

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

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

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

SECOND WITNESS STATEMENT OF DENNIS SWANSON

27 March 2015

CONTENTS

| | |
|---|---|
| A. FORTISBC'S NEGOTIATIONS WITH MERCER CONCERNING ITS ARBITRAGE PROJECT | 1 |
| B. FORTISBC'S DETERMINATION OF A GBL FOR CELGAR IN THE BCUC G-202-12 PROCEEDING | 5 |
| C. THE CLAIMANT'S ELECTRICITY RATES UNDER THE 2008 FORTISBC-CELGAR POWER SUPPLY AGREEMENT | 6 |
| 1. FortisBC's Electricity Rates for the Celgar Pulp Mill | 6 |
| 2. The FortisBC-Celgar 2008 Power Supply Agreement | 7 |
| D. FORTISBC'S NON-PPA EMBEDDED COST POWER RATE WOULD PERMIT CELGAR TO EXPORT ALL OF ITS ELECTRICITY | 9 |

E. CONCLUSION..... 14

I, Dennis Swanson, declare as follows:

1. I am the former Director of Regulatory Affairs for FortisBC. I was promoted to Vice President of Corporate Services for FortisBC in November 2014.¹

2. In this witness statement, I respond to Mr. Merwin's assertion in his second witness statement that FortisBC did not inform him of the regulatory risks associated with its "Arbitrage" project. I will also briefly address the Claimant's characterization of FortisBC's GBL calculation for the Celgar pulp mill in the BCUC G-202-12 matching methodology proceeding. Finally, I have been asked by Canada to provide some additional information concerning the Celgar pulp mill's electricity and transmission rates under the FortisBC-Celgar 2008 Power Supply Agreement and our proposed matching methodology and rate rider for self-generators.

3. I have personal knowledge of the matters described in this witness statement, except where based on information and belief, in which case I indicate the source of the information and my belief that it is true. I have reviewed the documents attached for purposes of preparing this witness statement.

A. FORTISBC'S NEGOTIATIONS WITH MERCER CONCERNING ITS ARBITRAGE PROJECT

4. As I explained in my first witness statement,² FortisBC engaged in extensive negotiations with Mercer from June 2007 onward for a period of more than a year concerning its proposal to have FortisBC supply the electricity it normally self-generated so that it could sell all of its self-generated electricity.³ FortisBC had discussions with Mercer concerning FortisBC's perspective on the regulatory risk associated with this proposal throughout this period.

5. Mr. Merwin asserts in his second witness statement that Mr. Don Debeinne, the Vice President of Power Supply and Strategic Planning at that time, was his primary

¹ See <http://www.fortisbc.com/About/leadershipteam/Pages/default.aspx>, **R-490**.

² See generally, Denis Swanson Statement I, ¶¶ 55-75.

³ FortisBC-Zellstoff Celgar Power Supply Agreement, 21 August 2008, **R-248**.

point of contact and that he did not explain the regulatory risks associated with this proposal.⁴ This is only partially correct. Mr. Debiegne was the main point of contact for the Claimant at the outset of the negotiations (although I and other FortisBC personnel became more directly involved as the negotiations progressed). However, it is my recollection that Mr. Debiegne indicated at that time that he had discussed these regulatory risks with Celgar.

6. Although Mr. Debiegne retired in March 2011, I contacted him to confirm my recollection of events and to discuss Mr. Merwin's most recent assertions.⁵ Mr. Debiegne was willing to discuss these events and informed me that he had retained his FortisBC laptop with some of his business emails as well as some personal notes from this timeframe. He reviewed all of these materials to refresh his recollection prior to our discussion.

7. Mr. Debiegne indicated that it was apparent from the outset of his negotiations that the Claimant was a sophisticated customer that was well aware that there were regulatory risks associated with its proposal. Mr. Debiegne recalled that Mr. Merwin received regulatory advice from Celgar's consultant, Mr. George Isherwood the former Director of Regulatory Affairs for FortisBC. He also indicated that Mr. Merwin was aware that BC Hydro (and potentially the B.C. Ministry of Energy) would vigorously oppose Mercer's proposal to engage in arbitration.

8. Mr. Debiegne recalled that Mr. Merwin first contacted him concerning his proposal to sell all of Celgar's existing self-generation on June 15, 2007.⁶ He subsequently met with Mr. Merwin and discussed some of the potential regulatory problems from FortisBC's perspective during their first meeting in June 2007. In particular, he indicated to Mr. Merwin that any arrangement with Mercer could not result in FortisBC arbitrating BC Hydro's 3808 energy that it received pursuant to the 1993

⁴ Second Witness Statement of Brian Merwin (December 15, 2014), ¶ 30, footnote 30.

⁵ Mr. Debiegne and I discussed his recollection of events on February 3, 2015.

⁶ Email from Brian Merwin to Don Debiegne, Celgar-Fortis Potential Concept (June 15, 2007), at MER00292771, **R-241**.

PPA.⁷ This could have occurred, for example, if the Claimant notionally sold more self-generated energy to a third party than it actually self-generated at the pulp mill. In these circumstances, FortisBC would have almost certainly relied on some of BC Hydro's 3808 electricity to supply this difference, which could have resulted in the arbitrage of the power supplied by BC Hydro, contrary to the provisions in the 1993 PPA.⁸

9. On September 26, 2007, Mr. Debiegne emailed Mr. Merwin to advise him that FortisBC was conducting in-house regulatory research on the term of the EPA and other issues.⁹ I was the official responsible for conducting this regulatory research which indicated that there was a 50 percent chance that the BCUC would reject the Claimant's Arbitrage project.¹⁰

10. On October 24, 2007, Mr. Debiegne exchanged emails with Mr. Merwin again to explain that FortisBC was receiving some final regulatory advice.¹¹ Mr. Debiegne subsequently contacted Mr. Merwin and informed him of the results of this regulatory advice. In particular, he discussed with Mr. Merwin the relevant BCUC regulatory precedents concerning arbitrage such as BCUC Order G-38-01 and Order G-113-01. He also explained that, while FortisBC believed there was no legal requirement to file a FortisBC-Celgar Power Supply Agreement with the BCUC, we preferred to do so in light of the regulatory risks associated with the proposal. He indicated to Mr. Merwin that this was the only way to gain business certainty. The Claimant would later indicate that it

⁷ Email from Don Debiegne to Brian Merwin, June 11, 2007, at MER00292771, **R-241**. ("I don't know of any reason why Celgar could not become a "full time" load and as long as no 3808 power is exported, it should not be an issue.").

⁸ FortisBC would also have to be taking BC Hydro's 1993 PPA electricity at the same time. FortisBC does not draw on this electricity at all times throughout the year.

⁹ Email from Don Debiegne to Brian Merwin, Update, September 26, 2007, at MER00292771, **C-214**.

¹⁰ Dennis Swanson Statement I, ¶¶ 58-64.

¹¹ Email from Don Debiegne to Brian Merwin, Update, October 24, 2007, at MER00292770, **C-214** ("I have a teleconference call with our regulatory external counsel tomorrow morning at 11 which will provide me with their interpretation of the Act and how it might apply to what we want to do. After that, I will make contact and we can start working this together again.").

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also preferred to file the Power Supply Agreement with the BCUC for the same reasons—a fact that is reflected in Mr. Debiegne’s contemporaneous notes.¹²

11. On June 24, 2008, FortisBC filed its Umbrella Agreement with the City of Nelson with the BCUC.¹³ The BCUC subsequently provided this agreement to BC Hydro for comment. BC Hydro submitted its comments to the BCUC on July 16 approximately a month later.¹⁴ I explained to Mr. Debiegne that Mr. Merwin has asserted in this NAFTA proceeding that, at that time, Mr. Debiegne represented to him that the regulatory risks associated with the proposal were minimal based on a one line email he had sent the following day in which he indicated that FortisBC was “feeling like” it was still on “terra firma”.¹⁵

12. Mr. Debiegne explained that Mr. Merwin was misrepresenting this email as it was sent the day after our regulatory group had received the first BC Hydro response and we had only just started to get a sense of their arguments.¹⁶ He clarified that he was simply indicating to Mr. Merwin that FortisBC still believed that it had a credible position and arguments to make before the BCUC.

13. Finally, Mr. Debiegne was shocked to learn that Mr. Merwin referred to this proposal to purchase its existing self-generation from FortisBC as the “Arbitrage” project

¹² Don Debiegne, Personal Notes, April 18, 2008, **R-491**. Mr. Debiegne also recalled that Mr. Merwin indicated that he planned to use the threat of the sale of this energy to the United States as a “lever” to force BC Hydro to purchase its power in the Bioenergy Call. See email from Don Debiegne to Dennis Swanson, City of Nelson and Celgar Export Issue, June 26, 2008, **R-492**. (“Note that BC Hydro has declared any of Celgar’s existing generation as ineligible for the bioenergy call, so they plan on exporting it all out of the province (40+MW) which will obviously give them a lever with BC Hydro to include it in the call (i.e. keep it in the province by accepting it in the call or lose it). And the drama continues...”)

¹³ FortisBC, Letter to the BCUC re: Filing of Umbrella Agreement for Short-Term Firm or Non-Firm Point to Point Transmission Service Agreement dated April 18, 2008 between FortisBC Inc. and the Corporation of the City of Nelson; and Power Coordination Agreement dated May 14, 2008 between FortisBC Inc. and the Corporation of the City of Nelson, June 24, 2008, **R-247**.

¹⁴ Letter from Joanna Sofield (BC Hydro) to Erica Hamilton (BCUC), Re: FortisBC Inc. Filing an Umbrella Agreement for Short Term or Non-Firm Point-to-Point Transmission Service and a Power Coordination Agreement, 16 July 2008, **R-366**.

¹⁵ Email from Don Debiegne to Brian Merwin, FW: G-38-01 BCH and Exports, July 17, 2008, MER00292757, **C-214**. Mr. Debiegne was forwarding Mr. Merwin a copy of BCUC Order G-38-01 in this email.

¹⁶ Email from Dennis Swanson to Don Debiegne, Joyce Martin and Dan Egolf, FW: BC Hydro to BCUC re FortisBC Umbrella Agreement, July 16, 2008, MER00292756, **C-214**.

in his internal communications. He had difficulty believing that Mr. Merwin would use such an inflammatory term to describe this project given the likelihood of litigation concerning this issue.

B. FORTISBC’S DETERMINATION OF A GBL FOR CELGAR IN THE BCUC G-202-12 PROCEEDING

14. The Claimant asserts in its Reply that BC Hydro’s GBL methodology is not “objective” and relies on FortisBC’s calculation of a 41 MW GBL for Celgar in the BCUC G-202-12 proceeding as evidence to support its position.¹⁷ In particular, the Claimant asserts that FortisBC used BC Hydro’s GBL methodology to set this GBL but complains that we used a three year baseline period rather than a one year period that BC Hydro normally uses.

15. The Claimant fails to mention that FortisBC explained that it was modifying BC Hydro’s GBL methodology in the BCUC G-202-12 proceeding. In particular, FortisBC explained that we set the GBL using a three year period because Celgar had previously proposed this approach:

The averaging over 3 years is the method used by Celgar to calculate the average generator capacity in previous submissions (using a different timeframe). Using the single year prior to the generation addition would not change the result.¹⁸

16. FortisBC used a three year baseline (2007-2009) because we wanted to minimise the differences between the methodology Celgar had previously employed¹⁹ and our approach which was based on BC Hydro’s methodology. FortisBC also explained that the GBL would remain at 41 MW even if we used a one year baseline.

¹⁷ Claimant’s Reply, ¶¶ 288-289. (“Beyond that, FortisBC used a three-year period for averaging Celgar’s load and generation data, as opposed to BC Hydro’s one-year period, and did not use as its starting point the most current completed calendar year (then 2011), but instead used the period 2007-2009 to preserve for Celgar the benefits of its most recent investment in incremental energy, the Green Energy Project.”)

¹⁸ FortisBC, Reply to Submissions in the Matter of a Filing by FortisBC of Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), July 4, 2012, pp. 24-25, **R-266**.

¹⁹ Celgar, Evidence Submission, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 15 March 2010 at 24, **R-280**.

17. FortisBC recently filed an application with the BCUC which sets out our proposal for self-generation policies and a schedule for the submission of formal GBL guidelines.²⁰ The BCUC has established a separate proceeding to consider our application and proposal concerning self-generation policy, which will be subject to further filings in 2015.²¹ Celgar is an intervener in these proceedings.

C. THE CLAIMANT’S ELECTRICITY RATES UNDER THE 2008 FORTISBC-CELGAR POWER SUPPLY AGREEMENT

18. Although I previously provided a general description of the relevant FortisBC rate schedules,²² I have been asked by Canada to provide some additional information concerning Celgar’s electricity rates, including the blended electricity rate which would have been applicable under the FortisBC-Celgar 2008 Power Supply Agreement.

1. FortisBC’s Electricity Rates for the Celgar Pulp Mill

19. FortisBC maintains two rate schedules for transmission service for large industrial customers: (1) Rate Schedule 31 which is a flat rate; and (2) Rate Schedule 33 which is a time of use rate. FortisBC provided service to the Claimant on the time of use rate (i.e., Rate Schedule 33) from October 1, 2006 onwards.²³

20. The BCUC, however, later determined in Order G-156-10 that the Claimant could not remain on the time of use rate because FortisBC’s Electric Tariff required an executed written agreement for time of use service and the load factor for the Claimant

²⁰ Letter from Diane Roy, Director, Regulatory Services to Erica Hamilton, Commission Secretary, *Re: FortisBC Inc. (FBC), British Columbia Utilities Commission (the Commission) Decision and Order No. G-60-14 Compliance Filing, Application Regarding FBC’s Self-Generation Policy*, 9 January 2015, enclosing FortisBC Inc., Self-Generation Policy Application (9 January 2015), **R-493**.

²¹ See BCUC Order G-3-15, *FortisBC Inc. Self-Generation Policy Application* (January 13, 2015), **R-494**.

²² Dennis Swanson Statement I, ¶¶ 19-20.

²³ FortisBC had previously provided the Claimant with service using the flat rate for large industrial customers (i.e., Rate Schedule 31) pursuant to the 2000 General Service Power Contract. See General Service Power Contract, December 20, 2000, MER00280586, s. 5, **R-223**.

was not “satisfactory”.²⁴ The BCUC therefore moved the Claimant to a flat rate under Rate Schedule 31 effective January 2, 2011.²⁵

21. The Claimant brought a complaint against FortisBC a few months later concerning several issues, including the cost of its electricity service pursuant to Rate Schedule 31. The BCUC determined in Order G-188-11 that FortisBC should continue to provide the Claimant with service under Rate Schedule 31, but on an interim and fully refundable basis.²⁶ It also directed FortisBC to create for the Claimant a stand-by rate²⁷ and a rate that excluded BC Hydro’s 3808 electricity.²⁸ FortisBC has also created a stand-by rate and the BCUC is expected to issue a final decision in due course.

2. The FortisBC-Celgar 2008 Power Supply Agreement

22. FortisBC and Celgar negotiated a blended rate under the 2008 Power Supply Agreement:

Section 3.3 Payment Rates. FortisBC shall invoice Celgar for Actual Demand at the following rates:

²⁴ See BCUC, Order G-156-10 and Decision, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, 19 October 2010 (“BCUC Order G-156-10”), pp. 64-67, **R-228**. FortisBC’s electricity Tariff required an industrial customer on a time of use rate (i.e., Rate Schedule 33) to have a “satisfactory” load factor. Load factors are determined by taking the average load and dividing it by the maximum load for a specific period of time. A load factor essentially measures how efficiently a customer is using a system. The BCUC found that Celgar’s load factor was unsatisfactory or too low because it took little energy relative to its peak demand on our system. It also determined that the revenue FortisBC received from Celgar was very low in comparison to the cost of providing the pulp mill with service.

²⁵ BCUC Order G-156-10, p. 67, **R-228**.

²⁶ BCUC Order G-188-11, ¶¶ 3 and 5, **R-44**; and *In the Matter of Zellstoff Celgar Limited Partnership, A Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges*, Decision, 14 November 2011, p. 18, **R-275**. The rate was refundable effective March 31, 2011.

²⁷ BCUC Order G-188-11, ¶ 10, **R-44**; and *In the Matter of Zellstoff Celgar Limited Partnership, A Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges*, Decision, 14 November 2011, p. 46, **R-275**.

²⁸ BCUC Order G-188-11, ¶ 4, **R-44**; and *In the Matter of Zellstoff Celgar Limited Partnership, A Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges*, Decision, 14 November 2011, p. 32, **R-275**. The BCUC also directed FortisBC to develop stepped rates for transmission voltage customers, but ultimately rejected these rates in BCUC Order G-67-14.

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- (a) for the first 36MWh of electricity within an hour at the rate set out in Rate Schedule 31;
- (b) if the Actual Demand exceeds 36 MVA within an hour, then the demand set out in Rate Schedule 31 is billed at 36 MVA. However, if the Actual Demand does not exceed 36 MVA, then the demand set out in Rate Schedule 31 is billed at Actual Demand; and
- (c) for any electricity exceeding 36MWh within an hour at the rate set out in Rate Schedule 33. ...²⁹

23. This blended rate envisaged FortisBC charging Celgar a flat rate under Rate Schedule 31 that in the first half of 2009³⁰ was equivalent to C\$39.07 MWh for the first 36 MWh of electricity with a corresponding demand charge of C\$5,370 MVA for the first 36 MVA of demand each month.³¹ The current interim rate for Rate Schedule 31 service is C\$51.32 MWh with a demand charge of C\$7,170 MVA.³² FortisBC would also charge Celgar using the time of use rate for the remaining 4 MWh which in 2009 ranged from C\$20.89 MWh to C\$165.33 MWh.³³ No demand charge applied to this time-of-use component. The current interim time-of-use rates range from C\$27.57 MWh to C\$218.04 MWh.³⁴

24. FortisBC also intended to recover from Celgar the cost of transmission and certain other expenses that were associated with its notional transmission of electricity through the FortisBC system to the Kootenay Interconnection with BC Hydro.³⁵ In particular, the Claimant would have been responsible for transmission costs that were recovered

²⁹ FortisBC-Celgar Power Supply Agreement, August 21, 2008, s. 3.3., MER00279313, at MER00279319, **R-248**.

³⁰ This rate was effective from January 1–September 1, 2009.

³¹ FortisBC Rates Spreadsheet, Tab 1 - Rate Increases from 2005, **R-495**. FortisBC's rate increases over time are set out in this spreadsheet.

³² *Id.* Tab-2 BCUC Rates, **R-495**.

³³ *Id.*, Tab 1 - Rate Increases from 2005, **R-495**.

³⁴ *Id.*, Tab-2 BCUC Rates, **R-495**.

³⁵ FortisBC-Celgar Power Supply Agreement, August 21, 2008, s. 7.1., MER00279313, at MER00279320, **R-248**.

through an assumed line loss of 6.08 percent pursuant to Rate Schedule 109.³⁶ The Claimant also would have been responsible for a Scheduling, System Control and Dispatch Services fee of C\$0.86 MWh under Rate Schedule 103 and a Reactive Supply and Voltage control charge of C\$0.89 MWh pursuant to Rate Schedule 104.³⁷ The current interim price for Rate Schedule 103 service is C\$1.17 MWh and the interim price of Rate Schedule 104 is C\$1.22 MWh.³⁸

D. FORTISBC’S NON-PPA EMBEDDED COST POWER RATE WOULD PERMIT CELGAR TO EXPORT ALL OF ITS ELECTRICITY

25. Although it asserts that the BCUC and BC Hydro have imposed restrictions on its ability to sell its self-generation, the Claimant’s description of these measures and of the subsequent BCUC proceedings is incomplete and somewhat misleading.³⁹ The Claimant correctly states that the restriction in BCUC Order G-48-09 actually applies to FortisBC (i.e., that FortisBC is prohibited from selling self-generating customers BC Hydro’s 3808 electricity if these customers are simultaneously selling self-generated electricity below their load).⁴⁰ It is also correct that this restriction created a practical problem for FortisBC as it was difficult to segregate the BC Hydro 3808 electricity from the electricity that is sold to the Celgar pulp mill. The Claimant, however, appears to ignore almost all of the BCUC proceedings that followed BCUC Order G-48-09.

26. As I explained in my first witness statement,⁴¹ the BCUC in its Decision under Order G-188-11 held that “Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power.”⁴² In other words, the BCUC directed FortisBC to supply Celgar with non-PPA embedded cost power up to 100% of its load, while Celgar

³⁶ FortisBC-Celgar Power Supply Agreement, August 21, 2008, s. 7.1., MER00279313, at MER00279320, **R-248**.

³⁷ FortisBC, Tarriff Rate ID Spreadsheet, **R-495**.

³⁸ FortisBC Rates Spreadsheet, Tab-2 BCUC Rates, **R-495**.

³⁹ See e.g., Claimant’s Reply, ¶¶ 17, 33-35.

⁴⁰ Claimant’s Reply, ¶¶ 33.

⁴¹ Dennis Swanson Statement I, ¶¶ 115-125.

⁴² BCUC, Decision G-188-11, p. 49, **R-275**.

sold its self-generated electricity below the BC Hydro GBL of 40 MW. To that end, the BCUC directed FortisBC to “develop a rate for Celgar and other self-generators” based on Rate Schedule 31 (our standard embedded cost rate for industrial transmission customers), but excluding BC Hydro PPA power.⁴³ It is my understanding that, unlike Celgar, BC Hydro self-generators are precluded from selling self-generated electricity below a GBL.

27. FortisBC held consultations with its ratepayers (including Celgar) to devise a methodology to establish a rate for non-PPA embedded cost power that a self-generator could use when selling its below-load self-generation. This became the proposed “Non-PPA Embedded Cost of Power” (“NECP”) rate, which would exclude BC Hydro’s PPA electricity and ensure that there was no harm to our other ratepayers.⁴⁴ Pursuant to BCUC Order G-188-11, we proposed to permit self-generating customers to nominate up to 100% of their load to receive service using the NECP rate.

28. FortisBC planned to source power for the NECP rate using all available resources with the exception of BC Hydro’s PPA power. These sources included surplus from FortisBC’s owned generation (e.g. hydro-electric generating plants), BC Hydro non-PPA power, and the market. The NECP rate would be the difference between two embedded cost calculations with a slightly different resource stack – one with BC Hydro PPA power and one without BC Hydro PPA power. In other words, the NECP would be calculated as the delta between the cost of the replacement electricity (all embedded cost resources excluding PPA power) and the cost of Rate Schedule 31 (all embedded cost resources including PPA power⁴⁵). If there was no delta, then no NECP rate would apply.⁴⁶

⁴³ BCUC Order G-188-11, ¶ 4, **R-44**; and *In the Matter of Zellstoff Celgar Limited Partnership, A Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges*, Decision, 14 November 2011, p. 14, **R-275**.

⁴⁴ This was not a “Made-for-Celgar” rate as the Claimant alleges (Claimant Memorial, ¶ 365), but would be made available to any self-generator in FortisBC territory.

⁴⁵ Rate Schedule 31 is our standard embedded cost rate for industrial transmission customers such as Celgar.

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29. FortisBC submitted a detailed proposal for the NECP rate rider to the BCUC, which would have permitted the Claimant to sell all of its self-generation. The application provided the following example to explain how the rate rider would work in practice:

If a transmission customer elects to receive 100 GWh in each of the next two years from FortisBC to serve its load while exporting an equivalent amount of power, FortisBC will have to make a matching purchase for the entire amount. Assume, for example, that the Company is able to acquire the power from an eligible source at a hypothetical all-in cost of \$35/MWh. If, this amount of power would be available under the PPA for an average cost of \$45/MWh, no [Non-Embedded Cost Power] Rider would be required. If, however, the power was available for purchase from an eligible alternate source at \$55/MWh, a monthly rider of \$ 83,333 would be required over the two year life of the agreement, calculated as follows:

| | Customer Load (MWh) | \$/MWh | Total Cost (\$) |
|---------------------------------------|---------------------|--------|------------------|
| Matching Purchase Cost | 200,000 | 55 | 11,000,000 |
| Less: PPA Cost | 200,000 | 45 | <u>9,000,000</u> |
| | | | 2,000,000 |
| Divided by: Term of Contract (months) | | | 24 |
| Monthly NECP Rider (\$) | | | 83,333 |

In this scenario, the [Non Embedded Cost Power] rate rider would be billed to the self-generating customer in addition to any charges payable under the regular ... rate regardless of consumption.⁴⁷

⁴⁶ Letter from Dennis Swanson, Director, Regulatory Affairs to Erica Hamilton, Commission Secretary, *Re: FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Customers (the Application)*, 28 March 2013, enclosing: FortisBC Inc. An Application for Stepped and Stand-By Rates for Transmission Customers, 28 March 2013, pp. 27-29, **R-462**.

⁴⁷ Letter from Dennis Swanson, Director, Regulatory Affairs to Erica Hamilton, Commission Secretary, *Re: FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Customers (the Application)*,

30. FortisBC believed that the NECP was a fair and cost effective method of providing the Claimant with electricity to replace its self-generation while protecting the interests of other FortisBC ratepayers. Regrettably, this view was not shared by the Claimant. The Claimant supported our position that it should be permitted to sell 100% of its self-generation,⁴⁸ but had three problems with the proposed NECP rate.

31. First, the Claimant argued that the NECP should only apply to the portion of its load that would have notionally been served by BC Hydro's PPA electricity.⁴⁹ However, as FortisBC pointed out, this would have simply permitted the Claimant to arbitrage BC Hydro's PPA electricity with the portion of the electricity that was not supplied through the matching methodology. The BCUC subsequently rejected the Claimant's position for this reason.⁵⁰

32. Second, the Claimant disliked the source of the electricity, which it believed should come solely from FortisBC's owned existing resources, whether surplus or not, rather than just from surplus, or BC Hydro (non PPA) power, or the market. However, sourcing the NECP from our existing resources had the potential to increase costs to all other FortisBC ratepayers. While the Claimant took the view that it was "entitled" to have the NECP sourced from FortisBC's owned existing resources regardless of impact on other customers,⁵¹ this was not tenable from FortisBC's perspective. As we explained to the BCUC: "Clearly, the increased costs (which Celgar acknowledges) associated with

28 March 2013, enclosing: FortisBC Inc. An Application for Stepped and Stand-By Rates for Transmission Customers, 28 March 2013, p. 28, **R-462**.

⁴⁸ Claimant submission to BCUC, August 10, 2012, p. 18, **R-499**.

⁴⁹ Letter from Kim Moller, Sangra Moller LLP to Erica Hamilton, Commission Secretary, *Re: Zellstoff Celgar Limited Partnership ("Celgar") – FortisBC Inc. Project No. 3698675/Order G-54-12; Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11)*, 22 June 2012, pp. 3-5, **R-498**.

⁵⁰ BCUC, Order G-202-12 and Decision, in the Matter of FortisBC Inc., Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 15, **R-265**.

⁵¹ See e.g. Claimant submission to BCUC, August 10, 2012, p. 2, **R-499** ("The proposition that any gains that Celgar would achieve would be at the expense of other FortisBC customers relies on the premise that Celgar is not entitled to receive service. In a system where incremental utility power costs are shared by all customers, any new customer could be seen as accessing power at the expense of other customers, if its right to such access was not recognized.")

serving the Celgar load stem not from normal operating activities, but from exporting power not in excess of load.”⁵²

33. Third, the Claimant was concerned by the price of the proposed NECP rate. As the Claimant states in this NAFTA case, it was concerned that the NECP would not reflect “traditional embedded cost rates”⁵³ and would therefore be “uneconomic.”⁵⁴ This concern is, however, misplaced. Since 2009, the cost of replacement power (*i.e.*, from owned surplus generation, BC Hydro (non PPA) power, and the market) has predominantly been lower than the cost of Rate Schedule 31 and is expected to remain lower into the future. For example, FortisBC has often purchased electricity at Mid-C prices rather than from the PPA for the benefit of all its ratepayers precisely because Mid-C is cheaper. As we have indicated to the BCUC:

“As FortisBC has confirmed on a number of occasions, even if the requested NECP Rate Rider were in effect, given the state of power markets for the foreseeable future, there would be no charges attributable to the NECP Rate Rider even if a self-generating customer were exporting power not in excess of load.”⁵⁵

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

35. The Claimant’s concern about the potential price of the NECP rate is also surprising in light of its frequent assertion that it intended to sell its electricity as

⁵² FortisBC Submission to BCUC, August 17, 2012, p. 6, **R-500**.

⁵³ Claimant’s Memorial, ¶ 363.

⁵⁴ Claimant’s Memorial, ¶ 364.

⁵⁵ FortisBC Letter to BCUC, June 4, 2014, p. 2, **R-501**.

renewable energy at prices that would presumably be much higher than Rate Schedule 31 and/or the NECP. I have attempted to explain to Mr. Merwin on several occasions that FortisBC's proposals are a good deal for Celgar. After BCUC Order G-48-09 I even offered to attempt to find longer-term contractual sources as replacement electricity for Celgar sales and told him that we were willing to consult Celgar on potential long-term contracts before agreeing to them. It was our intent to find an acceptable way of supplying Celgar with electricity without arbitraging BC Hydro's 1993 PPA electricity or harming our other ratepayers.

36. The BCUC approved FortisBC's NECP methodology in Order G-202-12⁵⁶ and FortisBC subsequently filed details on the NECP rate with the BCUC on March 28, 2013.⁵⁷ A few months later the Claimant decided to intervene in and challenge the FortisBC-BC Hydro 2014 PPA, which we had filed for approval with the BCUC. The 2014 PPA set out a methodology for FortisBC to set a Customer Specific Baseline which would have been equivalent to a GBL for FortisBC customers. The Claimant raised issues in its intervention in the 2014 PPA proceeding relating to its access to BC Hydro's PPA power, which would have consequences for the NECP rate. As a result of this overlap the BCUC suspended FortisBC's parallel proceeding concerning the application for a NECP rate. A review of the NECP has now been further suspended pending the BCUC's review of FortisBC's self-generator policies.⁵⁸

E. CONCLUSION

37. As I explained in my first witness statement, throughout our negotiations with the Claimant we have strived to treat them fairly, while staying consistent with our focus on the protection of ratepayers. It is my understanding that the Claimant alleges in this NAFTA case that the BCUC has "prevented" FortisBC from selling Celgar any

⁵⁶ BCUC, Order G-202-12, ¶¶ 2-3 and *Decision, in the Matter of FortisBC Inc., Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11)*, 27 December 2012, pp. 8 and 15, **R-265**.

⁵⁷ Letter from Dennis Swanson, Director, Regulatory Affairs to Erica Hamilton, Commission Secretary, *Re: FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Customers (the Application)*, 28 March 2013, enclosing: FortisBC Inc. An Application for Stepped and Stand-By Rates for Transmission Customers, 28 March 2013, **R-462**.

⁵⁸ BCUC Order G-107-14, **R-463**.

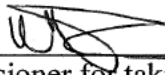
embedded cost power for its below-load sales. This is wrong for two main reasons. First, the BCUC has repeatedly encouraged the Claimant to negotiate a GBL with FortisBC. While FortisBC made reasonable attempts to negotiate a FortisBC GBL, the Claimant continued to take unreasonable positions alleging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

38. Second, the BCUC has in fact granted the Claimant access to embedded cost power for its below load sales. The BCUC made this clear in Order G-188-11 and G-202-12. While the Claimant may have been concerned that the proposed NECP rate would be higher than what it refers to as "traditional embedded cost power," I explain above why the Claimant's concern is unfounded. In this context, it is hard to comprehend how the BCUC has "prevented" the Claimant from accessing embedded cost power.

* * * * *

39. I affirm that the information provided above is true and correct.
40. I affirm this witness statement in support of Canada's Rejoinder Memorial in the *Mercer International Inc. v. Government of Canada* NAFTA arbitration and for no improper purpose.

AFFIRMED BEFORE ME)
at the City of Kelowna,)
in the Province of British Columbia,)
this 27 day of March, 2015.)



A Commissioner for taking Affidavits for)
British Columbia)

MONIC PRATCH)
Barrister and Solicitor)
FortisBC Inc.)
#100 - 1975 Springfield Road)
Kelowna, BC V1Y 7V7)



DENNIS SWANSON