 buy everything above the GBL."

15 Well, he wants to apply that and Celgar wants
16 to apply that to a mill that was built in 1994,
17 refurbished in 2006, 2005, and offered into a 2008
18 procurement process. Well, the evidence shows that
19 that's not incremental. It can't be incremental. It
20 was existing. But that's the heart of the case.

21 That's what the GBL is about. It's not about
22 38-01. There is no GBL in 38-01. You can't find the

2025

10:58:59 1 term "GBL" in 38-01.

2 So, what is the consequence? If you decide
3 that a GBL is lower, then you have to decide that the
4 difference between what BC Hydro says and what you say
5 is, in fact, incremental. And what I suspect is that
6 would require BC Hydro to come up with a new metric
7 because clearly it needs to be able, under B.C.
8 policy, under BCUC policy, to be able to distinguish
9 between--for procurement purposes between
10 "incremental" and "existing resources."

11 Let me just focus very quickly on some
12 specific criticisms of the Claimant's quantum process.
13 You've heard Mr. Kaczmarek. He didn't admit, he just
14 corrected some other errors, I'll take "admit" out.
15 He also didn't respond successfully in my view to
16 other errors that we pointed out. In my view his
17 resolves were deficient. And in his process he
18 introduced some new errors which we dealt with in my
19 Second Report.

20 He has a number of different errors which
21 you've heard discussed. He does model damages into
22 perpetuity, but that's for an asset that has a fixed

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11:00:29 1 life. I mean, the plant was built in 1994. It's not
2 going to last forever. It's for a--under a
3 procurement process that had a finite term, so the
4 damages can't last forever, but yet he models the
5 damages to last forever.

6 It wasn't clear whether he was saying he was
7 just trying to alert you to long-term implications in
8 case you wanted to adjust your liability finding. I
9 was a little bit confused by that when he said that on
10 the stand.

11 He and I disagree on the Discount Rate. I
12 think he's using the wrong Discount Rate and I explain
13 the reasons why in my Report. He clearly ignores
14 transaction cost if he's thinking about sales to other
15 utilities, and I point out that he makes some modeling
16 errors.

17 And you've seen this chart before. This is
18 the difference between his results and my results.
19 What I will point out is that--and I think it's useful
20 for you to consider that in his--I don't want to say
21 "admitted," but his acknowledged errors, and in the
22 errors that I've corrected, I find it interesting that

2027

11:01:47 1 not one increased--I'm sorry--not one decreased
2 quantum--I said that backwards.

3 None of the errors failed to decrease
4 quantum. All the errors were in one direction. So
5 all the errors that he made--that I claim he made,
6 that he acknowledges that he made--they all acted to
7 increase his quantum result.

8 I find that interesting that that's all that
9 happens is that he makes a mistake and quantum goes
10 up. It is sort of like being in Lake Wobegon where
11 all the students are above average.

12 That completes my presentation.

13 PRESIDENT VEEDER: Are there any more
14 questions from Respondent?

15 MR. DOUGLAS: No, Mr. President.

16 PRESIDENT VEEDER: There will now being
17 questions from the Claimant.

18 CROSS-EXAMINATION

19 BY MR. SHOR:

20 Q. Good morning, Dr. Rosenzweig.

21 A. Good morning.

22 Q. My name is Michael Shor. Since you wear so

2028

11:02:59 1 many hats in this proceeding, I will be questioning
2 you with some of your hats on and then my colleague,
3 Gaela Gehring Flores, will address you on your other
4 hats.

5 I was interested in your remark that we are
6 in the trees and not in the forest. If I recall the
7 Opening Statement of Mr. Douglas, he said we were in
8 the moss on the floor of the forest. I take it it's
9 your testimony that we've made some progress during
10 this hearing?

11 A. I'm not as harsh a judge as he is.

12 Q. Well, maybe by the end we'll get to the
13 forest.

14 If I read your CV correctly, you have a Ph.D.
15 in applied mathematics?

16 A. That's correct.

17 Q. And you taught mathematics for five years at
18 our nearby Naval Academy?

19 A. That's correct.

20 Q. So you're very good with numbers; is that a
21 fair statement? Probably better than me?

22 A. Okay.

2029

11:03:52 1 Q. And with economic and financial analysis?

2 A. Yes.

3 Q. And all manner of quantitative and
4 statistical analysis?

5 A. No, I won't say all manner. I think that is
6 giving me way too much credit.

7 Q. More than me?

8 A. More than you.

9 Q. Okay. But you have neither expertise nor
10 experience in the design or operation of a kraft pulp
11 mill; correct?

12 A. That's correct.

13 Q. Like me, until this case you didn't know the
14 difference between a hog fuel and a Hogwart; correct?

15 A. I'm not sure I know Hogwarts, but I'll take
16 your representation.

17 Q. You have to read Harry Potter.

18 A. Okay.

19 Q. Or a recovery boiler or a power boiler?

20 A. No. I actually had information with power
21 boilers. I had to deal with that as part of my work
22 with the Energy Information Administration of the U.S.

2030

11:04:44 1 Government and with the U.S. Federal Energy Regulatory
2 Commission. We'll just call it FERC.

3 Q. But given your lack of expertise and
4 experience in the operation of a kraft pulp mill, you
5 are in no position to assess whether a particular set
6 of operating conditions for a pulp mill is normal or
7 not, are you?

8 A. I am not.

9 Q. Or whether a mill's generation levels over a
10 given time frame are normal or not?

11 A. I missed the word. Its "generation," did you
12 say?

13 Q. Or whether a mill's generation levels over
14 any given time frame are normal or not?

15 A. No.

16 Q. Or whether generation levels typically
17 increase or decrease in the winter or summer for a
18 kraft pulp mill?

19 A. Well, I mean, I guess specifically for a
20 kraft pulp mill, but I wouldn't--there are effects of
21 weather on electricity generators that I'm aware of
22 and have some fair knowledge about. I wouldn't expect

11:05:44 1 that a turbine at a kraft mill or a boiler turbine set
2 at a kraft mill would be somehow immune to them.

3 Q. And do you have the capability to assess a
4 kraft mill's thermal balance steam requirements?

5 A. No, I do not.

6 Q. Or how an integrated forest products company
7 that operates sawmills, pulp mills, and other mills
8 manages its overall wood and wood fiber resources?

9 A. Did you say would I have the basis for that?

10 Q. Did you have expertise in that?

11 A. Oh. No.

12 Q. Mr. Stockard knows far more--

13 A. I'm sorry. You tricked me. No, you didn't
14 trick me, but I went too fast. The issues that you're
15 talking about are also--apply more generally
16 beyond--the business decisions that an integrated pulp
17 mill, sawmill entity would undertake to decide that it
18 wants to do some activity, make some investment,
19 change something, that's not somehow a totally
20 mysterious thing. It's like almost all other, at
21 least at the basis is all other kinds of decisions
22 that corporations make. And I do have familiarity

11:07:02 1 with that.

2 Q. Because that would simply require basic
3 economic analysis?

4 A. Financial analysis.

5 Q. Financial and economic analysis.

6 A. Right.

7 Q. Now, on the other issues we were discussing,
8 the normal operations of a kraft pulp mill,
9 Mr. Stockard knows far more about those issues than
10 you do; correct?

11 A. And you may by now too.

12 Q. Yet Canada tasked you and not Mr. Stockard
13 with the job of assessing how BC Hydro treated all
14 pulp mills in B.C. in establishing their GBLs;
15 correct?

16 A. I think that's your characterization of what
17 they tasked me for. At a minimum, I would say they
18 wouldn't task Mr. Stockard because Mr. Stockard works
19 for a different company and so -- or have I got my
20 Witnesses confused?

21 Q. Well, let me ask it this way: On Page 27 of
22 your First Report, you have a table analyzing how GBLs

2033

11:07:59 1 were set for all the different pulp mills in British
2 Columbia; correct?

3 A. That table demonstrates--the attributes that
4 I was able to assess were used and considered in
5 setting the GBLs for all pulp mills. What I didn't
6 do--and I just want to clarify because I'm not sure
7 what your point is--I didn't verify for each mill that
8 the GBL calculation, whatever it was, was done in some
9 particular way.

10 Q. Okay. But you looked at all 12, and
11 Mr. Stockard didn't look at all 12, did he?

12 A. Oh, Mr. Stockard. Sorry. He does--let me go
13 back to your question. He knows a lot more about it
14 than I do.

15 Q. Okay.

16 A. Sorry.

17 Q. Right. So, you analyzed all 12--

18 A. Right.

19 Q. --he just analyzed the four or five that we
20 were looking at as comparators; isn't that correct?

21 A. I really don't know that.

22 Q. You didn't review his Witness Statement?

11:09:03 1 A. Yes. But I didn't memorize it. There were
2 two, and I looked at them.

3 Q. Okay. In Paragraph 48 of your First
4 Report--can you turn to that, please.

5 A. Is that in this binder?

6 Q. I hope. There should be tabs.

7 A. I'm sorry.

8 Q. And your First Report is the first tab.

9 A. Okay. That makes it easy.

10 Q. We try. It makes it easy for me too.

11 A. And it's appreciated.

12 Q. Could you turn to Paragraph 48, please?

13 A. Yes.

14 MR. SHOR: And can we highlight the last
15 sentence?

16 BY MR. SHOR:

17 Q. So, is it correct to say that you analyzed
18 whether BC Hydro applied a consistent process and
19 methodology for setting GBLs?

20 A. Yes.

21 Q. Could you please define what you mean by a
22 "methodology"?

11:10:10 1 A. I mean that it's a structured approach that
2 sets out key considerations that were taken into
3 account in setting GBLS, while recognizing that it had
4 to have some built in flexibility to deal with the
5 idiosyncratic situations that the different mills
6 found themselves in, both in terms of technology, and
7 I think it was referred to as "mill
8 architecture"--again, out of my league--but also
9 considerations in terms of fuel and things like that.

10 Q. Is there a difference between a methodology
11 and a formula?

12 A. Yes.

13 Q. And that's because a formula defines the
14 variables to be used in their relationship to one
15 another?

16 A. Yeah. A formula--yes, I think that's right.

17 Q. And BC Hydro's methodology does not do that,
18 does it?

19 A. Well, as I said, it can't do that because if
20 it did that, then it would be like Mr. Switlishoff's
21 BLAP. It would overlook the intrinsic differences
22 between the mills, which affects these kinds of

11:11:25 1 considerations.

2 Q. Does the methodology that BC Hydro use
3 identify all of the variables one must consider?

4 A. It's not a formula. So, you're using term
5 "variables." I think what I did--maybe we can
6 short-circuit this a bit. What I did was, I looked at
7 what they said their process was, and then I saw if
8 they applied that process in the same manner to all
9 the different mills.

10 Q. But I wasn't asking about the process they
11 applied.

12 A. I'm sorry.

13 Q. You said they applied a consistent process
14 and methodology. I assume you were distinguishing
15 between the two. So, I'm focused on the methodology.
16 I'm not asking what you did. I'm asking your
17 understanding of the methodology that BC Hydro
18 applied. Does it identify--does that methodology
19 identify somewhere in writing all of the variables
20 that must be considered in the analysis?

21 A. Yes.

22 Q. And where is that?

11:12:25 1 A. In the 2012 document.

2 Q. The June 2012 Information Report?

3 A. I don't remember the exact name.

4 Q. Okay. But at the time all the GBLs were set
5 here, which was in the 2009-2010 time frame, was there
6 any written document that identified all of the
7 variables that had to be considered in BC Hydro's
8 methodology?

9 A. There were a number of documents that
10 had--well, you want to call them "variables." I
11 wanted to call them "considerations," but, yes.

12 Q. Factors?

13 A. Yes, factors. I like factors. Okay.

14 Q. There's a comprehensive list of the factors
15 that must be considered?

16 A. One could have constructed a comprehensive
17 list if one had collected various documents.

18 Q. But it didn't exist in one coherent place?

19 A. Well, I don't know what a "coherent place"
20 is.

21 Q. One single place.

22 A. One single place.

11:13:24 1 Q. Okay.

2 A. No. And I'm not sure of the relevance of
3 that. I mean, if I know understood what the process
4 was by looking at 10 documents. I don't know that
5 they are disadvantaged if they can't look at one.

6 Q. I didn't ask if it was relevant. I just
7 asked if they had it, so please just answer the
8 question.

9 A. I apologize.

10 Q. This will go much more smoothly.

11 Does the methodology tell BC Hydro how to
12 consider each of these factors?

13 A. When you say "how to consider" it--

14 Q. Yes.

15 A. I'm not sure I understand what you mean.
16 Does it tell them how to assign weights, for example,
17 or how to quantify things or...

18 Q. Yes.

19 A. No. It just gives the factors that they have
20 to consider.

21 Q. And is the methodology completely objective,
22 or is there a subjective component to its application?

11:14:10 1 A. Well, the methodology is part of a process, a
2 procurement process which leads to negotiation. So,
3 the process leaves room to take into account
4 idiosyncratic situations and also is subject to the
5 discipline of a business negotiation.

6 Q. Is the methodology that BC Hydro applied in
7 setting GBLs something that would lead to two people
8 skilled in its application to the same unique GBL
9 result for a given mill at a given time?

10 A. I need to clarify. Are you talking about the
11 GBL that would show up in an EPA?

12 Q. Yes.

13 A. No. Because they might have different
14 negotiating skills. I mean, this is a result of a
15 business negotiation, and so you're asking me whether
16 two people would take the same factors and deal with
17 them in the same way in a negotiation, and I don't
18 think that's necessarily true.

19 Q. Okay. So, it's more of a general principle
20 that can lead to a range of results rather than a
21 precise detailed methodology that necessarily leads to
22 only one unique result; correct?

11:15:18 1 A. It has to be, as I said, because of the
2 idiosyncratic characteristics of the various mills,
3 but, most importantly, it's part of a business
4 negotiation and to assume that this process would lead
5 to the same GBL in different negotiations is--with
6 different negotiators, I think, is just not realistic.

7 Q. Would you agree that, if there was a flaw in
8 the methodology, that the procurement results may have
9 been different?

10 A. If there was a--well, I don't know because
11 it's the result of a negotiation. So, I assume if
12 there was a flaw in the methodology, the other
13 side--this is the discipline of the procurement
14 process. The other side would say, "Well, wait,
15 that's wrong."

16 << [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]

21 Q. Could you turn to Paragraph 52 of your First
22 Report?

11:16:32 1 A. Yes.

2 Q. This is a rather long paragraph.

3 A. Sorry.

4 Q. No need to apologize. I write long
5 paragraphs too sometimes.

6 A. It has lots of white space though.

7 Q. I'll give you that. Thank you. I thank you
8 for that.

9 But to summarize briefly, in this paragraph,
10 if I understand it correctly, you are identifying--you
11 break down BC Hydro's GBL approach into four factors.
12 Is that a fair characterization?

13 A. Yes.

14 Q. And then you take those four factors and
15 apply them to each of the mills you analyzed to see if
16 the factor was correctly considered in each case?

17 A. Well, I didn't apply it to a mill. I
18 reviewed all the materials that I had associated with
19 that particular GBL, and then I assessed whether I
20 thought that was consistent with these factors.

21 Q. Okay. So, these were the factors you
22 applied, and then you reviewed the work papers for the

11:17:26 1 GBL determination for each mill to see if the factor
2 was properly considered?

3 A. Right.

4 Q. What was your source for identifying these
5 factors as comprising BC Hydro's approach to setting
6 GBLs?

7 A. There was correspondence between the Parties.
8 There was the EPA itself. There were e-mails and
9 memos internal to and--internal to the BC Hydro and
10 between BC Hydro and the proponents.

11 Q. I think you misunderstood my question.

12 A. Sorry.

13 Q. I wasn't asking the information on which you
14 relied to determine whether the four factors were
15 applied. I was just looking at the source for the
16 four factors, and as I understand it--

17 A. Oh, I'm sorry.

18 Q. --you have just one citation in all your
19 footnotes to your long Paragraph 52, and that was
20 Mr. Dyck's Witness Statement, dated August 21, 2014.

21 A. Well, that's what I relied upon to be able to
22 cite to as a single source, but there was also the

11:18:41 1 2012 memo--not memo, I forget what you call it, the
2 2012 document.

3 Q. Information guidelines.

4 A. Thank you.

5 Q. Okay. But both Mr. Dyck's 2014 Witness
6 Statement and the 2012 information guidelines were all
7 written years after the GBLs at issue in this
8 proceeding were established; correct?

9 A. That's right. But if, in fact, there was a
10 consistent process or methodology applied in 2008,
11 2009, 2010, and it matched what was written in 2012,
12 then I conclude that there was a consistent process,
13 and it was followed consistently.

14 Q. Why didn't you rely on any contemporaneous
15 written statement of the BC Hydro GBL methodology?

16 A. Why didn't I not rely on it? I don't
17 remember it addressing these four factors. Let me ask
18 a clarifying question. Addressing these four factors?

19 Q. Your task was to analyze whether the GBL
20 methodology was applied consistently across all 12
21 mills.

22 A. Right.

11:19:45 1 Q. You had a source for determining what that
2 GBL methodology was. Your sources all are post hoc.
3 I'm asking, why didn't you rely on a contemporaneous
4 written statement of BC Hydro's GBL methodology?

5 A. Well, as I tried to explain, it didn't meet
6 your standard of a coherent source, but there were
7 documents that were written that allowed me to also
8 verify that these were the considerations that they
9 made.

10 Q. But you chose to rely on the 2012 and 2014
11 documents rather than any of those earlier documents.
12 Because you don't cite any of them in your Witness
13 Statement, do you?

14 A. Well, I think we refer to them in the
15 documents relied upon. But, yes, I would have had a
16 footnote that might have been--then you would have
17 really complained about how long this paragraph was.

18 Q. Okay. But just to be clear, the four factors
19 come from Mr. Dyck's Witness Statement. That's the
20 only source you cite in your First Witness Statement?

21 A. Yeah. That's only source I cite. I don't
22 know that that's the only place they come from because

11:20:52 1 I saw pieces of them in various documents that
2 predated Mr. Dyck's Witness Statement and predated the
3 2012 information, something or other.

4 Q. In relying upon factors Mr. Dyck identified
5 for you in 2014, your analysis really is only capable
6 of determining whether BC Hydro came up with an
7 explanation in 2014 covering the GBLs it previously
8 set; isn't that correct?

9 A. That's correct, but if that explanation--post
10 hoc explanation turned out to match the facts, no
11 harm, no foul.

12 Q. We may disagree on that point.

13 A. I'm sure we do.

14 Q. I'd like to return to your four factors and
15 explore how you applied them in concluding that
16 BC Hydro followed a consistent approach, apparently
17 with the slightest deviation because everybody gets a
18 check mark in every box; right?

19 A. At the level of these four factors, if they
20 were considered, not how they were considered, but if
21 they were considered, you get a check mark in the box.

22 Q. Okay. And I want to understand what it took

11:21:57 1 to get a check mark. That's what I'm getting at.

2 A. Okay.

3 Q. So, looking at your Paragraph 52, again, the
4 first factor you considered was annual use by the
5 customer for self-supply. That's on Page 24,
6 Paragraph 1. Annual use by the customer for
7 self-supply, that was the first factor?

8 A. Yes. That's right.

9 Q. And just to be clear, when you talk about
10 "annual use," we're talking about a solar year, the
11 one with 8,760 hours?

12 A. No, it's 365-day period.

13 Q. Which is 8,760 hours?

14 A. Oh, I thought you said "solar year." You and
15 I are having--I'm having trouble hearing you, I guess.

16 Q. How long does it take for the Earth to go
17 around the sun?

18 A. 8,760--no, wait. 60 point.

19 (Laughter.)

20 BY MR. SHOR:

21 Q. That's what I get for speaking with a
22 mathematician. Thank you for clarifying that.

11:22:57 1 A. Yes. But just to be clear, I'm not
2 suggesting it's a calendar year, which could be
3 confused with--

4 Q. That's fair. It's a 365-day, 8,760.25-hour
5 year.

6 And the term used by the customer means
7 actually used to meet the self-generator's own
8 electrical load?

9 A. Yes.

10 Q. And let's go back to Table 1 on your First
11 Report. Now, this is the result of your factors
12 analysis.

13 A. Where is that? I'm sorry.

14 Q. Page 27?

15 A. Oh, I went the wrong way.

16 Q. Which of these columns captures your
17 application of that first factor, the annual
18 use--actual annual use for self-supply?

19 A. The third column.

20 Q. The third column.

21 That would be the amount of load
22 self-supplied in the absence a contract?

11:23:54 1 A. Right.

2 Q. Now, what was the annual use period BC Hydro
3 used for Celgar?

4 A. I believe--I could check.

5 Q. Do you think it was calendar year 2007?

6 A. I do.

7 Q. And what was the annual use period BC Hydro
8 considered for Howe Sound?

9 A. I probably should look. I have that written
10 in a report, but I believe--subject to check--that
11 they use an [REDACTED] to come up with an
12 [REDACTED] period.

13 Q. But it wasn't << [REDACTED] [REDACTED]
14 [REDACTED] period.

15 A. Well, as I said, << [REDACTED]

16 Q. Subject to check.

17 A. Well, yes, but the << [REDACTED] is not the
18 issue. It is how you get << [REDACTED]

19 Q. We may disagree on that, too, but it was a
20 << [REDACTED]
21 correct?--for Howe Sound?

22 A. I'm sorry. It's a << [REDACTED]

11:24:55 1 Q. A <<[REDACTED]>> period.

2 A. That it would not correspond to a <<[REDACTED]
3 [REDACTED]

4 Q. Correct. Or not correspond to <<[REDACTED]
5 [REDACTED] It was [REDACTED] periods and [REDACTED]
6 [REDACTED]> was it not?

7 A. I'd have to look at that. I don't remember.

8 Q. And what was the annual use baseline period
9 used for Tembec Skookumchuck?

10 A. I have that written down. I don't remember
11 exactly right now, as I sit here, but in the
12 Appendix 2, if we want to turn to that, I can probably
13 figure that out.

14 Q. I think we all understand. I believe for
15 Tembec, the [REDACTED] model--modeled <[REDACTED]
16 [REDACTED] Is that your recollection?

17 A. That's the <[REDACTED]> We're talking about
18 generation.

19 Q. Is it your recollection that in calculating
20 Tembec's GBLs, BC Hydro used <<[REDACTED]
21 [REDACTED]

22 A. They used their <<[REDACTED] They

11:26:08 1 didn't use it, but it's the << [REDACTED] of the
2 pre-1997 EPA. But as I sit here now, unless you let
3 me look, I can't tell you precisely. I think it was
4 < [REDACTED] I don't remember if it was << [REDACTED]

5 Q. Fair enough. This isn't a memory test.

6 A. Damn good thing.

7 Q. Now, these differences in the timing and
8 duration of the baseline periods used and whether they
9 were actual generation data or hypothetical models,
10 that's not captured in your analysis at all here, is
11 it?

12 A. I'm sorry. That was a long question to go
13 with my long paragraph.

14 Q. We are both guilty of both of those things.

15 The differences in the timing and duration of
16 the baseline periods we just discussed and whether
17 BC Hydro used actual generation data or relied on a
18 hypothetical model, those differences are not captured
19 at all in your check-the-box analysis on Table 1, are
20 they?

21 A. Yes, they are. I didn't specify a method, in
22 your case--in your view, a formula for determining it.

11:27:22 1 So, as long as they determined it in a way that was
2 consistent with the objective, which is to determine
3 the annual self-generation load for a normal year, in
4 their viewpoint--in their point of view, then, in
5 fact, it would get a check mark.

6 Q. Is it fair to say that you just performed a
7 qualitative analysis, was a factor or other factors
8 considered and no quantitative analysis of how that
9 factor was considered and whether it was considered
10 the same way in difference cases?

11 A. I certainly didn't do any quantitative check.
12 I didn't check anything. I'm not sure, in the cases
13 that you're talking about, there was a similar
14 quantitative issue that would have applied in two
15 different places. So, I don't think I can answer your
16 question.

17 Q. Let me put it this way: Did you even
18 evaluate whether or not BC Hydro even used the same
19 arithmetic in computing GBLS across mills?

20 A. No, I did not. My role was to see if there
21 was a process and/or methodology that was consistently
22 applied to all the mills.

11:28:36 1 Q. And yet you are Canada's Quantitative Expert
2 here today?

3 A. I don't know that I'm their quantitative. Is
4 that what they call me, their Quantitative Expert? I
5 think I'm their Regulatory Economic Expert, but I
6 happen to have some quantitative history, which I
7 can't deny.

8 Q. Isn't it true that your analytic methodology
9 obscures differences in computation and methodology
10 rather than identifies them?

11 A. Can you give me an example of what you mean?

12 Q. Sure.

13 Assume that there were two identical mills
14 built at exactly the same time. They were twins.
15 Mill A and Mill B, and they had identical generation
16 histories, Contract histories, EPA guideline, every
17 factor that you consider in your analysis was exactly
18 the same for each mill.

19 A. Yeah.

20 Q. But for Mill A, BC Hydro used a three-year
21 baseline period and calculated a GBL of 50, and for
22 Mill B, BC Hydro used a one-year baseline resulting in

11:29:39 1 a GBL of 40. So, everything is the same, but
2 different GBLs.

3 Under your approach, you'd conclude that
4 BC Hydro considered the same relevant factors in both
5 cases, and you'd award full check marks to both, even
6 though they were treated differently; correct?

7 A. No.

8 Q. And where would I see that in this table?

9 A. In the analysis that underlies the check, if
10 we saw that that was what was done, that the factors
11 were identical, there was no reason--let me put it
12 this way: Take the one-year case, and if--which would
13 apply. All the factors in that case would apply to
14 the three-year case. If, in fact, we saw that they
15 used a one-year period as the normal period for one,
16 but under exactly the same conditions there was no
17 explanation--there could be no explanation of why
18 there was a three-year period, we would have said that
19 that was not a consistently applied process.

20 Q. But I'm a little confused how you would have
21 identified that, because I thought you told me earlier
22 that you didn't check the actual calculations?

11:30:47 1 A. That's not a calculation. That's a
2 consideration. We did consider the considerations.
3 We looked at the documents that were associated with
4 it, which explained why they picked particular
5 periods.

6 For example, one of your favorites, the Howe
7 Sound--I think it is Howe Sound << [REDACTED]
8 well, we looked at why they said they did the
9 << [REDACTED] and we agreed that that was a
10 plausible story, and that under their consistent
11 application of their process, they were looking for
12 the best 365-day period that represented what the
13 plant would do under certain conditions. And in your
14 hypothetical, that wouldn't have passed our filter.

15 Q. So, you found--in all your examination of all
16 12 mills for all four factors, you found no
17 inconsistency whatsoever, nothing that raised a
18 concern in your mind; everything was done by the book
19 exactly the same for every single mill?

20 A. At the level of these four factors, yes.

21 Q. So, you must have been very lucky. You're
22 the only person I've ever met who has been hired by a

11:31:57 1 state-owned enterprise that does everything right and
2 whose decisions are never influenced by political
3 considerations.

4 A. Well, let's be clear: This is BC Hydro
5 acting as a commercial entity under BCUC regulation.
6 Also, I think most of the clients--and I would add
7 myself to that list of complainers about things that
8 states do wrong--happened at a level below which we
9 were considering. So, whether they were able to add
10 or subtract correctly, yes, I didn't check that. And
11 whether I would be surprised if a State enterprise
12 made addition and subtraction errors, no, I would not.

13 Q. Now, I'd like to return to the annual use
14 factor that we were just examining and to reiterate,
15 that's annual use of self-generation actually used for
16 self-supply; correct?

17 A. Correct.

18 Q. Could you please turn to Paragraph 91 of your
19 Second Statement, where you address the calculation of
20 Celgar's GBL?

21 A. Is it the paragraph that starts "In support
22 of his conclusion"?

11:33:22 1 Q. I'm sorry. It's Paragraph 91 of your Second
2 Statement.

3 A. I think that's what I'm looking at, but maybe
4 I'm wrong.

5 Q. I know it's not what I'm looking at.

6 PRESIDENT VEEDER: That is the Second
7 Statement. It starts off "In support of."

8 Let me find...

9 BY MR. SHOR:

10 Q. And at the end, the sentence "fundamentally."

11 A. Oh, at the bottom of the page?

12 Q. The sentence beginning "fundamentally"?

13 A. Okay. Yes, that sentence. Right.

14 Q. Here you say, "Fundamentally, Celgar's
15 GBL"--and the next sentence.

16 "Celgar's GBL of 349 is based on its
17 historical generation."

18 And I'm wondering why you used the words
19 "historical generation" there rather than "generation
20 actually used for self-supply," like the principle
21 requires.

22 A. Because in Celgar's case--and I'm not sure

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11:34:39 1 it's the only case--but in Celgar's case, they had the
2 happy coincidence of its load matching its generation,
3 essentially.

4 Q. Okay. So, there's a rule that
5 applies--normally you measure actual generation
6 actually used for self-supply, but if the load exceeds
7 the generation--I'm sorry, if the generation exceeds
8 the load, then you apply a different methodology?

9 A. No. No. The methodology is to determine
10 what's a consistent measure of the load that the mill
11 self-supplies. If they self-supply--if they generate
12 more than their load, then that's not considered as
13 part of the self-supply because, obviously, if it's
14 above their load, they are not self-supplying.

15 Q. Okay. So, let me make sure I understand the
16 math. I like formula, so let me try to reduce it to
17 formulas.

18 A. Wait a minute. You said--

19 Q. I'm sure you'll correct me.

20 So, normally--<< [REDACTED]
[REDACTED] --BC Hydro used an overall formula for
22 calculating a GBL that started with total generation

11:35:53 1 and subtracted sales; correct?

2 << [REDACTED]
[REDACTED]

4 A. Right.

5 Q. And for Celgar, it was a little confusing
6 when Mr. Dyck was explaining his math, but I think the
7 end result of it was they didn't subtract all of
8 Celgar's sales. And I take it that's because their
9 load exceeded their--the load was lower than their
10 total generation?

11 A. No. I think you're--you are missing some
12 important points.

13 First of all, in the << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And I probably should go

17 look and get the precise words, and it's written up in

18 my Appendix 2--but subject to my not fouling up, they

19 had to << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11:37:14 1 In the case of Celgar, the sales that they
2 were making were opportunistic sales. They were sales
3 when, for whatever reason, their load, internal load,
4 was below their generation. And so, these are what we
5 call "non-firm opportunity sales." And so they would
6 sell those. That's a very different operation.

7 Q. Okay. I want to explore that.

8 I think you said for << [REDACTED] those << [REDACTED]
9 [REDACTED]

10 A. I believe that's right.

11 Q. Did you verify that?

12 A. Did I? I read the documents that stated
13 that. Did I go and check their invoices for << [REDACTED]

14 [REDACTED] No, I did not.

15 Q. Did BC Hydro do that?

16 A. I don't know whether they did or not.

17 Q. And for Celgar, I think you mentioned that
18 their sales were all surpluses. It was all
19 electricity above load, wasn't it?

20 A. What I said was, most of their sales--the
21 sales that we looked at and that you were talking
22 about, the 20--

11:38:16 1 Q. 23.

2 A. --23-gigawatt hours, most of them appeared to
3 be--to me, to be opportunistic; that is, they were
4 very short-term, they weren't reliable, you couldn't
5 sell them firm. You had to sell them
6 opportunistically. So, they were a sales that were
7 not an intrinsic part of the mill operation. They
8 resulted from--I don't know what from, but it could be
9 changes in mill operation or something like that.

10 Q. But did you understand they were all sales
11 that were surplus to Celgar's load?

12 A. Moment to moment, yes.

13 Q. Could you go back to your discussion of the
14 GBL principle?

15 A. Can I clarify what I just said for the
16 benefit of the Tribunal?

17 Q. No.

18 A. Okay.

19 Q. You have to wait for a question.

20 A. Okay.

21 Q. Could you go back to your discussion in the
22 First Report of the GBL principle. And I believe that

11:39:06 1 was Paragraph 52, where you're breaking down the
2 factors.

3 A. Yes. Right.

4 Q. Could you show me there where it
5 distinguishes between opportunistic sales and sales
6 that required extra natural gas and non-firm and firm
7 sales? I mean, those are a lot of distinctions you're
8 drawing, and I don't see them in the principle.

9 Can you show me where they are?

10 A. Well, they're in a step above the principle.
11 Thank you. This gives me the chance to make the
12 clarification that I wanted to make.

13 This is the in the context of a procurement,
14 a procurement for firm resources. And so, if you're
15 going to determine what resources you can depend on,
16 that is, this net dependable capacity, then you need
17 to take away extraneous or non-firm considerations.
18 So, in the case of Celgar, if you were trying to
19 decide what you could depend on in terms of their
20 above-GBL capability, then you wouldn't take into
21 account things that are not predictable, that are
22 variable, that are opportunistic.

11:40:21 1 And so, it's sort of embedded one level above
2 this. I mean, the whole purpose of this, the whole
3 purpose of the GBL process is to identify resources
4 for BC Hydro to add to B.C.'s resource stack on a firm
5 basis.

6 Q. Okay. So, it's your testimony that Celgar
7 sells to third parties, to NorthPoint and FortisBC,
8 the 23 megawatts we were discussing. Those were
9 included in Celgar's GBL, because they were non-firm?

10 A. Yes. They were not considered--they were not
11 subtracted in the GBL determination.

12 Q. Because they were non-firm?

13 A. Because they were non-firm.

14 Q. Now, let me ask another mathematical-type
15 question.

16 We heard testimony over the past few days
17 that Celgar's GBL was set higher than its actual use
18 for self-supply level because, on average, it was
19 meeting its load. And that was expressed in various
20 ways, and I think the way you expressed it was because
21 the total generation exceeded the total load. Total
22 generation was 350. Annual load was 349. So, on

11:41:35 1 average, the Mill was meeting its load.

2 I'd like you--

3 A. Can I disagree with your characterization?

4 Q. No.

5 A. No? Okay.

6 Q. You have to wait for the question to finish.

7 I haven't asked the question yet.

8 My question to you is, what would the GBL
9 have been--or what would a proper GBL have been, in
10 your Expert view, if Celgar's total generation in 2007
11 had been 348 rather than 349? Would that have changed
12 the GBL calculation?

13 A. And just to clarify, they were buying
14 the--the one--

15 Q. Everything else still remains the same. They
16 were still buying 22 megawatts from FortisBC and
17 selling 23--I'm sorry, 23. They were buying
18 22-gigawatt hours a year from FortisBC and selling
19 23-gigawatt hours a year.

20 A. Well, if I understand your--I'm sure you
21 don't mean to demean my mathematics degree, but this
22 is arithmetic.

11:42:37 1 Q. To me, that's mathematics.

2 A. Those numbers won't work out because they're
3 now short. They would have to--they would have to buy
4 more power to meet their load. I just wanted to
5 understand.

6 And the second part is, the generation is a
7 BLAP generation. It is 365 days, 24--

8 Q. Nothing changes in the actual and the But-For
9 Scenario to bring it back to those terms, except that
10 in 2007, total generation didn't hit 351; it was only
11 348?

12 A. If I understand what you're saying, if they
13 only generated 348, then--for self-generation purposes
14 and that's what the determination was, then that's
15 what the--glad this isn't a memory test.

16 Q. Okay. You lost the question.

17 I guess my question was, we had heard from
18 other Witnesses that the reason the sales weren't
19 subtracted, the reason the 23 weren't subtracted was
20 because, on average, Celgar met its load.

21 So, my question to you is, if Celgar, on
22 average, didn't meet its load, if it only generated

11:44:04 1 348 and its load was 349, would that have meant the 23
2 gets subtracted?

3 MR. DOUGLAS: How many hypotheticals can we--

4 MR. SHOR: As many as I want. Thank you very
5 much.

6 MR. DOUGLAS: There's so many factors that
7 would change in that type of scenario.

8 PRESIDENT VEEDER: Please continue.

9 BY MR. SHOR:

10 Q. Could you answer the question before we were
11 interrupted?

12 A. Well, now I get to criticize your
13 characterization. It's not based on a just the fact
14 that it's an average generation. What it's based on
15 is a net dependable for planning purposes. You're
16 losing track of that. That's what this is all about.
17 It's procurement for acquiring resources that are net
18 dependable.

19 And so, if you're trying to determine the
20 generation level that, reliably, the generator is
21 self-generating, so you don't end up purchasing some
22 of that existing resource, then you disregard the

11:45:09 1 opportunistic or unpredictable variable thing. So,
2 it's not just that it's an average. It's that when
3 you take away the things that, the opportunistic sales
4 and the opportunistic purchases, what's left is what
5 the utility can rely on for its ability to determine
6 what resources it can add to its stack.

7 Q. I don't think I'm at all confused. I think
8 that Mr. Dyck had another explanation, and this is the
9 first we've ever heard of the Net Dependable Resources
10 Theory. But thank you very much.

11 Let's turn to the--

12 PRESIDENT VEEDER: Mr. Shor, we're going to
13 need a break.

14 MR. SHOR: Now is a good time.

15 PRESIDENT VEEDER: Good time. Let's take 15
16 minutes. We'll come back at 12:00. Again, as always,
17 please don't discuss the case.

18 (Brief recess.)

19 PRESIDENT VEEDER: Let's resume.

20 BY MR. SHOR:

21 [REDACTED]

[REDACTED]

12:01:45 1 Now, as we've discussed, BC Hydro did not set
2 Tembec's GBL based on its actual use data; correct?

3 A. On its--on BC Hydro's actual use of data?

4 Q. No. In setting Tembec's GBL.

5 A. < [REDACTED] >

6 Q. BC Hydro did not rely on the amount of
7 electricity that Tembec actually had been using for
8 self-supply in the years leading up to the EPA;
9 correct?

10 [REDACTED]

11 Q. Could you turn to your First Report,
12 Appendix 2, memo for Tembec Skookumchuck. This is the
13 appendix where you provide mill-by-mill analyses.

14 A. Right.

15 Q. I'm going to ask you to turn to Page 7, but
16 I'm going to caution the Tribunal it is probably your
17 Page 6 because the highlighted versions and the
18 redacted versions have different page numbers.

19 In the carryover paragraph on the top of
20 Page 7, around the middle there's a sentence that
21 begins "Further." Can you read that sentence, please.

22 A. In the top part partial paragraph that

12:03:06 1 starts--

2 Q. Yes. The sentence begins "Further."

3 A. Yes, got it. "Further, even if the Mill were
4 to have continued operating under the 1997 EPA, given
5 the economic conditions at the time"--I should read
6 the highlighted thing.

7 Q. Just keep reading.

8 A. << [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

12 Q. Now, is it your understanding of the BC Hydro
13 GBL methodology that it's sufficient to reject actual
14 generation data in favor a hypothetical model based
15 upon the mere possibility that a mill may choose to
16 operate differently absent a contract?

17 A. The methodology, as I understood it and
18 determined from my analysis, determined the GBL absent
19 any preexisting contracts.

20 Q. Right. But going back to your first--

21 A. I'm sorry.

22 Q. Let me try. Going back to your four

12:04:19 1 factors--

2 A. Well, let me just finish. Sorry.

3 So in Tembec's case, [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED] [REDACTED] [REDACTED]

■ [REDACTED] [REDACTED]

■ [REDACTED]

■ Q. I guess my question was a little different.

10 In the sentence in your Report you use the

11 phrase that [REDACTED] [REDACTED] [REDACTED]

■ [REDACTED] And I'm asking under the methodology as

13 you understand it, BC Hydro's GBL methodology, is it

14 sufficient to reject actual historical generation data

15 in favor of [REDACTED] based on a mere conclusion that

16 the Mill [REDACTED] Don't they

17 have to find that they actually would have generated

18 differently?

19 A. In my analysis to assess whether the GBL

20 process was applied consistently, what they have to do

21 is either use the 2005 base year, which was the base

22 year for the CBL, or have some rationale why they

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12:05:39 1 didn't use that and came up with a different
2 rationale.

3 And so if--if what you're getting at is my
4 choice of the word "may," I didn't verify; what I was
5 doing was relying on the documents that I read. So
6 what I meant by "may" was that, given the <[REDACTED]> as
7 I understood it in those documents, the <<[REDACTED]

■ [REDACTED] [REDACTED] [REDACTED]
■ [REDACTED] [REDACTED]

10 Q. Okay. You're getting to where I wanted to
11 go, so let me just jump in.

12 Tembec's contention was <[REDACTED]> that it was
13 [REDACTED] [REDACTED]
■ [REDACTED] correct?

15 A. Well, let me say <<[REDACTED]

16 Q. I don't know if that's a word. But if that's
17 what you want to say, we'll call it <<[REDACTED]>>

18 A. Yeah.

19 Q. And I take it that sort of <[REDACTED]>
20 analysis is well within your area of expertise, is it
21 not?

22 A. It is in my area of expertise.

12:06:39 1 Q. What is your evaluation of the analysis
2 performed by BC Hydro to substantiate Tembec's claim
3 that its << [REDACTED]

4 A. My understanding of the process is that there
5 were two different parts of BC Hydro that dealt with
6 this issue, and that I relied on Mr. Dyck's
7 statements, and I assume--I made the assumption that
8 the financial people who dealt with the contract
9 finances were competent--your distrust of State
10 employees aside--were competent enough to have
11 verified the financial issues associated with the
12 Mill.

13 Q. Did you ask to review the analysis that had
14 been done?

15 A. I wasn't asked to, nor did I attempt to
16 audited the GBL-setting. What I attempted to do was
17 assess whether there was a consistently applied
18 process and methodology. So, no, I didn't, nor did I
19 see it as part of my charge.

20 Q. So you weren't asked to make any evaluation
21 at all of that economic analysis. You were asked to
22 assume that it was done?

12:07:56 1 A. I wasn't asked anything about that analysis.
2 What I was asked to do was to see whether I could
3 determine, assess, in my view that the methodology
4 that BC Hydro applied in the period--post-2007 period,
5 applied to the mills, was done in a consistent
6 and--consistently applied. A consistent process that
7 was consistently applied.

8 Q. Okay. So Tembec got a check mark for that
9 box on actual use consideration based on your
10 supposition and assumption that somebody else did an
11 analysis; correct?

12 A. As an Expert, I'm allowed to rely on the
13 documents and the sources that I feel reliable. As I
14 explained to you, yes, I didn't do an audit because
15 that wasn't what I was supposed to do. I made the
16 assumption, which I think is a reasonable assumption
17 for an Expert, that the people in BC Hydro who needed
18 to look at this information would have done it and
19 would have done it competently. If I had to look at
20 every document, of course, I would have been well out
21 of time before we started.

22 Q. So on this issue you said you relied on the

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12:09:06 1 documents and sources that you considered reliable.

2 Which documents and sources were those specifically?

3 A. Well, the documents are in the documents
4 relied upon and also other documents which I didn't
5 rely upon but reviewed. And the sources, you know, it
6 is my understanding--my understanding of the BC Hydro
7 organizational structure and the organizations that
8 would have dealt with various parts of this.

9 As I understood Mr. Dyck's testimony, he'd
10 worked on the GBL side. And there was another group,
11 another division, perhaps, that did the financial
12 part. I assumed that they were competent to do that.

13 Q. Just trying to be very specific. I
14 understand you have a long list of documents that you
15 relied on. As you sit here today, can you identify
16 any single document where you saw any indication that
17 BC Hydro had actually performed the <<[REDACTED]>
18 analysis we've been talking about?

19 A. No, I don't.

20 Q. Thank you.

21 A. I can't.

22 Q. I'd like to turn to your criticism of the

12:10:15 1 Below Load Access Percentage. I think people have
2 been calling it BLAP. Mr. Switlishoff prefers the
3 term "B-LAP" for reasons I've never understood.

4 Can you turn to Page 12 of your Second
5 Report, please? Paragraph 112.

6 A. Yes, I'm there.

7 Q. Do I understand you correctly here to
8 criticize Mr. Switlishoff's Measure, particularly as
9 applied to Howe Sound, because it ignores the fact
10 that Howe Sound had a thermomechanical pulp mill that
11 historically consumed large amounts of utility
12 electricity?

13 A. Yes.

14 Q. And it's your contention essentially that
15 those large utility purchases skew the BLAP too high
16 for Howe Sound?

17 A. Skew the BLAP too low.

18 Q. Too high.

19 A. The below-load--

20 Q. The Below Load Access Percentage?

21 A. --Below Load Access Percentage would be lower
22 than it--

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12:11:22 1 Q. Too low. Okay.

2 A. I think that's--maybe I've got it backwards.

3 Q. No, I think you had it right and I had it
4 backwards.

5 A. Okay.

6 Q. You're the mathematician. I'm the lawyer.
7 We're not very good with numbers.

8 What is your understanding of the numerator
9 in Mr. Switlischoff's computation of a BLAP for Howe
10 Sound?

11 A. I need to look. I don't remember. I'd have
12 to look.

13 Q. You can take a look at his First Witness
14 Statement, Paragraph 97. That might help you refresh
15 your recollection.

16 A. Is that here?

17 Q. It should be in the binder.

18 A. First Expert Report, yeah.

19 Q. First Expert Report, Paragraph 47.

20 PRESIDENT VEEDER: 47 or 97?

21 MR. SHOR: 97.

22 THE WITNESS: Are you just having fun with

12:12:17 1 me?

2 BY MR. SHOR:

3 Q. I'm intimidated by the numbers.

4 A. Okay.

5 Q. I believe Mr. Switlishoff there gives the
6 formula for the B-LAP of total self-generation minus
7 GBL. And if you turn to Paragraph 130, that's the
8 actual calculation he did for Howe Sound.

9 So, what's your understanding of the
10 numerator Mr. Switlishoff used? It was total
11 self-generation, was it not?

12 A. << [REDACTED]

[REDACTED]
14 So apparently the--

15 Q. I think that's the denominator. We're
16 focused on the numerator.

17 A. The numerator was the << [REDACTED] >>-gigawatt hours of
18 firm energy sales commitment.

19 Q. Plus?

20 A. I don't see a plus. But maybe that's my
21 mathematical expertise.

22 Q. Let me take a look.

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12:13:46 1 (Pause.)

2 Q. Look at the bottom part. So the amount of
3 available--you're correct. The numerator is < [REDACTED]

4 A. Right.

5 Q. And that is the amount available for sale?

6 A. It says it's the amount committed to sale.

7 Q. Correct. And what is the denominator?

8 A. It's the amount committed to sale plus the
9 GBL.

10 Q. Okay. So neither the numerator nor the
11 denominator uses load at all in the calculation, does
12 it?

13 A. The load of--I'm not sure whether the << [REDACTED] is
14 the load. It says effective annual GBL.

15 Q. It's the GBL.

16 A. But I don't know if the GBL was set at the
17 load.

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

20 A. Right.

21 Well, I need to go to my memo. I don't
22 remember the reason why this criticism came about, but

12:15:44 1 if I can go to my memo?

2 Q. I'm just trying to understand. You criticize
3 Mr. Switlshoff for not considering the--not adjusting
4 or not considering the fact that Howe Sound had this
5 large load for other reasons?

6 A. Right.

7 Q. But load isn't used in this calculation at
8 all, so I'm wondering why you criticize him for using
9 load?

10 PRESIDENT VEEDER: Is your memo on the table?

11 THE WITNESS: Yes.

12 PRESIDENT VEEDER: Please look at your memo
13 if it helps you answer the question.

14 THE WITNESS: In fact, it might be better if
15 I go to my Report, where I criticize, to see if I did
16 a better job of explaining it than I can remember.

17 BY MR. SHOR:

18 Q. Paragraph 112.

19 A. In my Report?

20 Q. Of your Second Report.

21 A. Second Report.

22 MR. DOUGLAS: I think it is also Paragraph 62

12:17:08 1 in your First Report as well, whichever.

2 THE WITNESS: Well, that would be more
3 convenient.

4 Well, it may be--I'm unable to find it right
5 now. Let's see. It may be that the criticism wasn't
6 related to Howe Sound but to other instances, but
7 right now as I sit here, I can't find the description
8 that I'm looking for.

9 BY MR. SHOR:

10 Q. Do you wish to retract--

11 A. No.

12 Q. --the criticism you make in Paragraph 112
13 that it didn't consider--that his analysis fails to
14 consider that Howe Sound has a large thermomechanical
15 pulp mill that adds additional load to calculation?

16 A. Probably not, but--

17 Q. I'll give you a chance to tell me how load
18 matters.

19 A. Okay. Well, what it says is, the point is
20 that MP mills, which is Howe Sound, have a significant
21 load but do not produce black liquor that can be used
22 as a fuel for generation to offset that load. So,

12:19:39 1 historically, Howe Sound consumed utility-provided
2 power to meet a large portion of its TMP load, unlike
3 Celgar, which has not, but BLAP simplistically
4 compares total load and/or generation data to GBL,
5 completely oblivious to this crucial difference
6 between Howe Sound and Celgar. So, as I understand
7 the formula, it is generation that's in the numerator.

8 Q. No. The numerator we saw was the amount
9 of--the amount that BC Hydro allowed you to sell, what
10 they defined as the incremental energy allowed for
11 sale.

12 A. Above its--

13 Q. And the denominator only included load when
14 it was less than total generation, which was not the
15 case for Howe Sound. I think we can move on.

16 You were the first person in this proceeding
17 to raise economic efficiency as a justification for
18 B.C.'s self-generation and GBL policy, were you not?

19 A. I don't know.

20 Q. I'll represent that you were.

21 Can you please to turn to Page 18 of your
22 First Report, Footnote 40.

12:21:17 1 A. Okay.

2 Q. Now, in that footnote, you define "economic
3 efficiency" in the classical terms that I remember
4 learning in my elementary economic classes, which was
5 where resources are put to their highest value use;
6 correct?

7 A. Correct.

8 Q. And in both your first and second reports you
9 make a lot of statements about economic efficiency and
10 efficiency--efficient resource acquisition, but do you
11 recall any argument you make where you actually apply
12 the definition of "economic efficiency" you have in
13 Footnote 40?

14 A. Well, it's the fundamental reasoning for
15 explaining why the GBL discriminates between or
16 differentiates between existing and incremental
17 resources. In order for BC Hydro to meet its
18 obligation to purchase--not purchase, acquire
19 resources in a cost-effective manner, which is akin to
20 economic efficiency, that's where I would use that
21 argument.

22 Q. That's the jump I'm not sure I understand.

12:22:28 1 You said that cost-effective resource acquisition is
2 akin to economic efficiency. I don't understand that
3 link at all. Could you explain that to me?

4 A. Okay. Yes. If something is not
5 cost-effective, it can't be economically efficient.
6 So, in order to--in the context of the BC Hydro
7 resource procurement, then the Measure of at least
8 maintaining economic efficiency is to insist on cost
9 efficiency.

10 Q. So your definition of "economic efficiency"
11 is cost efficiency for BC Hydro?

12 A. And it's in the context of a procurement.

13 Q. Okay.

14 A. Resource procurement.

15 Q. How did you assess whether requiring Celgar
16 to use 349-gigawatt hours a year of its own generation
17 for self-supply is economically efficient?

18 A. Well, I didn't do a specific analysis. What
19 I did was look at the history of the Celgar Mill and
20 the supporting documents for some of the economic
21 decisions associated with the purchase and with the
22 enhancements that they made. And it's clear that, in

12:23:41 1 the view of the decision-makers for Mercer, this was
2 going to add to the value, the overall value of their
3 enterprise, and in that sense I would take it that
4 they believed that it was economically efficient to do
5 that.

6 Q. Well, let's test that. But the fact that
7 BC Hydro required it to use its 349 megawatts for
8 self-supply, and that Celgar had been doing that
9 before, that doesn't mean that Celgar's below-load
10 electricity is put to its--to use your definition--its
11 highest and best use; correct?

12 A. Well, it doesn't mean that, but it indicates
13 that, but also I take exception to BC Hydro required
14 them to self-generate. I haven't seen anything that
15 suggests BC Hydro required them to self-generate.

16 Q. Have you read the Exclusivity Clause in the
17 EPA?

18 A. It says they can't--they can't sell their
19 below-GBL--they can't sell their below-GBL resources
20 to any third party while they are under the EPA,
21 except subject to the Side Letter, which Celgar
22 uniquely has.

12:25:02 1 Q. Okay. Which hasn't been activated. So, they
2 can't sell the 349, and they have to generate the 349
3 in order to generate the 238 that they have a firm
4 commitment to supply to BC Hydro; correct?

5 A. That, I'm not sure.

6 Q. You're not sure of the number, but there is
7 some amount that BC Hydro purchases?

8 A. There is some amount they purchase, but I'm
9 not sure whether as a precondition--I don't think so,
10 but I'm not sure that--that purchases is related to
11 the hog boiler at Celgar. You're confusing mills.

12 Q. Okay.

13 A. With the second--the Green Power Project.

14 Q. Right.

15 A. Okay, with the Green Power Project. And I'm
16 not sure the Green Power Project requires the other
17 assets to generate electricity for them to meet that.
18 So, if I'm right about that, then they could run their
19 mill and generate the power to meet their EPA
20 requirement. They could run their boiler, their black
21 liquor boiler, and generate the steam they need, and
22 could buy their electricity need from Fortis, is my

12:26:15 1 understanding.

2 Q. I think your understanding is completely
3 incorrect. I think, in fact--otherwise, we wouldn't
4 need to be here. But in order to sell the above the
5 GBL amount that BC Hydro agreed to purchase, they
6 first have to generate the below-GBL amount and use it
7 for self-supply. That's not your understanding?

8 A. It is certainly not my understanding of the
9 Exclusivity Clause. The Exclusivity Clause says they
10 can't sell that power. I don't know that it's--I
11 haven't seen anywhere--and maybe it does exist, but I
12 haven't seen where they are required to run their
13 turbine, generate the electricity and--as part of what
14 BC Hydro has required of them.

15 I agree it would be economically inefficient.

16 Q. I think we went--I'm sorry, I didn't mean to
17 interrupt.

18 A. I think I agree it would be economically
19 inefficient and not the best and highest use of the
20 steam to vent it, rather than to make the electricity
21 and self-supply.

22 Q. I fear I'm going down the same rabbit hole

12:27:13 1 went down with Mr. Stockard yesterday. But if they
2 can't sell it, what can they use it for?

3 A. They don't have to generate it. That's what
4 I'm saying. I don't know, unless you can point me to
5 something--I haven't seen anything which suggests that
6 they have to generate because they can create the
7 steam they need without running the turbine, and they
8 could buy the electricity from Fortis rather than
9 self-supply. I'm not suggesting I would recommend
10 that. I'm not suggesting that it would be a
11 business--a wise business decision, but they could.
12 So, it's not a requirement of BC Hydro, as far as I
13 understand.

14 Q. Okay. Let's just assume for a hypothetical
15 that it is, that the way the GBL works is BC Hydro
16 purchases only the amount generated above the GBL,
17 which means you must generate below the GBL before you
18 can make those purchases and that you must use it for
19 self-supply. I'm just asking you to assume that.

20 A. But that's--you're saying that's a
21 requirement of the EPA.

22 Q. I think it is. Let's just assume that for

12:28:11 1 purposes of analysis.

2 A. Okay. Yep.

3 Q. If that's the case, your approach to economic
4 efficiency is limited to consideration of whether
5 BC Hydro obtains the energy it wants for its system at
6 the lowest cost; correct?

7 A. In the context of their procurement, yes,
8 that's correct.

9 Q. Yes.

10 And the obligation, the assumed obligation of
11 Celgar to self-supply, that was not a
12 market-determined outcome, was it?

13 A. Under this hypothetical where they have to
14 generate?

15 Q. Yes.

16 A. Yes. That would be a contractually decided
17 outcome.

18 Q. In your definition of efficiency is obtaining
19 resources at the lowest possible cost, is there
20 anything in that approach that considers fairness or
21 consistent treatment of suppliers?

22 A. Well, there certainly is an element of

12:29:05 1 consistent treatment of suppliers, because that's part
2 of what--in the context of the BC Hydro procurement,
3 that's what I looked at. Fortunately, for me,
4 economists have very little to say about fairness.

5 Q. In fact, isn't it correct that all you really
6 determined is that it was cheaper for BC Hydro to
7 require Celgar to self-supply than for BC Hydro to
8 purchase that electricity?

9 A. In your hypothetical.

10 Q. In my hypothetical, yes.

11 A. In and only in your hypothetical because I
12 don't believe that's consistent with the facts, but
13 subject to check, but in your hypothetical, if
14 BC Hydro put that condition in the EPA and
15 Mr. Merwin--Celgar--agreed to it--because it's a
16 contract. They have to agree to it. So, I would
17 assume that there is some other consideration that
18 Mercer had that is not apparent to you or me that
19 caused them to agree to that rather peculiar
20 condition.

21 Q. If they agreed to it, why would there need to
22 have been a Side Letter?

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12:30:09 1 A. Well, now you're going from hypothetical
2 to--the Side Letter doesn't fit into your
3 hypothetical. Your hypothetical doesn't have a Side
4 Letter.

5 Q. On Page 47 of his Report, Dr. Fox-Penner
6 contends that the prevention of arbitrage is not
7 consistent with economic efficiency as you have
8 defined it in Footnote 80 because arbitrage, in fact,
9 directs resources to their highest value use.

10 Do you disagree?

11 A. Yes. I think that's too broad a statement.
12 I think implicit in his statement is an underlying
13 economic model of efficient markets, and what he's
14 saying is that, if, in fact, you have a situation
15 where in a market or--usually two markets, where
16 there's a mismatch between generation--sorry,
17 production costs, and price, that it demonstrates that
18 there is inefficient allocation of resources.
19 Resources aren't going to their highest and best use.
20 And arbitrage, to some mechanism, you put the
21 electricity--in the case of electricity--in a wagon
22 and drag did over to somebody else's area, and you

12:31:21 1 sell it for a higher price--would cause the resource
2 and cost balance to--resource and cost conditions to
3 come more into balance, and that would be economic
4 efficient. That is not the situation that we're
5 discussing here.

6 Q. Thank you.

7 I'm going to make a segue to the damages
8 component, which means I'm almost done.

9 I take it you would agree that if our
10 Tribunal--that our Tribunal will reach the issue of
11 damages only after it finds liability; correct?

12 A. That's the usual way. They may have a
13 different way. Apparently, Mr. Kaczmarek suggested a
14 different way, where they would look at the damages
15 first and decide whether it was de minimis, and they
16 wouldn't have to decide liability. I've never heard
17 of that.

18 Q. So, for purposes a damages assessments, you
19 cannot rely on a theory that assumes there is no
20 liability; correct?

21 A. That's correct.

22 Q. So, let's take Celgar's claims regarding its

12:32:25 1 GBL. Let's assume that the Tribunal concludes that
2 even under BC Hydro's own professed methodology, the
3 GBL was set incorrectly, that they incorrectly defined
4 what was incremental and what was preexisting. And
5 let's assume further that they conclude that the
6 nondiscriminatory GBL, one that fairly defined what
7 was incremental and what was not, resulted in a GBL of
8 249 rather than 349.

9 In that scenario, is it your contention that
10 BC Hydro would not have purchased the difference
11 between the 249 and the 349, even though the Tribunal
12 concludes that that should have been considered as
13 incremental?

14 A. Yes. That's my position because the
15 Tribunal, with all its expertise, is probably not the
16 right group to decide for BC Hydro what's incremental
17 and what's existing. You know, BC Hydro's resource
18 acquisition is to provide specific resources that have
19 specific characteristic, one of which, importantly, is
20 that it adds to the resource stack of British
21 Columbia.

22 If something already exists, regardless of

12:33:41 1 whether the Tribunal decides that it's incremental,
2 it's not incremental, and BC Hydro wouldn't buy it.
3 Because they wouldn't buy it because the EPA would be
4 rejected by the BCUC saying "but that's not
5 incremental." And the BCUC has made it quite clear
6 they're not going to approve EPAs like that.

7 Q. Okay. So, your damages assessment excludes
8 the possibility of a But-For Scenario, doesn't it?

9 A. No, it doesn't. There are two parts to my
10 damage analysis. One is just looking at the
11 appropriateness of whether liability has been shown in
12 a way consistent with the damage calculations that
13 Mr. Kaczmarek did. And the second part is, even
14 ignoring the fact that I don't believe that those
15 connections have been made, that the Measures are
16 linked to the GBL damages, I then went and looked at
17 Mr. Kaczmarek's calculations and found errors and
18 things that I think are not done correctly, and then I
19 corrected those things.

20 Q. So you've labeled Celgar's generation, all of
21 the 349 as preexisting because BC Hydro did that and
22 nobody but BC Hydro can reevaluate that? Our Tribunal

12:35:04 1 can't evaluate that and come to a conclusion? That is
2 just BC Hydro?

3 A. BC Hydro is responsible for the procurement.
4 So BC Hydro has the primary responsibility to decide
5 that. Whether--I don't know--well, I don't know
6 whether the Tribunal could order BC Hydro to consider
7 the 100-gigawatt hours that you're talking about as
8 BC Hydro has to consider it as incremental. I don't
9 know. Maybe they can. But from the perspective of
10 BC Hydro in its regulatory environment, it's precluded
11 from buying that because it is not incremental.

12 Q. But you understand that our Tribunal is not
13 going to order BC Hydro to buy anything. They're just
14 going to order Canada to give us a check if we win;
15 right?

16 A. I don't know. Maybe--if they can't order it,
17 then their decision would have no effect on BC Hydro's
18 purchase decisions. You would just get a check.

19 Q. So you label Celgar's generation
20 as--increment as preexisting because that's what
21 BC Hydro did?

22 A. No. Wait. That's not right. It is

12:36:07 1 preexisting because it is preexisting. BC Hydro
2 determined using its metric that it was preexisting.
3 But we're talking about a 1994 plant that has been
4 used for 23--you're the mathematician--23 years to
5 self-generate and there were some added enhancements
6 in 2005, 2006 predating--

7 Q. It was actually 2007, wasn't it?

8 A. I don't remember.

9 Q. Blue Goose.

10 A. I think--you're right. I think it dribbled
11 into 2007 a couple months if I recall, but I don't
12 really remember. But in any case, that asset is
13 existing. I mean, it's a matter of physics. It's a
14 matter of observation that that asset existed.

15 Q. And wasn't Tembec's hog fuel boiler in
16 existence since 2001 as a matter of physics and
17 observation?

18 A. Yes.

19 Q. So is that preexisting?

20 A. The hog boiler?

21 Q. Yes.

22 A. Yes, it's preexisting but--

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12:37:11 1 Q. There is always a "but," isn't there?

2 A. There always is. But the hog boiler was
3 incentivized by 1997 EPA, and the operation of Tembec
4 [REDACTED] [REDACTED] One of the
5 factors in the process that BC Hydro applied was to
6 consider the load, self-generation requirement absent
7 any preexisting contracts, EPAs or LDAs. So, that
8 would suggest that that's why there was some different
9 treatment for Tembec.

10 Q. Okay. But the original EPA incentivized
11 Tembec to install the hog boiler. It provided some
12 [REDACTED] to install it?

13 A. That's right.

14 Q. But once it was installed, again getting to
15 your analogy about a matter of physics, wasn't it
16 physically there and available to generate
17 electricity?

18 A. Yes.

19 Q. Okay. So, it was preexisting?

20 A. Yes, but--sorry--but, as I just explained,
21 that isn't the process that was applied to each of the
22 mills to determine what was--what was their

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12:38:33 1 preexisting generation. The resource had--was
2 certainly existing, but they wanted to incentivize [REDACTED]
3 [REDACTED] > So that's what's missing in your
4 analysis. There was--as we discussed, there was
5 this--

6 Q. So incremental really is nothing more than
7 what BC Hydro wants to incentivize?

8 A. No. Incremental includes assets that may be
9 preexisting but are idle.

10 Q. But were they idle?

11 A. << [REDACTED]

12 Q. Was that hog boiler idle?

13 A. << [REDACTED] > But BC Hydro is not totally inept. They
14 can look forward. They have--these are big customers
15 of theirs. So they have constant communication with
16 these big customers, and they are concerned about what
17 their big customers have to say.

18 And so they--it's not that they looked at one
19 minute in time and said well, it's existing or it's
20 not. They looked--I'm relying on their analysis that
21 they looked and saw there was a very high likelihood
22 in their judgment or reasonable level of likelihood in

12:39:43 1 their judgment that << [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

5 Q. And that analysis you're referring to is the
6 one that has no documentation that you've ever seen;
7 correct?

8 A. I didn't audited that calculation.

9 Q. Okay. So it's not just a matter of physics
10 and observation, is it?

11 A. In Celgar's case, yes. There is no
12 preexisting contract. There is no other consideration
13 that needs to be made.

14 Q. There wasn't a contract with FortisBC and
15 NorthPoint?

16 A. Not for firm power.

17 Q. Again, the difference between firm and
18 non-firm. Can you show me where in Mr. Dyck's
19 statement--

20 A. You just dismissed that. That's the key to
21 this. It's resource acquisition, firm power resource
22 acquisition.

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12:40:33 1 Q. Could you show me where in the RFP,
2 particularly in Addendum 8, which defined as
3 "incremental power" that was shown--that was sold to a
4 preexisting buyer, it defines that eligible for sale
5 as incremental. Could you tell me where in that
6 section of the RFP it distinguishes between "firm" and
7 "non-firm" power? Are you familiar with that
8 document?

9 A. I've seen it. I don't have it memorized.
10 But again, if you were to--trying to come up with an
11 analogy. If you were going into a bank and fill out a
12 loan application, you wouldn't have to explain that
13 you were going there to borrow money. So, it doesn't
14 have to say it's firm power. It's in a resource
15 acquisition procurement, and the only thing that
16 they're going to procure for resource acquisition is
17 firm power. It makes no sense to procure anything
18 else. It's not--it can't count to meet their resource
19 obligations.

20 Q. There is certainly a lot of unwritten rules
21 that we're not familiar with. I'm just wondering
22 where they all come from.

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12:41:45 1 A. The one I just spoke about is just good
2 utility practice. You can look in almost any utility
3 operating manual and you'll see--you could go, for
4 example, to the WECC operating manual and they'll tell
5 you what they count as meeting utility resources. You
6 can go to most--probably BCUC, but I don't know that,
7 and they would also define what they're willing to
8 accept as meeting the utilities resource obligation.

9 Q. Okay. Could you turn to Page 2 of your slide
10 presentation where you define the Measures.

11 Now, you have three Measures listed here, but
12 we've only identified two. You've separated--Celgar
13 has certainly made a claim based on G-48-09 and then
14 their second claim is about the GBL and how through
15 the Exclusivity Clause they are prohibited from
16 selling below-load energy through to third parties.
17 You've separated those two when we had them together.
18 Why are they--I mean, to get back to your forest and
19 trees analysis, we had one forest and now you're
20 giving me two trees.

21 A. You had two trees now. I've given you three
22 trees. I've separated them because this is in the

12:43:12 1 context of damages, and so the damage calculation
2 separated them into the effects of Mr. Kaczmarek's
3 analysis.

4 Q. I don't think Mr. Kaczmarek separated
5 exclusivity from--

6 A. I can't quote, but he referred to the
7 Exclusivity Clause as being the indicia of
8 load--what's his word? I don't remember--mandatory
9 load displacement or forced load displacement or
10 something.

11 Q. Okay. Could you turn to Page 5 of your slide
12 presentation.

13 A. Uh-huh. Yes.

14 Q. Now, I may be misremembering this, but I
15 think when I was in high school they taught us logic
16 as part of my math class, and I remember vividly one
17 logical concept called the fallacy of the excluded
18 middle. Are you familiar with that?

19 A. I didn't have that in my math class, but you
20 can explain it to me and I'll try to understand.

21 Q. I'll try. In your presentation when you were
22 talking about--your testimony was there was no damages

12:44:27 1 because long-term green energy sales are not
2 available, and spot non-green energy sales were priced
3 too low. Where in your analysis can I find a
4 discussion of long-term non-green energy sales, the
5 excluded middle in my hypothetical?

6 A. It's in the presentation. It's where we talk
7 about third-party sales. I mean, those would have to
8 be third-party sales.

9 Q. But couldn't there be third-party long-term
10 sales that were long term but non-green?

11 A. No, not for Celgar. Celgar couldn't get
12 transmission. That's the--and when I say
13 "transmission," well--look, it's an integral part of
14 making a long-term sale. It has to have supporting
15 transmission, firm transmission in order for it to be
16 a long-term firm sale.

17 Q. Not as a contractual matter. That's just
18 your construct?

19 A. Oh, no.

20 Q. I'm trying to separate the two components--

21 A. I didn't finish my answer--

22 Q. Can you please not--

12:45:29 1 A. I didn't finish my answer. You're
2 interrupting me. But okay. Go ahead. I'll let you
3 get away with this one.

4 Q. Just this once, please. I want to separate
5 the transmission access from the market. Did you
6 consider in your analysis the opportunity Celgar had
7 to sell its power on a long-term non-green basis?

8 A. I can't separate out the transmission because
9 it's my experience that the two are bound intimately
10 together. If you want a long-term firm sale and
11 someone is going to buy a long-term firm product,
12 somebody has to provide long-term firm transmission or
13 else the deal doesn't go.

14 Q. In your experience are long-term energy
15 contract prices tied to the spot market, or are they
16 more tied to utility long-range marginal costs?

17 A. These are business contracts, so I don't
18 know--I think if you were to look at Mid-C prices in
19 2001 or whenever, people might have been signing
20 long-term resource contracts on the basis of the spot
21 price based on a fear that the spot price was going to
22 continue to go up. I don't know. Those are business

12:46:47 1 decisions.

2 Q. But in the 2008, '09, and '10 time frame
3 we're talking about, BC Hydro is entering into EPAs
4 with self-generators on a long-term basis?

5 A. Right, correct.

6 Q. At prices above \$100 a megawatt?

7 A. Correct.

8 Q. And they're not using--they are justifying
9 those prices to the Utilities Commission on the basis
10 that they are lower than their long-run marginal cost.
11 They are not justifying them with with reference to
12 the spot market price, are they?

13 A. No, they are not.

14 MR. SHOR: Thank you. Maybe we have a break
15 and we can switch.

16 PRESIDENT VEEDER: We might even want to have
17 lunch. It is 10 to 1:00. Why don't we break now and
18 resume at 10 to 2:00.

19 Would that be convenient for the Claimant?

20 MR. SHOR: Yes.

21 PRESIDENT VEEDER: And I'm sure the Witness,
22 like us, would like lunch.

12:47:31 1 THE WITNESS: I'm happy to continue going
2 forward because I have to eat lunch by myself
3 otherwise.

4 PRESIDENT VEEDER: Well, I think you're going
5 to be here for some time, so I think we need to break.
6 We'll come back at 10 to 2:00.

7 THE WITNESS: All right. Thank you.

8 (Whereupon, at 12:48 p.m., the Hearing
9 was adjourned until 1:50 p.m., the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT VEEDER: Let's resume.

3 MS. GEHRING FLORES: Thank you,
4 Mr. President.

5 BY MS. GEHRING FLORES:

6 Q. Good afternoon, Mr. Rosenzweig.

7 A. Good afternoon.

8 Q. I'm Gaela Gehring Flores, and I represent the
9 Claimant, Mercer International, in this arbitration.
10 My colleague, Mr. Shor, has asked you some questions.
11 And I think he started hovering over the border of
12 questions with respect to damages.

13 So, with that in mind, we've talked about the
14 different hats that you wear in this proceeding, the
15 different Expert hats, and shifting to putting your
16 damages hat on, you didn't create your own damages
17 model; correct?

18 A. Correct.

19 Q. And you detail, I believe, in Appendix 2 of
20 your Second Report, Section B, what you believe to be
21 as technical errors in Mr. Kaczmarek's damages
22 analysis; is that correct?

01:56:46 1 A. Did you say Second Report?

2 Q. Appendix 2, Second Report, Section B.

3 A. Yes.

4 Q. Have you presented the Tribunal with any
5 analysis of the discrete impacts of each of these
6 errors that you identify?

7 A. No.

8 Q. So, if you haven't given the Tribunal damages
9 numbers that would allow them to accept some of the
10 corrections and reject others, they don't have that
11 option; correct?

12 A. I guess they could run the model themselves
13 or ask us to run the model for them under those--there
14 are a couple situations where we did run isolated
15 cases in the areas where Mr. Kaczmarek agreed that he
16 had made mistakes in the first--in his First Report.
17 We did run those separately.

18 Q. And is the value associated with those
19 corrections, is it in your Report or in
20 Mr. Kaczmarek's Report?

21 A. I think they're in both, but I'm not
22 100 percent sure. I think we have it somewhere in

01:58:18 1 this Report.

2 Q. Okay. I think during your presentation you
3 criticized Mr. Kaczmarek's damages analysis generally
4 because, according to you, all the corrections he
5 makes reduced the damages amounts; correct?

6 A. Correct.

7 Q. Could that be because you aren't particularly
8 pointing out any areas where Mr. Kaczmarek is being
9 conservative in his damages analysis?

10 A. I guess it could be, but it seems, to me,
11 unusual that if you took a random sample of errors
12 that they would all go in one direction. That was all
13 I was pointing out.

14 Q. When you were going through Mr. Kaczmarek's
15 Expert Reports, did you have an eye for maybe
16 sometimes when he might be too conservative?

17 A. His Report had the assumptions in it that we
18 looked at. I don't recall any--we did look at them to
19 see whether, in fact, we agreed with them. It would
20 have occurred to us that he had understated something
21 if, in fact, he had. I don't recall that.

22 Q. Could I turn you to Paragraph 168 of

01:59:44 1 Mr. Kaczmarek's First Report. And then--sorry, I'll
2 let you get there.

3 A. Yes.

4 Q. In that paragraph, Mr. Kaczmarek is
5 explaining the rate that he assumed for Celgar's
6 replacement electricity in analyzing damages. He says
7 that specifically on 18 October 2013, FortisBC
8 requested from the BCUC a rate increase of 3.3 percent
9 in 2014 and 3.6 percent from 2015-2018.

10 And then if you continue on over to the next
11 page, Mr. Kaczmarek explains: "Since BC Hydro
12 supplies nearly an eighth of FortisBC's electricity,
13 there will likely be a knock-on effect of FortisBC's
14 requested rate increases." And he's talking before
15 that--sorry, I'll read the sentence before that.
16 "After FortisBC announced its proposed rate increases
17 on 26 November 2013, BC Hydro announced price tariff
18 increases of 9 percent in 2014, 6 percent in 2015,
19 4 percent in 2016, 3.5 percent in 2017, and 3 in
20 2018."

21 And then he goes on to talk about the
22 knock-on effect that this might have in FortisBC's

02:01:28 1 future requested rate increases. And, therefore,
2 instead of using the percent increase that FortisBC
3 itself requested in 2013, he requests a rate increase
4 percentage of 4.4 percent.

5 Would that be an instance where you might
6 point out that Mr. Kaczmarek is being conservative?

7 A. Well, two, things: One, the fact that
8 they're announcing price tariff increases, I'm not
9 sure whether these are--have been approved by the
10 BCUC. It could be that this is a request, in which
11 case, no, it isn't conservative to not adopt a
12 proposed rate.

13 Second of all, the knock-on effects are not
14 laid out here, so it's not clear, you know, that he is
15 being conservative. He may be, but it's not clear.
16 But third and finally, the fact that he may have been
17 conservative in some things, if he's got a uniform
18 series of errors that uniformly go in one direction,
19 it's something that should be pointed out.

20 Q. Is 4.4 percent higher than 3.3 percent,
21 Mr. Rosenzweig?

22 A. For all number systems based on 10 that I'm

02:02:51 1 aware of, yes.

2 Q. Fine. Great.

3 Yeah, I definitely don't want to get into
4 number systems not based on 10, let me just make that
5 clear.

6 And FortisBC in 2013 only requested a
7 3.3 percent increase for 2014 and a 3.6 percent
8 increase for 2015-'18; correct?

9 A. I'm sorry. You lost me there. Based on--the
10 4.4 and the 4.0 are in this next sentence?

11 Q. We can move on.

12 Now, talking about rates, you also criticize
13 Mr. Kaczmarek for assuming that the rate established
14 in the 2008-Celgar FortisBC PSA is the appropriate
15 rate to apply to Celgar's electricity purchases in the
16 But-For Scenario; correct?

17 A. Correct.

18 Q. And just to clarify, in this But-For
19 Scenario, Mr. Kaczmarek is assuming that BC Hydro
20 would have given Celgar a lower GBL, and G-48-09 would
21 not have been issued in this But-For Scenario. Is
22 that your understanding?

02:04:15 1 A. I'd have to go look, but I'll take your
2 representation.

3 Q. Okay. I will represent that that is
4 Claimant's But-For Scenario dealing with both the GBL
5 and G-48-09.

6 And you're not disputing, are you, that the
7 PSA between FortisBC and Celgar was agreed to between
8 them and signed and executed; right? Are you
9 disputing--

10 A. No.

11 Q. Okay. And you're not disputing that it
12 actually reflected a specific rate that the Parties
13 agreed to?

14 A. Just to be clear, it's a rate that the two
15 Parties agreed they would propose to the BCUC.
16 Utilities don't get to set their own rate. So, the
17 fact that they may have agreed to a rate as, for
18 example, they agreed to for the PSA and--I think it
19 was the PSA--and the utility Commission said, "Sorry,
20 that's not appropriate," there's no guarantee--and I
21 have no information to know whether the BS--try
22 again--BCUC would approve this rate, and if they

02:05:32 1 didn't approve it, what rate they would set.

2 Q. So, the only issue that we're talking about
3 here is the fact that the BCUC never approved the PSA
4 between Celgar and FortisBC; correct?

5 A. I believe that's what we said, yes.

6 Q. Okay. Do you know how often the BCUC rejects
7 power service or Power Supply Agreement contracts that
8 have been negotiated and agreed to between a utility
9 and its customer?

10 A. I do not.

11 Q. Were you here for Mr. Swanson's testimony
12 yesterday?

13 A. Yes.

14 Q. Because we've heard quite a bit testimony
15 from Mr. Swanson yesterday that the BCUC always and
16 very quickly approves rates that are agreed to between
17 a utility and its customer.

18 So, do you disagree with Mr. Swanson?

19 A. I don't disagree with him. I don't know the
20 specific answer, how often they do that. I also know
21 that the BCUC rejected and agreed to proposals under,
22 I guess, G-48-09, or at some point they rejected a

02:06:48 1 proposed arrangement between Fortis and Celgar.

2 Q. I mean, I'll guess I'll represent to you that
3 the PSA between Fortis and Celgar was withdrawn from
4 approval after the issuance of G-48-09. It was not
5 rejected by the BCUC.

6 A. Okay. I stand corrected.

7 Q. We can all agree that it was not approved,
8 but it was not rejected.

9 Okay. So in Paragraph 140 of your second
10 statement, you've also taken issue with Navigant's
11 forecast FortisBC and BC Hydro rates as unreliable
12 because they lack BCUC approval. Is that your
13 understanding?

14 A. Yes.

15 Q. But the BC Hydro rates for 2015 and 2016 have
16 actually been approved, haven't they?

17 A. I don't know if they were--I don't know.

18 Q. Okay. Let's just contrast this with the
19 position that you take in your Expert Reports. In
20 Paragraph 142 of your Second Report, the First
21 Statement, you argue that Navigant should have used
22 Rate Schedule 37 or a standby rate; is that correct?

02:08:45 1 A. I don't think so.

2 Q. No?

3 A. No. I think, if I recall, what we were doing
4 here was saying there was the possibility a new rate,
5 and it was not mentioned, and what the effects might
6 be of that new rate.

7 Q. So, Mr. Kaczmarek is criticized for using
8 rates that haven't been approved in his But-For
9 Scenario, but he's also criticized if he doesn't
10 mention other rates that haven't been approved yet?

11 A. Well, the way rates are dealt with in many
12 jurisdictions and from what I'm reading here, I assume
13 here rates can be accepted subject to approval and
14 subject to refund. And the point was that, if, in
15 fact, these rates were accepted, and they ended up
16 resulting in a lower rate, there would be a refund
17 to--that hadn't been mentioned and might affect the
18 quantum. So, even though the rate hadn't been
19 approved, what had been put in place was the refund,
20 the subject to refund.

21 Q. That hasn't been decided or approved yet?

22 A. No. I think that was decided. I think they

02:10:07 1 accepted the rates subject to refund. That's my
2 understanding.

3 Q. Okay. With your approach, wouldn't it be
4 impossible to ever forecast electric utilities' rates
5 for the purposes of a damages analysis?

6 A. If they had ratings that were in effect, I
7 guess--if you had some understanding, demonstrated
8 some understanding of what the rates might be and your
9 analysis didn't stretch on for infinity, then it might
10 be more acceptable to make some sort of extrapolation
11 of current rates. But if you make that extrapolation
12 forever, then that gets to be a much bigger problem.

13 Q. How far out can you forecast, do you think?

14 A. I don't know that I--I'd have to think about
15 it in each case. If the rate history had been they
16 were stable for 10 years, then you might say 10 years.
17 If the utilities filed rates every year, then I would
18 say there was a real issue, making that kind of
19 extrapolation might be a real problem.

20 Q. How would you value a utility that's a going
21 concern that won't go out of business?

22 A. I'm sorry?

02:11:37 1 Q. That will not go out of business.

2 A. How would you value it?

3 Q. Yeah, how would you value it if you can't
4 forecast the rates?

5 A. We're talking about two different things.
6 We're talking about speculation and a damage
7 calculation and valuation for some other purpose which
8 you haven't established. So, the standard for doing
9 damage calculations is--you're not supposed to award
10 damages based on speculation. So, it's up, of course,
11 to the Tribunal to decide what they accept or won't
12 accept, but that's different than a valuation. If you
13 were going to value a company for some reason, then
14 you might have to forecast rates, but you know that
15 your valuation is subject to the errors of your
16 forecast.

17 Q. Mr. Rosenzweig, you understand that a
18 significant portion of our but-for damages model is
19 based on a Fair Market Value calculation; right?

20 A. A fair proportion. I think it's a third, if
21 that's what you mean.

22 Q. Sorry?

02:12:43 1 A. I think it's a third, but I don't recall
2 exactly.

3 Q. And you understand that Navigant looked at
4 Celgar's lost historical cash flows as well as the
5 diminution and Fair Market Value of Celgar; correct?

6 A. Basically, it did the same analysis twice.
7 It just characterized one as a valuation effect.

8 Q. As Navigant applied the Fair Market Value
9 standard, you understand that it looks at what a
10 hypothetical buyer would have bought Celgar for in the
11 actual world and in the but-for world. Do you
12 understand that?

13 A. Could you repeat that?

14 Q. Navigant applied the Fair Market Value
15 standard--

16 A. Right.

17 Q. --that looks at what a hypothetical buyer
18 would have bought Celgar for in the actual world
19 compared to the but-for world.

20 Is that your understanding?

21 A. Yes.

22 Q. Okay. And that is a purchase modeled in

02:13:44 1 2014; correct?

2 A. I don't remember, but I think that's right
3 but I don't remember.

4 Q. Okay. And the diminution in value between
5 the value in the actual world and the value in the
6 but-for world is the diminution in the value of Celgar
7 as a result of the Measures. Is that your
8 understanding of Mr. Kaczmarek's analysis?

9 A. That's my understanding of his thought
10 process.

11 Q. Okay. And you understand that in
12 Mr. Kaczmarek's model, he's modeling a buyer acquiring
13 Celgar with 79.5 percent equity and 20.5 percent debt?

14 A. I don't remember.

15 Q. Okay.

16 A. I mean, there is some assumed capital
17 structure for the transaction.

18 Q. Okay. And, of course, Mr. Kaczmarek uses a
19 Weighted Average Cost of Capital, and we understand
20 that that's something that you criticize him for?

21 A. That's correct.

22 Q. Okay. In your Appendix 2, Paragraph 19, also

02:14:57 1 in Appendix 3--and this is from your Second Report.

2 So, Appendix 2, Paragraph 19, and Appendix 3,

3 Paragraphs 3 and 4 of your Second Report.

4 A. I'm sorry. You're going way too fast?

5 Q. Sorry. So, Appendix 2, Paragraph 19.

6 A. Of the Second?

7 Q. Yeah, both are of the Second Report.

8 A. Okay. Appendix 2. Sorry. I'm in Kaczmarek.

9 That won't help at all. Let me try again. NERA First
10 Report.

11 Q. Second?

12 A. NERA Second Report. Appendix?

13 Q. 2.

14 A. Okay.

15 Q. And then Paragraph 19.

16 A. Paragraph 19.

17 Q. And then I just wanted to give you another
18 reference. In Appendix 3, Paragraphs 3 and 4, this is
19 all to get to the point where you assert that Celgar
20 has an Internal Rate of Return to shareholders of
21 between [REDACTED] percent and < [REDACTED] percent; is that
22 correct?

02:16:05 1 A. Yes, that's what it says in Paragraph 19.

2 Q. I believe it's actually only Paragraph 3 in
3 Appendix 3 as well. Where did you get that Internal
4 Rate of Return?

5 A. From my recollection it is from a Mercer
6 document.

7 Q. From a Mercer document? Okay. Well, I
8 believe you cite to one of your exhibits, NERA 94,
9 which is a CIBC World Markets presentation?

10 A. Yes. We cited to, I think, to two. One
11 was--

12 Q. Go ahead. Sorry.

13 A. One was Pöyry Report which was, as I
14 understand it, commissioned by Mercer.

15 Q. Okay. So you cite to a CIBC World Markets
16 Report and a Pöyry Report. The CIBC World Markets
17 Report is NERA 94?

18 A. Uh-huh.

19 Q. And the Pöyry Report is NERA 93. Can you
20 tell me what the date of those presentations are?

21 A. The CIBC is November 19, 2004, and the Pöyry
22 is November 18, 2004.

02:17:21 1 Q. And you assert that the equity Internal Rate
2 of Return that you calculated is much higher than
3 Mr. Kaczmarek's Cost of Equity and the WACC, if you
4 don't mind me calling it that.

5 A. I don't mind you calling it that. It will
6 always be higher, almost always be higher than the
7 WACC. It would be a strange situation if it wasn't
8 higher than the WACC. But, yes, our determination of
9 the equity rate was higher than his.

10 Q. Okay. So, the Internal Rate of Return is
11 based on reports from November 2004; correct?

12 A. Correct.

13 Q. So your Internal Rate of Return is that which
14 was expected by Mercer in November 2004 before
15 acquiring Celgar?

16 A. My understanding is these were reports that
17 were to analyze the acquisition. And so it was--in my
18 view, it's the minimum return, as Mr. Kaczmarek
19 pointed out. It's the decision point about to invest
20 or not to invest.

21 So, it's in my view a representation of what
22 the demanded return of Mercer was and that was the

02:18:38 1 standard definition of "Cost of Equity."

2 Q. But again, Mr. Kaczmarek's model is based on
3 a purchase in 2014; correct?

4 A. Yes.

5 Q. So, you're using an Internal Rate of Return
6 for 2004 to value a company in 2014?

7 A. No. What we're doing is the Discount Rate.
8 The damages here are supposed to be related to the
9 fact that Mercer invested in the existing mill at
10 Celgar, the 52-megawatt mill, and the damages
11 resulting in that should reflect--should be discounted
12 at the Rate of Return that Mercer intended to--or
13 demanded actually because it's the IRR of the decision
14 process, that they intended to get. And the fact that
15 10 years later their Cost of Equity is different
16 doesn't mean that--the equity they put in, which is
17 what we're talking about, in the model we're talking
18 about their equity because we subtracted the debt cost
19 so we're talking about their equity, should be
20 discounted at their demanded Rate of Return, equity
21 Rate of Return.

22 Q. I guess I'm just a little confused. I'm not

02:20:00 1 exactly sure how 2004 data would apply to a valuation
2 in a model for something purchased in 2014, but we can
3 just leave it there.

4 A. Well, the equity return refers not just to
5 the valuation but also to the cash flow that is
6 associated with the--I think it's 2009 to 2020 or 2008
7 to 2020 calculation.

8 MS. GEHRING FLORES: Just one moment.

9 (Pause.)

10 MS. GEHRING FLORES: I have no further
11 questions for you, Dr. Rosenzweig. Many apologies for
12 calling you Mister. I understand you're
13 Dr. Rosenzweig.

14 THE WITNESS: I answer to lots of things.

15 PRESIDENT VEEDER: Thank you.

16 Are there any questions from the Respondent
17 by way of redirect examination?

18 MR. DOUGLAS: Yes, but just two minutes,
19 please.

20 PRESIDENT VEEDER: Do you mean two or do you
21 mean five?

22 MR. DOUGLAS: I mean two Canadian seconds,

02:21:17 1 meaning stay.

2 PRESIDENT VEEDER: Okay.

3 (Pause.)

4 REDIRECT EXAMINATION

5 BY MR. DOUGLAS:

6 Q. Hi, Dr. Rosenzweig. Just a few questions.

7 First on Mr. Switlishoff's below-load access
8 percentage, this is Paragraph 14 of Mr. Fominoff's
9 Witness Statement where he describes the Mill Load and
10 its different components. He's explaining that the
11 total Mill Load is <<[REDACTED] megawatts, that the kraft
12 process of that mill was <[REDACTED] megawatts, and the TMP is
13 <[REDACTED] If you were to subtract the TMP away, you would
14 be left with about 41 megawatts. I'm just wondering
15 what impact that would have on the Below-Load Access
16 Percentage of Howe Sound if you remove the load of the
17 TMP line?

18 A. Well, if you remove the 75 megawatts, then
19 that would change the denominator, and that would
20 change the below-load access.

21 Q. As you mentioned, does the Celgar Mill have a
22 TMP line?

02:22:49 1 A. No.

2 Q. What is the purpose of GBL in the procurement
3 context?

4 A. Well, as I think I've said--I hope I've
5 said--the GBL in the EPA procurement process, the
6 BC Hydro procurement process, has a specific meaning,
7 a specific Application, which is it demarcates or
8 distinguishes between as far as the procurement
9 "existing" and "incremental" resources.

10 Q. Does assigning access percentages, based on
11 Mr. Switlishoff Below-Load Access methodology relate
12 in any way to that purpose?

13 A. No.

14 Q. If you could turn to Paragraph 50 of your
15 First Expert Report, please.

16 A. Yes.

17 Q. The first two sentences there, you're
18 discussing the purpose of an EPA and the GBLs, which
19 sounds to me--you can correct me if I'm wrong--is to
20 incentivize or change behavior. Mr. Shor asked you
21 some questions about Blue Goose today. Is it your
22 understanding that the EPA that Celgar signed

02:24:08 1 incentivized that project?

2 A. The Blue Goose project?

3 Q. The Blue Goose project.

4 A. No, because the Blue Goose project was
5 completed before the EPA was, as I understand it,
6 signed and agreed to.

7 Q. Is there a word that comes to mind that could
8 describe BC Hydro paying incentivized prices for
9 something that the Claimant decided to do on its own?

10 A. You mean besides "stupid"? Yes, it would be
11 a "wealth transfer."

12 Q. Finally, Ms. Gehring Flores was asking you
13 questions about a hypothetical buyer of the Celgar
14 Mill that Mr. Kaczmarek assumes. In his quantum
15 calculation, what does Mr. Kaczmarek assume about
16 BC Hydro's procurement of Celgar's self-generation?

17 A. I think he made it quite clear that he
18 assumes that BC Hydro assumes that--sorry, let me try
19 again--that BC Hydro buys all of their generation
20 above the GBL.

21 Q. And what is the lowest GBL that he
22 quantifies?

02:25:15 1 A. Zero.

2 MR. DOUGLAS: Those are my questions.

3 PRESIDENT VEEDER: Thank you very much. The
4 Tribunal has no questions. Thank you very much for
5 coming to testify. You've come to the end your
6 testimony.

7 THE WITNESS: Thank you for that.

8 (Witness steps down.)

9 PRESIDENT VEEDER: We're slightly ahead of
10 time. Is there anything we can usefully do this
11 afternoon before we adjourn until Friday morning?

12 We ask the Claimant first.

13 MS. GEHRING FLORES: Yes, Mr. President,
14 although I'm fearing your button.

15 The Claimant requests to submit 13 BCUC
16 Orders awarding Celgar and the funded--the entity
17 funded by Celgar, ICG costs in proceedings starting in
18 2010. This is in response to Mr. Swanson's testimony
19 yesterday at the transcript at 1724 and 1725, where he
20 claimed that the BCUC actually has agreed with
21 FortisBC with respect to awarding costs in BCUC
22 proceedings. And it has done so on several occasions

02:26:50 1 and, therefore, rejected Celgar's requests for costs.

2 At that point in the transcript, I reminded
3 Mr. Swanson that he was under oath. He repeated his
4 contention that the BCUC has rejected Celgar's
5 requests for cost Awards in BCUC proceedings.

6 I am requesting that the Tribunal accept for
7 submission into evidence the BCUC Orders that
8 accept--that are granting Celgar Awards for costs in
9 these proceedings. I went to counsel for Canada over
10 the break and presented them with these documents.
11 They said that they object, and we asked if they
12 would--if they would stipulate that Mr. Swanson was
13 incorrect in his testimony, and they said they would
14 not.

15 By the way, in every single case, the BCUC
16 has awarded Celgar or its related funded entity, ICG,
17 an award of costs in these BCUC proceedings.

18 PRESIDENT VEEDER: Can you show this indices
19 more specifically? Can you show us indices of the
20 transcript, more specifically, the passage?

21 MS. GEHRING FLORES: Can you pull it up,
22 Laura, please. It's the transcript at 1724 and 1725.

02:28:36 1 PRESIDENT VEEDER: Is that the final
2 transcript or the rough transcript?

3 MS. GEHRING FLORES: The final.

4 MR. DOUGLAS: Can I interject here,
5 Mr. President?

6 PRESIDENT VEEDER: Just one moment. We want
7 to see what the Application is. Unless you're going
8 to agree, in which case we --

9 MR. DOUGLAS: No, I'm sorry. I can't do
10 that.

11 PRESIDENT VEEDER: I didn't think you were.
12 Let's continue. So let's look as the passage, because
13 I can't find it.

14 MS. GEHRING FLORES: If you start at Line 13
15 on 1724.

16 PRESIDENT VEEDER: So, we start with the
17 question, "Is there any request of Celgar that you
18 have not opposed?"

19 MR. DOUGLAS: Could we blow it up. I don't
20 have a screen, either, in front of me.

21 PRESIDENT VEEDER: You should have the
22 transcript. Do you have the paper transcript?

02:29:18 1 MR. DOUGLAS: I do not at this moment, not in
2 front of me.

3 PRESIDENT VEEDER: It helps.

4 MS. GEHRING FLORES: Basically starting at
5 Line 13 from transcript 1724, down to Line 10 of 1725.

6 MR. DOUGLAS: It says--

7 PRESIDENT VEEDER: Just wait a second.

8 MR. DOUGLAS: Sorry.

9 PRESIDENT VEEDER: Just in looking at that
10 passage, what are the words that you would wish to see
11 "corrected"?

12 MS. GEHRING FLORES: So, as opposed to
13 "several" it would be "zero." And up on Line 19,
14 where he says "typically"--sorry. Up on Line 15, "I
15 believe the requests have generally been outside the
16 guidelines, so I have challenged them, and typically
17 the Commission has agreed with some those challenges."
18 "Some" should be "zero."

19 And then in answer at Line 21, "not
20 100 percent, but with some." "Some" should be "zero."
21 "I haven't calculated a percentage," da da.

22 And then on Line 5, "several" should be

02:31:20 1 "zero."

2 PRESIDENT VEEDER: And what--these documents
3 you want to show all the decisions involving Celgar?

4 MS. GEHRING FLORES: Yes. And its funded
5 entity, ICG.

6 PRESIDENT VEEDER: And all of those, you say,
7 have been--

8 MS. GEHRING FLORES: They're all cost awards.
9 It's all the BCUC awarding Celgar and ICG costs for
10 its intervention in these BCUC proceedings. Everyone.

11 PRESIDENT VEEDER: And why does costs
12 make--you say that's indicative that none of the
13 challenges were accepted?

14 MS. GEHRING FLORES: Because he's saying in
15 his testimony that there were several instances where
16 the BCUC rejected Celgar's requests for costs.

17 PRESIDENT VEEDER: So, that goes out to the
18 top of Page 1724. Really more broadly than that, but
19 you're saying it's really all about costs?

20 MS. GEHRING FLORES: Yes. It's his answer in
21 response to my question whether the BCUC has agreed
22 with FortisBC on these Awards for costs.

02:32:38 1 PRESIDENT VEEDER: This is an issue that
2 simply goes to credit, or does it go to a particular
3 substantive issue?

4 MS. GEHRING FLORES: It goes to--it really
5 does go to credibility, but it also goes to a point
6 that he was trying to make, which is Celgar is abusing
7 the BCUC proceedings. And I was asking him about
8 that: Does the BCUC agree with you with respect to
9 this abuse? Because they have this provision to award
10 costs to intervenors, and they can reject any requests
11 for Award of costs when intervenors are involved in
12 the process.

13 And FortisBC has actually challenged Celgar's
14 requests for costs and has told the BCUC that Celgar
15 is being abusive, and the BCUC has still awarded
16 Celgar costs. So, it goes to the point that
17 Mr. Swanson and Canada have generally been making,
18 which is that Celgar is abusing the BCUC proceedings.

19 I think the discussion may have started way
20 up--not way up, but it may have started on 1723.

21 PRESIDENT VEEDER: With your question?

22 MS. GEHRING FLORES: Yes. With my question

02:34:14 1 on Line 13 at transcript 1723, "And it is your
2 contention that, basically, Celgar is abusing the BCUC
3 process?"

4 PRESIDENT VEEDER: Thank you.

5 We understand this is opposed? What is the
6 Respondent's position?

7 MR. DOUGLAS: I believe, first of all, that
8 Mr. Swanson, in his testimony, stated expressly that
9 he was not accusing the Claimants of abusing the
10 BC Hydro process.

11 (Comment off microphone.)

12 MR. DOUGLAS: He states, at Line 18, it's on
13 the screen, "Whether that's classified as abuse of the
14 process, I don't know. I can't go quite that far"--"I
15 don't know that I can go quite that far."

16 So, first of all, there's a misrepresentation
17 of Mr. Swanson's testimony. Mr. President,
18 Mr. Swanson addressed some of these costs at Paragraph
19 152 of his First Witness Statement. If the Claimant
20 felt the need--

21 PRESIDENT VEEDER: This is the 1.5 percent
22 point?

02:35:56 1 MR. DOUGLAS: Correct. If the Claimant felt
2 the need to file exhibits, they could have elected to
3 do so in their Reply Memorial, rather than on the last
4 day, penultimate day of the hearing. I don't know
5 what these documents are or what they say. I don't
6 know whether they're comprehensive.

7 Is Canada free, now, to go and find documents
8 to contradict the testimony of their Witnesses? Can
9 we just--I just--this is a box that I think should be
10 closed, and we should just move on and focus on
11 preparing our closing statements.

12 PRESIDENT VEEDER: Are all these decisions on
13 cost public documents?

14 MR. DOUGLAS: I have no idea.

15 MS. GEHRING FLORES: It's my understanding
16 that they are publicly accessible. I do not believe
17 they're on the BCUC Web site, but they are accessible
18 to the public.

19 PRESIDENT VEEDER: Well, let's ask, how did
20 you get them?

21 MS. GEHRING FLORES: I got them through
22 Celgar. Celgar has them in their files.

02:36:51 1 PRESIDENT VEEDER: How long have they had
2 them in their files? Before the hearing started?

3 MS. GEHRING FLORES: I honestly don't know.
4 And they were going--and I understand that some of
5 these they requested from the BCUC because they didn't
6 have them in their files. And I think--just one
7 point--that point made in Mr. Swanson's statement, in
8 his First Statement, is not about cost Awards. He's
9 making a completely separate point. This is a point
10 that came out during his testimony. His testimony on
11 the 1.5 percent rate increase is something that--it's
12 a separate point that I dealt with Mr. Swanson later,
13 after this question. This is a completely separate
14 point.

15 MR. DOUGLAS: May I just respond?

16 PRESIDENT VEEDER: Mr. Shor, I cut you off.
17 What were you going add?

18 MR. SHOR: I was just going to make the point
19 that Ms. Gehring Flores just made, that these are
20 completely different issues. Mr. Swanson was talking
21 about different cost.

22 PRESIDENT VEEDER: Of course you may respond.

02:37:59 1 MR. DOUGLAS: What's at issue here is the
2 regulatory program under the Utilities Commission Act
3 that allows for the participation of interveners,
4 facilitates that by having the utilities, who are
5 involved in the proceedings, pay for intervenors
6 within their territory to come and participate in the
7 proceedings. So, the costs being awarded are being
8 paid by FortisBC ratepayers. So, the costs are
9 included in the 1.5 percent, which is addressed at
10 Paragraph 152 of Mr. Swanson's First Witness
11 Statement.

12 It's a bit odd, because the point actually
13 doesn't help the Claimant. Mr. Swanson testified that
14 the threshold to receive costs is incredibly low and
15 that the Claimant has availed itself of that program,
16 has received costs, which have been paid for by other
17 ratepayers inside that jurisdiction. So, the
18 documents don't actually serve them very well, but to
19 be quite honest, there's other things I have to do to
20 focus on, that my team has to focus on. We're pulling
21 together our closings.

22 I've never been part of a process where new

02:38:56 1 exhibits have been filed after the last testifying
2 Witness or Expert. Mr. Swanson is no longer here.
3 There is no longer a Witness or Expert to speak to
4 these documents. To me, it's just unprecedented and
5 unfair.

6 PRESIDENT VEEDER: Give us 10 minutes. We'll
7 break for 10 minutes.

8 (Brief recess.)

9 PRESIDENT VEEDER: Let's resume.

10 We've made a decision. We've noted the
11 Application made by the Claimant and its reasons for
12 the Application, and we accept that as a submission
13 and it's noted on the transcript. We've also noted
14 Mr. Swanson's testimony, which is that he did not
15 support in that passage at Page 1723, Lines 18 and 19,
16 the contention that basically Celgar was abusing the
17 BCUC process. And accordingly, we do not allow this
18 Application.

19 Is there anything else that Claimant wishes
20 to raise?

21 MS. GEHRING FLORES: Nothing further other
22 than at some point we are going to give you an actual

02:45:16 1 tab for one of our exhibits, for one of our previously
2 submitted exhibits. That's all.

3 PRESIDENT VEEDER: That sounds incredibly
4 important.

5 MS. GEHRING FLORES: Yes, for organizational
6 purposes.

7 PRESIDENT VEEDER: Okay. Thank you for that.
8 Anything on the Respondent's side?

9 MR. DOUGLAS: No, Mr. President.

10 PRESIDENT VEEDER: Let's adjourn and let's
11 resume on Friday. Now, we've got a fairly full day,
12 but, of course, subject to timings. I don't know if
13 we can ask our Secretary to give us even approximately
14 the timings remaining. Obviously we will be probably
15 asking questions and intervening, so don't assume that
16 the day will be quite as short as it might otherwise
17 be.

18 MS. MARTÍN BLANCO: The Claimant has 2 hours
19 and 38 minutes, and the Respondent has 2 hours and
20 25 minutes.

21 PRESIDENT VEEDER: Do you want to start at
22 9:00 as always or 9:30?

02:46:17 1 MR. DOUGLAS: 9:00 works for us,

2 Mr. President.

3 MS. GEHRING FLORES: I would propose 9:30,

4 but it's up to the Tribunal.

5 PRESIDENT VEEDER: We've got time for 9:30,
6 let's go for 9:30. You may want last-minute tabs for
7 your PowerPoint slides.

8 (Laughter.)

9 MS. GEHRING FLORES: It's all about the tabs.

10 PRESIDENT VEEDER: Okay. So 9:30, we'll
11 obviously hear the Claimant first and the Respondent
12 and then a Reply, which really should be only a Reply
13 at that stage.

14 Now, we haven't talked about anything that
15 happens after Friday. Obviously there is certain
16 things that need to be addressed, like checking the
17 transcript and if there are any errors--not, of
18 course, of the shorthand writer, but of the
19 speakers--we need to have that cleared up within a
20 certain timetable. We also need to address any
21 further submissions regarding costs.

22 Did we discuss at all any form, however,

02:47:24 1 limited, of Post-Hearing Submissions, or was Friday
2 going to be it? I'm afraid I don't remember if it was
3 raised.

4 MR. SHOR: I think we had agreed to leave
5 that for the Tribunal to decide. So, the answer to
6 your question is we've left that until Friday.

7 MR. DOUGLAS: Yes, that is fine.

8 PRESIDENT VEEDER: I mean, our present view
9 is that we do not want a repetition in writing of what
10 we have in writing and orally. But that does not
11 exclude written comments on the testimony, the oral
12 testimony that we've heard at this Hearing. We'd also
13 wish to impose a page limit. We haven't precisely
14 indicated what it might be, but the content would be
15 very specific--and it would not be a repetition of
16 what you've either said or written--by the end of
17 Friday evening, but it might also give us a chance to
18 ask particular questions which you could address in
19 writing after we've considered your Closing Oral
20 Submissions. So, if that's okay, we'll come back to
21 it Friday evening.

22 MR. DOUGLAS: Yes. I was just going to

02:48:29 1 suggest if there were specific questions or issues
2 from the Tribunal, we would very much like to avoid
3 having 300-page submissions again. If there are
4 specific issues or questions that the Tribunal would
5 like some assistance with.

6 PRESIDENT VEEDER: We're thinking not more
7 than 50 pages, maybe significantly less. We're
8 talking a fairly modest, albeit important, exercise,
9 and it focuses on the testimony and the transcript,
10 oral testimony.

11 MR. DOUGLAS: We're in your hands.

12 PRESIDENT VEEDER: Okay. We'll come back to
13 that.

14 Is there anything else that we need to think
15 about post-Friday?

16 We ask the Claimant first.

17 MR. SHOR: We don't think so, Mr. President.

18 PRESIDENT VEEDER: And the Respondent.

19 MR. DOUGLAS: No, Mr. President.

20 MS. GEHRING FLORES: Except one pre-Friday
21 is, does the Tribunal have any questions for us for
22 Friday?

02:49:13 1 PRESIDENT VEEDER: I wish we did, but right
2 now we don't. I think assume not, so do your own
3 thing for Friday.

4 MR. SHOR: You know where to find us if you
5 do.

6 PRESIDENT VEEDER: We certainly do.

7 MR. DOUGLAS: May I ask,
8 Mr. President--sorry, just one clarifying--the
9 rebuttal time, as I understood how we've discussed it
10 was going to be 20 minutes per Party. I mean, I do
11 note you have about 13 more minutes than us. I mean,
12 I guess I'm fine. I just didn't know whether you were
13 restricted to 20 minutes for your rebuttal and use
14 that additional time you have for your Closing.

15 MR. SHOR: I think that is something for the
16 Tribunal. You might want to address.

17 My understanding was that the Closing remarks
18 were capped at two hours for the initial presentation
19 and 20 minutes. So we both have the same amount of
20 time. I don't know if there was any intention that we
21 could each use our 5 or 18 minutes remaining.

22 MR. DOUGLAS: That works for us.

02:50:15 1 PRESIDENT VEEDER: I think you are 2 minutes
2 short, aren't you?

3 MR. DOUGLAS: We're w hours and 25 minutes.

4 PRESIDENT VEEDER: Oh, 25 minutes. That's
5 okay.

6 MR. DOUGLAS: So leaving it to 2 hours and
7 then 20 minutes for rebuttal is fine.

8 PRESIDENT VEEDER: That was our idea; 2 hours
9 and then 20 minutes, but our interventions would not
10 count.

11 MR. DOUGLAS: That sounds reasonable.

12 PRESIDENT VEEDER: I mean, injury time would
13 not be against you.

14 Does that answer your question?

15 MR. SHOR: As long as we can have stoppage
16 time at the end, that's okay.

17 PRESIDENT VEEDER: Stoppage time exactly.

18 Anything else?

19 MR. DOUGLAS: I'm worried about your
20 questions now.

21 No, nothing else.

22 PRESIDENT VEEDER: Okay. Until 9:30 Friday.

02:50:55 1 Thank you.

2 (Whereupon, at 2:51 p.m., the Hearing was
3 adjourned until 9:30 a.m. on Friday, July 31, 2015.)

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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