

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**

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**WITNESS STATEMENT OF DENISE MULLEN**

**25 March 2015**

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I, Denise Mullen, declare as follows:

1. I was born on [REDACTED] I presently reside [REDACTED]  
[REDACTED]
2. I am the Director of Environment and Sustainability with the Business Council of British Columbia. The Business Council of British Columbia is a private sector non-profit organization that provides public policy research and advice to approximately 250 private sector enterprises in British Columbia.<sup>1</sup>
3. Before joining the Business Council of British Columbia, I worked as a Senior Project Analyst and later as Director of the Projects and Policy Branch of the B.C. Ministry of Energy, Mines and Petroleum Resources (“MEMPR”) from 1988-2002. In the Project and Policy Branch, I handled more than 20 applications for Energy Project Certificates for major capital projects and was the MEMPR lead on the Energy Project Review Process. Later, through my consulting company DMD Management Ltd., I acted as the lead writer and researcher for the preparation of Certificates of Public Convenience and Necessity applications submitted to the BC Utilities Commission (“BCUC”).
4. I have 28 years of experience in natural resource management which has focused primarily on energy and water issues. I have worked in the public, private and non-profit sectors and extensively with all levels of government, other stakeholders and First Nations in the development of policy, legislation, and the review and permitting of major projects. I was co-creator of the British Columbia-BC Hydro Water Use Planning process.
5. I was one of three process-specific experts who has advised government on the legislation which would become the *Environmental Assessment Act, 1996* as well as its supporting regulations. I have also contributed to a variety of environmental regulations, forest practices standards, land and resource management plans, environmental standards

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<sup>1</sup> See <http://www.bcbc.com/mission>, R-520. Mercer International Inc. is a member of the Business Council of British Columbia. I am appearing before this Tribunal in my personal capacity and not as a Director of the Business Council of British Columbia. The Business Council of British Columbia is not engaged with this case and has no position in relation to any of the matters under dispute.

for the mining and energy industry and water management plans. I currently write extensively on a range of environmental and energy issues and coordinate policy and regulatory responses to a variety of federal, provincial and local government initiatives on behalf of the Business Council of British Columbia.

6. I attach my *curriculum vitae* as Appendix A.

7. In this witness statement, I will describe the Energy Project Review Process, as it was then, including the procedure for applying for an Energy Project Certificate. I will then describe two energy project certificates for energy self-generation projects that I was involved with. Finally, I will discuss Celgar's application for an Energy Project Certificate in 1990.

8. 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.

9. I have reviewed the documents attached for purposes of preparing this witness statement. I am a fact witness in this NAFTA arbitration.

**A. THE ENERGY PROJECT REVIEW PROCESS**

10. As the Director of the Projects and Policy Branch, I was responsible for the Energy Project Review Process which assessed applications for Energy Project Certificates ("EPC") and Energy Operation Certificates ("EOC") for "regulated projects" that we received pursuant to the *Utilities Commission Act* ("UCA").<sup>2</sup> This process was intended to provide an "integrated" approach to the regulation of new energy projects that was, in many respects, similar to a modern environmental assessment.<sup>3</sup> It assessed

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<sup>2</sup> S.B.C. 1980, chapter 60, as amended in S.B.C. 1988, chapter 63 **R-93**.

<sup>3</sup> See B.C. Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen's Printer for British Columbia, 1982), p. 4, **R-95**; ("1982 EPRP Guide") and B.C. Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen's Printer for British Columbia, 1993), p. 1, **R-502** ("1993 EPRP Guide"). The Energy Project Review Process was one of three precursor processes on which the B.C. Environmental Assessment process would eventually be modelled.

“regulated projects” with respect to energy policy, the environment, resource and land use as well as social, financial and economic considerations.<sup>4</sup>

**1. The *Utilities Commission Act***

11. As the Energy Project Review Process concerned the approval of important energy projects, it was established under Part 2 of the *UCA*. Part 2 provided, in relevant part, that:

Energy project and operation certificates

**17.** (1) No person shall, except to the extent that he is authorized to do so under section 19(1)(c) or by a certificate of public convenience and necessity,

- (a) construct a regulated project except in accordance with an energy project certificate, or
- (b) operate a regulated project except in accordance with an energy operation certificate.

[...]

Application for certificate

**18.** An application for an energy project certificate or for the modification of it or of an energy operation certificate shall be made to the minister and shall contain information the minister prescribes.

Minister’s disposition of application

**19.** (1) On receipt of an application under section 18 the minister may

- (a) with the concurrence of the Minister of Environment, refer the application to the commission for review,
- (b) order, in the case where the application is a public utility, that the application be dealt with by the commission under Part 3 as an application for a certificate of public convenience and necessity,

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<sup>4</sup> 1982 EPRP Guide, pp. 8-9, **R-95**; 1993 EPRP Guide, pp. 2, 9-10, **R-502**.

- (c) with the concurrence of the Minister of Environment, order that the construction and operation of the regulated project is exempt from provisions of this Act specified in the Order, or
- (d) reject the application.<sup>5</sup>

12. Section 17(1) set out a prohibition on proponents of a “regulated project” from constructing or operating the project except in accordance with an EPC (or an EOC) that, following a review by the BCUC, would be issued by provincial Cabinet pursuant to section 21 of the *UCA*. This provision also indicated that this prohibition was not applicable where authorization for the regulated project had been provided pursuant to section 19(1)(c) or a Certificate of Convenience and Public Necessity. “Regulated projects” were defined to include certain energy transportation, transshipment or storage, energy use and electricity generation (i.e., thermal and hydro-electric) projects.<sup>6</sup>

13. Proponents of regulated projects initiated the Energy Project Review Process through an application to the Minister of Energy, Mines and Petroleum Resources (“The Minister of Energy”).<sup>7</sup> These applications were important as the information in them would allow the Minister of Energy to assess whether the regulated project required a full review by the BCUC and subsequent approval by provincial Cabinet. The Minister of Energy on receiving an application could refer it, with the concurrence of the Minister of Environment, to the BCUC for such a review.<sup>8</sup> The Minister could also refer applications by public utilities to the BCUC for a Certificate of Public Convenience and Necessity.<sup>9</sup> However, the most frequent way of dealing with applications was for the Minister, again with the concurrence of the Minister of Environment, to issue an Order exempting the project from further review subject to certain conditions pursuant to section 19(1)(c) of the *UCA*. I also note that these Orders sometimes had different titles (e.g., Ministers’

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<sup>5</sup> S.B.C. 1980, chapter 60, **R-93**. The Claimant’s Reply suggests that there were only three options under s.19(1) of the *UCA*. See Claimant’s Reply, ¶ 63. However, the *UCA* was actually amended in 1985 to include a fourth option, which was the rejection of the application.

<sup>6</sup> *Id.*, s 16, **R-93**.

<sup>7</sup> *Id.*, s 18, **R-93**.

<sup>8</sup> *Id.*, s. 19(1)(a), **R-93**.

<sup>9</sup> *Id.*, s. 19(1)(b), **R-93**.

Order, Disposition Order or Exemption Order). This difference was not material to the substance of these Orders.

14. Section 19(3) provided for the enforcement of Orders exempting “regulated projects” from further review. This provision provided that:

An order under subsection (1)(c) may include any condition that could be included in an energy project certificate or energy operation certificate under section 21(1)(b), and a person constructing or operating the project is bound by them in the same way as if they had been included in an energy project certificate or energy operation certificate issued to him, and sections 17 and 124 apply.<sup>10</sup>

15. The provincial Cabinet was authorized pursuant to section 21(1)(b) to impose conditions that they considered to be in the “public interest”. These conditions did not last in “perpetuity”.<sup>11</sup> Rather, the conditions lasted the lifetime of the project unless the Minister modified or rescinded them.<sup>12</sup>

16. Section 124 of the *UCA* provided for the enforcement of these conditions. In particular, section 124(1)(g) made it an offence to contravene section 17, which could have resulted in a fine of as much as \$10,000 per day.<sup>13</sup> Moreover, the Minister of Energy was permitted under section 124.1 to apply to the B.C. Supreme Court to restrain a person from constructing or operating a regulated project in a manner that was not in accordance with the Order.<sup>14</sup> I am therefore surprised by the Claimant’s suggestion that the conditions imposed by these orders were unenforceable.<sup>15</sup>

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<sup>10</sup> S.B.C. 1980, chapter 60, s.19, **R-93**.

<sup>11</sup> See Claimant’s Reply, ¶¶ 72 and 87.

<sup>12</sup> See Canfor disposition order, ¶5, **R-503**.

<sup>13</sup> S.B.C. 1980, chapter 60, **R-93**; s. 124(1)(g), **R-504**.

<sup>14</sup> *Id.*, s.124.1, **R-93**. according to section 124.1(1) of the *UCA* “Where a person, to or in respect of whom [...] (e) an order under section 19(1)(c) [...] is issued, contravenes a condition or requirement of the certificate, order or approval, the contravention may be restrained in a proceeding brought by the minister in the Supreme Court.”

<sup>15</sup> Claimant’s Reply, ¶¶ 79 and 111; David Austin Expert Statement, 15 December, 2014, ¶ 18; John Allan Statement, 11 December, 2014, ¶ 22. It is my understanding that Mr. Les MacLaren and Mr. David Bursey address the transition of these Section 19(1)(c) Orders and their enforcement under the *Environmental Assessment Act* that came into force in June 1995.

**2. Regulation 388/80 - Application Requirements under Section 18 of the Utilities Commission Act**

17. As I explained above, the application for an EPC was important as the submission informed the Minister of Energy’s decision regarding the type of review the regulated project would receive. Regulation 388/80 set out the requirements for the information that had to be provided with an application. This regulation required the proponent to provide a detailed description of the applicant, the project, a project justification, and to list any other “ancillary applications” that were concurrently being sought under the *Waste Management Act* and the *Water Act*.<sup>16</sup> Regulation 388/80 indicated that the project description must describe the purpose of the project.<sup>17</sup> The Project Rationale was to provide information on “...the technical, economic and financial feasibility of the project” as well as the project’s “... costs and benefits”.<sup>18</sup> Finally, Regulation 388/80 separately set out the information that was required for an application to amend an energy project certificate.<sup>19</sup>

18. Regulation 388/80 was supplemented by the Energy Project Review Process Guide, which was intended to provide applicants with a detailed explanation of the process.<sup>20</sup> It also provided a more detailed explanation of the information Regulation 388/80 required in an EPC application in an Appendix entitled “Information Requirements”.<sup>21</sup> This Appendix explained that the Project Justification should demonstrate the need for the energy provided by the project by forecasting energy supply (or alternatively demand) for the project.<sup>22</sup> It also indicated that these forecasts of energy demand and supply could be limited to the project itself or, where appropriate, could also

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<sup>16</sup> Reg. 388/80, s. (1), **R-412**.

<sup>17</sup> Reg. 388/80, s. (1)(b)(i), **R-412**.

<sup>18</sup> Reg. 388/80, s. (1)(c), **R-412**.

<sup>19</sup> *Id.*, **R-412**.

<sup>20</sup> 1982 EPRP Guide, **R-95**; and 1993 EPRP Guide **R-502**.

<sup>21</sup> 1982 EPRP Guide, Appendix 2 – Information Requirements, p. 23, **R-95**; and 1993 EPRP Guide, Appendix 3 – Information Requirements, p. 28, **R-502**.

<sup>22</sup> 1982 EPRP Guide, Appendix 2 – Information Requirements, p. 23, **R-95**; and 1993 EPRP Guide, Appendix 3 – Information Requirements, p. 28, **R-502**.

require regional or provincial supply and demand considerations.<sup>23</sup> The Project Justification was also to include summaries of all quantifiable and non-quantifiable direct benefits and costs to B.C. residents.<sup>24</sup>

### 3. The Procedure for an Energy Project Review

19. As I have already mentioned, the Policy and Project Branch of the MEMPR was responsible for the administration of the Energy Project Review Process.<sup>25</sup> The Ministry of Environment and the B.C. Utilities Commission, however, were also heavily involved in the process. These Ministries and the BCUC established an Energy Project Coordination Committee (“EPCC”) to coordinate the review of regulated projects and to provide advice to the Ministers.<sup>26</sup>

20. The Energy Project Review Process consisted of the pre-application phase, the application phase and the disposition of the application.<sup>27</sup> In the pre-application phase, the proponent could submit a prospectus and a draft EPC application. The prospectus was intended to introduce and provide a description of the proposed project, the project rationale, the preliminary study work and a public consultations program.<sup>28</sup> The project rationale included an explanation of the project’s purpose, its general implications for the province’s energy supply and demand, and its benefits to the province.<sup>29</sup> The preliminary studies were to provide, among other things, a preliminary environmental and socio-

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<sup>23</sup> 1982 EPRP Guide, Appendix 2 – Information Requirements, p. 23, **R-95**; and 1993 EPRP Guide, Appendix 3 – Information Requirements, p. 28, **R-502**.

<sup>24</sup> 1982 EPRP Guide, Appendix 2– Information Requirements, p. 24, **R-95**; and 1993 EPRP Guide, Appendix 3 – Information Requirements, p. 29, **R-502**.

<sup>25</sup> 1982 EPRP Guide, p. 8, **R-95**; and 1993 EPRP Guide, p. 9, **R-502**. I note that this branch had a different title at different times and is referred to as the Power and Projects Branch in the 1993 EPRP Guide. It was also referred to as the Energy Projects Analysis Branch at the time of Celgar’s application in 1990.

<sup>26</sup> 1982 EPRP Guide, p. 8, **R-95**; and 1993 EPRP Guide, pp. 9-10, **R-502**.

<sup>27</sup> 1982 EPRP Guide, pp. 10-16, **R-95**; and 1993 EPRP Guide, pp. 11-17, **R-502**. The 1982 EPRP Guide and the 1993 Guide set out these phases a somewhat differently but the process was essentially the same. The 1982 EPRP Guide contains a separate sub-heading in this section for the submission of the application which lists certain procedural requirements for the submission of the application. The 1993 EPRP Guide only included a pre-application phase and an application phase. The disposition of the application fell under the application phase.

<sup>28</sup> 1982 EPRP Guide, p. 10, **R-95**; and 1993 EPRP Guide, pp. 13-14, **R-502**.

<sup>29</sup> 1982 EPRP Guide, p. 10, **R-95**; and 1993 EPRP Guide, p. 13, **R-502**.

economic assessment for the project.<sup>30</sup> In practice, proponents sometimes preferred to simply submit a draft EPC application for feedback during the pre-application phase.<sup>31</sup>

21. Following the pre-application phase, proponents would submit an EPC application. The EPC application had to conform to the requirements set out in Reg. 388/80.<sup>32</sup> The Projects and Policy Branch would then create a list of provincial and federal ministries and agencies that we thought would have an interest in the project, circulate the application to those ministries and agencies, and request feedback from them. After the application was reviewed by these ministries and agencies, MEMPR could request supplemental information concerning the application on the basis of our comments and the comments we had received from other stakeholders. This supplemental information was often incorporated by reference into the EPC or the Order that dealt with the project. The EPC application and any supplemental information would be forwarded to the Minister of Energy and the Minister of the Environment with recommendations

22. The Minister of Energy and the Minister of Environment would then decide on the disposition of the EPC application (*i.e.*, whether the regulated project required further BCUC review for an EPC or a Certificate of Public Convenience and Necessity or could be exempted from further review through a Ministers' Order that was subject to certain conditions).

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<sup>30</sup> 1982 EPRP Guide, pp 11-12, **R-95**; and 1993 EPRP Guide, p. 14, **R-502**.

<sup>31</sup> I have reviewed the documentation associated with the Celgar EPC application, which appears to have been an example of this practice. *See* Celgar Pulp Company, Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act* – Draft Copy, September 11, 1990, **R-408**. The submission of a draft EPC application was incorporated as a separate step in the process in the 1993 EPRP Guide. *See* 1993 EPRP Guide, p. 14, **R-502**.

<sup>32</sup> *See UCA*, s. 18, **R-93**; and B.C. Reg. 388/80, s. (1), **R-412**.

#### 4. Energy Policy Context in the Early 1990s

##### a) British Columbia Energy Policy: New Directions for the 1990s

23. In November 1990, the MEMPR released *British Columbia Energy Policy: New Directions for the 1990s* (“1990 Energy Policy”), which identified four broad priorities for energy policy:

1. **Energy Efficiency** – Energy efficiency was identified as a priority as the reduction of waste, among other things, would maintain the competitiveness of B.C. industry while providing immediate environmental benefits.<sup>33</sup> BC Hydro’s Powersmart Program was identified as an important energy efficiency initiative;<sup>34</sup>
2. **Clean Energy** – Clean energy was considered a priority for energy development, supply and use. The 1990 Energy Policy emphasized the importance of the Energy Project Review Process in regulating the environmental impact of new energy projects;<sup>35</sup>
3. **Secure Energy** – MEMPR continued to emphasize secure energy through a stable and diverse energy supply as a policy priority. This priority included policies to encourage energy development activity that was necessary to ensure reliable supply was available for the domestic market.<sup>36</sup> It also emphasized the importance of developing alternative forms of energy to expand the province’s portfolio of resource options. The cogeneration of electricity was considered an important initiative to encourage secure energy;<sup>37</sup> and
4. **Energy for the Economy** – The priority encompassed the management of energy resources to encourage economic growth through competitive energy pricing, expanding private sector business opportunities and monitoring the export of energy to guarantee that domestic needs were met.<sup>38</sup>

24. These policy priorities influenced the Energy Project Review Process as MEMPR attempted to ensure that EPC applications for regulated projects were consistent with this energy policy framework. There were several specific policies in the 1990 Energy Policy

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<sup>33</sup> B.C. Ministry of Energy, Mines and Petroleum Resources, *British Columbia Energy Policy: New Directions for the 1990s* (November, 1990), p. 6, **R-98**.

<sup>34</sup> *Id.*, pp. 7-8, **R-98**.

<sup>35</sup> *Id.*, p. 11, **R-98**.

<sup>36</sup> *Id.*, p. 16, **R-98**.

<sup>37</sup> *Id.*, **R-98**.

<sup>38</sup> *Id.*, p. 20, **R-98**.

that were particularly relevant to EPC applications for electricity generation projects. For example, the 1990 Energy Policy indicated that cogeneration was an important initiative to secure energy as it "...helps to diversify the province's power supply and reduces the need for large new generating stations and long-distance transmission."<sup>39</sup> It also observed that cogeneration was becoming increasingly frequent in the pulp and paper sector and that BC Hydro was now offering to buy cogenerated electricity.<sup>40</sup>

25. The energy efficiency of certain large industrial customers was also a concern that MEMPR attempted to deal with through energy efficiency and load displacement initiatives under the BC Hydro Power Smart program which was introduced in 1989.<sup>41</sup> The Power Sense program was adopted by West Kootenay Power around the same time.<sup>42</sup>

26. Finally, the policy priorities of secure energy and energy for the economy both indicated that electricity could be exported but only if it received a provincial removal certificate and was considered surplus to domestic needs.<sup>43</sup> The 1990 Energy Policy also indicated that Powerex would attempt to facilitate exports of electricity but only if these exports were sourced from "private generation facilities built for the export market."<sup>44</sup> It also emphasized that these exports would be for "a limited term, after which the export facilities are 'recaptured' for domestic use."<sup>45</sup>

#### b) British Columbia's Electricity Export Policy

27. In November 1989, Jack Davis, Minister of Energy, issued a statement outlining a new provincial policy concerning long-term electricity exports.<sup>46</sup> Minister Davis explained in his statement that proponents that intended to export electricity would be

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<sup>39</sup> *Id.*, p. 16, **R-98**.

<sup>40</sup> *Id.*, p. 17, **R-98**.

<sup>41</sup> *Id.*, pp. 7-8, **R-98**.

<sup>42</sup> *Id.*, **R-98**.

<sup>43</sup> *Id.*, pp. 16, 20, **R-98**.

<sup>44</sup> *Id.*, p. 21, **R-98**.

<sup>45</sup> *Id.*, **R-98**.

<sup>46</sup> Jack Davis Statement on Power Export Policy, November 28, 1989, **R-505**.

subject to the Energy Project Review Process and would have to submit an EPC application. Moreover, projects that received an EPC (and an EOC) or a section 19(1)(c) Order, would then have to apply for an Energy Removal Certificate (“ERC”). The project would also require approval from the National Energy Board. Mr. Davis explained that these approvals were necessary to ensure that the project was in the public interest, was economically viable, and was environmentally sound. It is clear from his statement that he envisioned private projects (not just those submitted by BC Hydro) applying for ERCs for Long-Term-Firm (“LTF”) exports.<sup>47</sup>

28. In 1992, the new Minister of Energy, Anne Edwards, issued terms of reference to the BC Energy Council (BCEC)<sup>48</sup> to seek public input on LTF electricity exports.<sup>49</sup> While the BCEC was conducting its review, Powerex’s mandate over LTF exports was placed on hold, in effect creating a temporary moratorium on LTF exports.<sup>50</sup>

29. The result of the BCEC consultation process was the 1993 Electricity Export Policy, in which the MEMPR accepted the main recommendation of the BCEC report – “that carefully managed LTF electricity exports may proceed”.<sup>51</sup> The Electricity Export Policy made it clear that the province supported LTF electricity exports. However, LTF electricity exports would be subject to careful scrutiny to ensure they were in the province’s best interest. Finally, a key condition for LTF electricity export approval would be ensuring that “potential British Columbia buyers of electricity for domestic purposes have been given fair market access to the electricity available for export.”<sup>52</sup>

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<sup>47</sup> *Id.*, **R-505**.

<sup>48</sup> The BCEC was an advisory body to the MEMPR.

<sup>49</sup> Province of British Columbia, Ministry of Energy, Mines and Petroleum Resources, “British Columbia Electricity Export Policy, Long-Term Firm Exports”, July 12, 1993, p. 1. **R-506**.

<sup>50</sup> British Columbia Utilities Commission, “British Columbia Power and Hydro Authority and British Columbia Exchange Corporation, Energy Removal Certificate Application, Report and Recommendations to the Lieutenant Governor in Council”, June 30, 1992, p. 1, **R-507**.

<sup>51</sup> Province of British Columbia, Ministry of Energy, Mines and Petroleum Resources, British Columbia Electricity Export Policy, Long-Term Firm Exports, July 12, 1993, p. 1, **R-506**.

<sup>52</sup> *Id.*, p. 2, **R-506**. At the same time the province was formulating the Electricity Export Policy, West Kootenay Power issued an ‘All Source Supply-Side Power Acquisition Request for Proposal’. Thus, at the time, there were clearly domestic utilities – WKP –looking for electricity. Before an export permit could be granted, a potential exporter would have to offer their electricity to WKP first, at market rates. Letter from

The policy made it clear that domestic needs had to be met before electricity could be exported.

30. The 1993 Export Policy did not alter the regulatory approvals required to export electricity. Proponents were still required to submit an EPC application, and following its approval, an ERC application. To be granted an ERC, a proponent had to provide proof that a market existed for the electricity from their project and a Letter of Intent or a Memorandum of Understanding with a purchaser.<sup>53</sup>

31. Although the province supported the concept of LTF electricity exports, it was not as straightforward to facilitate them in practice. The “export” of electricity within the province to a local utility such as BC Hydro<sup>54</sup> was less complicated as it only involved securing transmission capacity with that utility.<sup>55</sup> However, securing transmission capacity could still be difficult as BC Hydro, made serving the domestic load their priority. If all available transmission capacity was being used to serve domestic customers, there would be no spare capacity available for electricity from industrial self-generators. On the other hand, self-generators who served their own loads eased some of the transmission issues by freeing the capacity that had historically been used to serve them.

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RG Siddall to Bob Learmouth, “Re: West Kootenay Power’s All Source Supply-Side Power Acquisition Request for Proposal,” June 3, 1993, **R-508**.

<sup>53</sup> British Columbia Ministry of Energy, Mines and Petroleum Resources, “Long-Term Firm Electricity Exports from British Columbia” July 12, 1993, p. 13, **R-506**.

<sup>54</sup> See, e.g., Letter from D.N. Mitra to Peter Ostergaard, “Re: Self-Generation Project at Kamloops”, and attached “Self-Generation Project at Weyerhaeuser Canada Ltd. Kamloops Pulp Mill. Energy Project Application (Preliminary), July 3, 1990” **R-509**. The Weyerhaeuser draft EPC application is discussed in more detail below.

<sup>55</sup> Contrary the Claimant’s Reply memorial where in ¶113 they claim that “Celgar had no commercially viable option for its self-generated electricity other than to use it to serve the Mill’s load,” at the time of Celgar’s application, mills were able to sell their surplus self-generated electricity to their utility, as Weyerhaeuser proposed to do. Claimant’s expert witness, David Austin, notes this himself at ¶ 31 of his export report: “[t]he only potential buyer for Celgar’s electricity at the time was the electric utility to which Celgar was interconnected, West Kootenay Power.” See also **C-308**, Inter-office Memorandum from Niall McMillan to Peter Ostergaard re: Celgar Pulp Mill Expansion Panel Recommendations, Westar Hog Fuel Options Study, attaching BC Environment Briefing Note from March 7, 1991 (30 April 1991), at Canada Bates163876.

32. The export of electricity outside of the province was even more problematic as there was no provincial wheeling policy or wheeling tariff. The province attempted to resolve this issue in 1992; however, no policy on wheeling was achieved.<sup>56</sup> In the absence of a policy, Powerex negotiated on a one-on-one basis with private power producers to determine the appropriate market based price for wheeling services for specific projects. The outcomes of these negotiations were then reviewed by the BCUC.<sup>57</sup>

33. On November 10, 1995, BC Hydro applied for approval of its wholesale transmission tariff to facilitate wheeling and the export of electricity.<sup>58</sup> The BCUC approved the Wholesale Transmission Tariff on June 25, 1996 on the condition that certain amendments were made by BC Hydro.<sup>59</sup> BC Hydro refiled its Wholesale Transmission Tariff with the BCUC on February 17, 1997. British Columbia harmonised the Wholesale Transmission Tariff with the requirements of the U.S. FERC and this would become what it now referred to as B.C.'s Open Access Transmission Tariff.

**c) British Columbia's Load-Resource Balance 1990–2000**

34. MEMPR's position on an EPC application (or in Celgar's case the modification of its EPC application) and an ERC would have been heavily influenced by the provincial and regional load resource balances at the relevant time. If the province forecasted an electricity surplus, it would have been more likely to grant an EPC application (or modification) and an ERC. The MEMPR's position on EPC applications and ERCs would have also been influenced by the need to ensure that export projects did not proceed at the expense of other domestic ratepayers. Projects that passed on these costs to domestic ratepayers would have been less likely to be approved.

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<sup>56</sup> Weyerhaeuser Canada Ltd., and Inland Pacific Energy Corp., "Draft Energy Project Certificate Application for the Kamloops Energy Recovery Project," November 1994, p 16, **R-509**.

<sup>57</sup> *Id.*, p. 16, **R-509**. By at least 1994, Powerex was negotiating wheeling rates with self-generators.

<sup>58</sup> BCUC Order G-67-96 and Decision, in the Matter of an Application by BC Hydro for Approval of Wholesale Transmission Services, 25 June 1996, p. 1, **R-314**.

<sup>59</sup> *Id.*, pp. 1 and 27, **R-314**.

35. Although BC Hydro experienced energy surpluses in the 1990s, Celgar's local utility, West Kootenay Power ("WKP") faced an energy deficit at that time. BC Hydro and WKP were in the process of finalising the 1993 PPA which would address some of the energy deficient in the early 1990s. However, WKP issued a 1993 RFP for electricity as it was still forecasting an energy deficit for the late 1990s.<sup>60</sup> Accordingly, while it is true that WKP was under no obligation to purchase Celgar's self-generated electricity,<sup>61</sup> it would have likely been interested in doing so in the early 1990s.

36. Celgar, therefore, could have proposed in its EPC application, or in a subsequent application to modify the Ministers' Order, to sell all of its electricity to WKP rather than using it for self-supply. Moreover, it is my understanding that Celgar did sell surplus energy to WKP and other local facilities.<sup>62</sup> It is less clear whether Celgar would have been permitted to export this electricity in the early 1990s. This is especially so after its EPC application where it indicated the purpose of this project was for load displacement which aligned precisely with MEMPR energy policy at this time. Moreover, Celgar operated in a region where the local utility projected shortfall of electricity. This shortfall also suggests that Celgar would not have been permitted to export until WKP's needs were satisfied.<sup>63</sup>

37. British Columbia's load-resource balance shifted in the late 1990s, resulting in changes to its policy orientation and interest in devising new ways to maintain energy security.<sup>64</sup> Moreover, the 2000 Western United States Energy Crisis increased B.C.

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<sup>60</sup> Letter from RG Siddall to Bob Learmouth, "Re: West Kootenay Power's All Source Supply-Side Power Acquisition Request for Proposal," June 3, 1993, **R-508**.

<sup>61</sup> As indicated in ¶113 of the Claimant's Reply.

<sup>62</sup> Fax from Clyde Sharp to Bob Williams/R Koots (Pope and Talbot), Re: Energy and Demand, dated June 15, 1993, **R-510**.

<sup>63</sup> British Columbia Ministry of Energy, Mines and Petroleum Resources, "Long-Term Firm Electricity Exports from British Columbia" July 12, 1993, p. 2, **R-506**. "LTF electricity exports will only be certified if there is evidence that potential buyers of electricity for domestic purposes have been given fair market access to the electricity available for export."

<sup>64</sup> BC Hydro, "Challenges and choices – Planning for a secure electricity future", March 2006, p. 3, **R-290**. *See also* 2002 Energy policy p. 18 "In the past two years, BC Hydro was a net importer due to low water levels."

awareness of its own energy security issues.<sup>65</sup> Furthermore, increased market prices for electricity in the United States (as a result of the crisis), resulted in increased incentive for Canadian electricity producers to export. Therefore, British Columbia attempted to balance industrial customers' interest in taking advantage of U.S. market prices while continuing to meet provincial needs.

38. In January, 2001, the Minister of Employment and Investment<sup>66</sup> issued a Minister's Order granting Pacifica Power Co. Ltd approval to sell surplus power generated by its hydroelectric facility to public utilities in the province or to wholesale customers. The Minister's Order was clear, however, that Pacifica could only sell its excess power; whatever was not needed to service its pulp and paper mill.

39. The Ministry and BC Hydro were concerned that Pacifica had originally sought to sell self-generated electricity that was not surplus to its own needs, and soon faced a similar demand from Howe Sound Pulp and Paper.<sup>67</sup> BC Hydro therefore requested that the BCUC initiate a process to "determine the extent of BC Hydro's obligation to serve RS 1821 customers that take their self-generation output to market".<sup>68</sup> The result was a workshop, which I attended, and BCUC order G-38-01.<sup>69</sup> Order G-38-01 permitted self-generators to sell their excess self-generated electricity; however, BC Hydro was not required to supply any increased embedded cost service to a RS 1821 customer selling its self-generation output to market.<sup>70</sup>

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<sup>65</sup> British Columbia Ministry of Energy, Mines and Petroleum Resources, *Energy for our Future: A Plan for BC*, 2002, p. 19, **R-21**.

<sup>66</sup> The responsibility for energy fell under the ambit of the Ministry of Employment and Investment at that time.

<sup>67</sup> Letter from Ray Aldeguer to Robert Pellatt, Re: British Columbia Hydro and Power Authority ("BC Hydro") Obligation to Serve Rate Schedule 1821 ("RS 1821") Customers with Self-Generating Capability, February 28, 2001, **R-82**.

<sup>68</sup> Letter from Ray Aldeguer to Robert Pellatt, Re: British Columbia Hydro and Power Authority ("BC Hydro") Obligation to Serve Rate Schedule 1821 ("RS 1821") Customers with Self-Generating Capability, February 28, 2001, **R-82**.

<sup>69</sup> BCUC order G-38-01 was also in response to Howe Sound's request to export electricity.

<sup>70</sup> BCUC Order G-38-01 at ¶1, **R-19**.

40. In 2002, the MEMPR released the policy document *Energy for our future: A Plan for BC*. According to the policy, “unless domestic energy sources are developed, British Columbians could find themselves increasingly dependent on imports and vulnerable to price swings”.<sup>71</sup> The policy explained that as the province had faced opposition to building new energy resources of its own, it was looking to the private sector for new energy development.<sup>72</sup> Furthermore, while the province continued to recognize the economic benefits of exporting energy, it was also aware of the need to meet increasing domestic demand. Provincial energy security remained an important priority.

## **B. EPC APPLICATIONS FOR ENERGY SELF-GENERATION PROJECTS IN THE FOREST PRODUCTS SECTOR**

### **1. The Canfor (Intercon) Pulp Mill**

41. One of the final EPC applications before the Energy Project Review Process was replaced by the *Environmental Assessment Act, 1996*,<sup>73</sup> was the Canfor (Intercon) pulp mill cogeneration project. This EPC application described the purpose of this project in the following manner:

<<The cogeneration facility is essentially a self-generation load displacement project and will have a rated capacity of approximately 45 MW but will, on average, operate at about [REDACTED]. The proposed facility will be constructed at a cost of approximately [REDACTED]. This will make the [Prince George Pulp and Paper] complex [REDACTED] self-sufficient from an electricity perspective. The facility will significantly reduce Canfor’s electrical power requirements from B.C. Hydro and Power Authority, as well as our purchased natural gas requirements from Inland Natural Gas.>><sup>74</sup>

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<sup>71</sup> British Columbia Ministry of Energy, Mines and Petroleum Resources, *Energy for our Future: A Plan for BC*, 2002, p. 6, **R-21**.

<sup>72</sup> *Id.*, p. 19, **R-21**.

<sup>73</sup> *Environmental Assessment Act*, R.S.B.C. 1996, chapter 119 (which has subsequently been repealed and replaced by the *Environmental Assessment Act*, S.B.C. 2002, chapter 43). B.C. Reg. 276/95, **R-94**.

<sup>74</sup> <<Canadian Forest Products Ltd. Prince George Pulp and Paper Division, Application for an Energy Project Certificate, March 21, 1995, p. 7,>> **R-511**. <<See also *Id.*, pp. iv-v,>>**R-511**. <<“Canadian Forest Products Ltd. (Canfor) proposes to construct a cogeneration power project at its Intercontinental Pulp Mill (Intercon) in Prince George. Because the incremental [REDACTED] of electrical power generated will be consumed internally by Canfor’s existing Prince George pulp and paper mill complex, the project is classified as a “self-generation load displacement cogeneration power project”. This [REDACTED]

42. I was directly involved with this EPC application as the Director of the Projects and Policy Branch at that time. The Canfor self-generation load displacement project was appealing to the MEMPR as it corresponded with a number of the priorities in the 1990s Energy Policy. First, the Canfor project met the province's energy efficiency priorities by enabling the mill to meet up to [REDACTED] of its electricity needs.<sup>75</sup> Next, the project satisfied energy security priorities by diversifying the province's electricity sources by generating electricity through load displacement through cogeneration. Finally, the load displacement project was intended to eliminate a number of "beehive burners"<sup>76</sup> near the pulp mill by redirecting wood residue to its rebuilt boiler.

43. Canfor received a Disposition Order pursuant to section 19(1)(c) of the *UCA* for its cogeneration project in July 1995.<sup>77</sup> The Disposition Order included the condition that Canfor design, locate, construct, and operate the project in accordance with their application. The Disposition Order therefore required Canfor to operate the cogeneration project for the purpose of load displacement, which would result in approximately [REDACTED] self-sufficiency.

44. Canfor was not authorised under the Disposition Order to operate the cogeneration facility for another purpose (e.g., the export of electricity). Moreover, the size of the cogeneration facility and the amount of electricity it self-generated for load displacement was important to MEMPR and we would have expected a request for a

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project will make the Prince George Pulp and Paper (PGPP) complex [REDACTED] electrically self-sufficient."

<sup>75</sup> AK MacMillan, Canfor Vice-President for Environment and Energy, supplemented the Canfor application with a letter extolling the virtues of the proposed project. In the letter he wrote "the incremental [REDACTED] of electrical power generated by the Intercon project will, however, be consumed internally at Canfor's existing pulp and paper mill complex in Prince George." This statement, along with the others in the Canfor application clearly identify the Canfor project as a load-displacement project. AK MacMillan letter to Anne Edwards, "Application for an Energy Project Certificate and a Request for a Disposition Order for a Cogeneration Project at the Intercontinental Pulp Mill in Prince George, B.C.", March 21, 1995, >> R-511.

<sup>76</sup> Beehive burners are burners that are used to dispose of wood waste from sawmills and other wood processing facilities. Beehive burners vent large amounts of smoke directly into the atmosphere and contribute to poor air quality. The elimination of beehive burners was a provincial policy objective because of their adverse effect on air quality.

<sup>77</sup> Letter from AK MacMillan to Denise Mullen-Dalmer, "Re: Intercon Cogeneration Project – Disposition Order", July 7, 1995, R-503.

modification to the Disposition Order if this had changed in a material manner. MEMPR was not concerned with relatively minor shifts or changes in the amount of self-generation.

45. Nor did MEMPR need to impose an elaborate monitoring regime concerning this project as Canfor would have had to apply for BCUC approval if it entered into contracts to sell its self-generation and sought and ERC if it intended to export the electricity.<sup>78</sup>

## 2. Weyerhaeuser Canada Ltd - Kamloops Energy Recovery Project

46. On July 3, 1990, Weyerhaeuser Canada Ltd. submitted a draft EPC application to the MEMPR for a wood residue cogeneration project. According to this draft EPC application, Weyerhaeuser expected that “sufficient power will be produced for load displacement as well as surplus power for sale to the utility. The surplus available for export will be approximately [REDACTED].”<sup>79</sup>

47. At the time of Weyerhaeuser’s proposal, I was Senior Project Analyst in the Energy Project Analysis Branch. The Weyerhaeuser KERP proposal was unique compared to the proposals submitted by Canfor and Celgar as it proposed to generate sufficient electricity to displace its load and have a surplus available for sale to BC Hydro.

48. The 1990 Weyerhaeuser project proposal satisfied a number of the province’s 1990 Energy Policy goals. It addressed the province’s concerns for energy efficiency as it was proposing to displace its load through self-generation. It also addressed energy security concerns by producing electricity through cogeneration. Finally, the project proposed to reduce the use of beehive burners by redirecting wood residue to its more environmentally friendly boilers.

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<sup>78</sup> The UCA would have been engaged if Celgar had sought to sell its self-generated electricity (1) in the export market (section 22); (2) to another end user (in which case Celgar would have fallen within the definition of a public utility and attracted the obligation to file rate schedules under sections 64-69); or (3) to a public utility (in which case an energy supply contract would have been reviewed by the commission under section 85.3). Section 85.3 is the equivalent to what is now section 71. UCA ss. 22, 54-69 **R-93** and section 85.3 which was added to the UCA by S.B.C. 1988, chapter 63, **R-504**.

<sup>79</sup> “Self-Generation Project at Weyerhaeuser Canada Ltd., Kamloops Pulp Mill. Energy Project Certificate Application (Preliminary)”, July 1990, p. 2, **R-512**.

49. The MEMPR was also receptive towards Weyerhaeuser's plan to sell surplus electricity to BC Hydro. However, the MEMPR advised Weyerhaeuser that BC Hydro would only be willing to purchase this electricity at a price that was less than or equivalent to the cost of its long-run marginal supply.<sup>80</sup>

50. Despite some exchanges between the MEMPR and Weyerhaeuser, nothing further occurred on this project until 1994. In January 1994, Weyerhaeuser had electricity from the project shortlisted by Portland General Electric Co. as part of a RFP for renewable-based generation projects. It subsequently filed a revised draft EPC application in November 1994 that proposed installing a 53MW turbine that would be used for energy exports or alternatively for sale within British Columbia.<sup>81</sup> The revised draft EPC application was necessary, in part, as Weyerhaeuser had changed the purpose of the project and the proposed use of the electricity to be generated by that project. It indicated that:

[t]he Kamloops Energy Recovery Project ("KERP") is being developed in response to a request by Portland General Electric ("PGE") for supplies of electricity generated from renewable resources. Approximately half of the KERP's electricity would be purchased by PGE and sold to its customers in the State of Oregon. [...] The balance of the KERP's output is expected to be sold to BC Hydro or other utilities in the Pacific Northwest.<sup>82</sup>

51. The project would have had to have demonstrated that it was consistent with our policy on LTF electricity exports which required it to offer the electricity from the project to domestic utilities at a fair price. Moreover, the revised draft EPC application for the KERP raised the issue of wheeling. As there was no provincial policy on wheeling at the time, Weyerhaeuser would have to engage Powerex directly in negotiations so that it would be able to export electricity along BC Hydro transmission lines. Finally, before the Weyerhaeuser KERP project could move forward, it needed an ERC. The ERC was

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<sup>80</sup> Letter from Bryan Gates to Dip Mitra, August 20, 1990, **R-513**.

<sup>81</sup> Kamloops Energy Recovery Project, Draft Energy Project Certificate Application, November 1994, p 1, **R-509**. *Also see* letter from Rick Maksymetz to Environmental Assessment Office, May 30, 2001, **R-514**. In the letter Maksymetz writes that "[s]urplus power was expected to be sold to BC Hydro or other utilities in the Pacific Northwest.

<sup>82</sup> Kamloops Energy Recovery Project, Draft Energy Project Certificate Application, November 1994, p. 1, **R-509**.

dependent upon the KERP successfully obtaining a contract with PGE. The project was ultimately abandoned by Weyerhaeuser.<sup>83</sup>

### **3. EPC Applications and Disposition Orders for Electricity Generation Projects in the Forest Products Sector**

52. As I explained in Section A.2 above, EPC applications were required to provide the information set out in B.C. Reg. 388/80 and Appendix 2 of the Guide to the Energy Project Review Process.<sup>84</sup> B.C. Reg. 388/30 and the Guide required EPC applications to provide a Project Description that explained the purpose of the project and a Project Justification which would explain the need for the electricity and provide forecasts of electricity supply and demand for the project. The purpose of the project was important to the MEMPR. Proponents that submitted an EPC application for a self-generation project that would result in load displacement had a purpose that aligned directly with MEMPR energy policy.

53. The purpose of a cogeneration project would have been more controversial from a policy perspective if the proponent intended to export the electricity. British Columbia's LTF electricity export policy supported the concept of electricity exports but at the same time maintained that this electricity had to first be offered to domestic utilities at a fair price. Moreover, LTF electricity exports required a proponent to have an MOU or letter of intent to obtain an ERC. Finally, British Columbia had not established a policy on wheeling which meant in practice that each transaction had to be separately negotiated with Powerex.

54. If a proponent intended to change the purpose of its project from the purpose described in its EPC application (e.g., from self-generation for load displacement to the electricity export), it was required to submit a request pursuant to B.C. Reg. 388/80 for a modification to the terms of its Disposition Order (or alternatively its EOC). Different considerations would apply if it was an export-oriented project, and thus it might not have been approved. The fact that Weyerhaeuser revised its draft EPC application to

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<sup>83</sup> Letter from Rick Maksymetz to Environmental Assessment Office, May 30, 2001, **R-514**.

<sup>84</sup> 1982 EPRP Guide, Appendix 2, p. 23, **R-95**; and 1993 EPRP Guide, Appendix 2, p. 28, **R-502**.

explain the change in purpose and to attempt to justify that it was consistent with provincial energy policy reflects this requirement.

55. MEMPR also required the Project Justification to describe the need for the electricity and to forecast the electricity supplied by the project. The amount of electricity an energy generation project anticipated generating was a critical term in an EPC application. I am not aware of any hydroelectric or thermal project that was approved without this information. Forecasts, as the word implies, were expected to be predictions based on the proponent's engineering and other relevant technical assessments. MEMPR understood that there might be some variation in actual supply and demand once the project became operational because of issues such as equipment performance and fuel availability. This meant that MEMPR was not over prescriptive in enforcing these forecasts.<sup>85</sup> However, we would have expected a proponent to submit a request for a modification Order if the amount of electricity it produced changed in a material manner. This actually occurred in respect of both the [REDACTED] energy generation projects which changed the size of their energy generation facilities after they had received a Disposition Order.<sup>86</sup>

56. The Ministers' Orders and Disposition Orders I was involved with, all contained a clause that contained language that was identical to (or very similar) to that found in the Canfor and Celgar Orders indicating that the project would be "designed, located, constructed, and operated" in accordance with the application.<sup>87</sup> This clause reflected the

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<sup>85</sup> The Canfor application states that nameplate capacity for new boiler would be 45MW, its peak output was likely to be 43MW, and its yearly average output would be closer to 38MW. The differences in these values would be due to variables such as fuel quality and equipment performance. Canadian Forest Products Ltd. Prince George Pulp and Paper Division, Application for an Energy Project Certificate, March 21, 1995, p. 21, **R-511**.

<sup>86</sup> See e.g., Letter from Doug Dryden to Denise Mullen, Re: Modification to NW Energy Disposition Order, dated April 11, 1991, and attached draft modification order, **R-515**. See also Letter from Doug Dryden to Denise Mullen-Dalmer, Re: NW Energy – Revision of Disposition Order, dated December 16, 1993, and attached materials, **R-516**.

<sup>87</sup> See "In the matter of an application by Canfor Corp. (Canfor) for an energy project certificate application for the Prince George Wood Residue Cogeneration Project", signed 19 June, 1995 by Anne Edwards, Elizabeth Cull, AK MacMillan and Richard Weinman, **R-470**. "in the matter of an application by Howe Sound Pulp and Paper Limited for an Energy Project Certificate for the Howe Sound Pulp and Paper Thermal Electric Power Plant, Disposition Order" signed 14 June, 1990 by Jack Davis and John Reynolds, **R-517**. "In the matter of an application (the Application) by NW Energy (Williams Lake) Corp. (NWE)

MEMPR's expectation that the project would remain within the scope of the EPC application. It was intended to be binding. British Columbia relied on applications to describe the purpose of the project and to provide it with forecasts of electricity generation so that MEMPR could determine how the project would affect the B.C. load resource balance in the future. If a project proponent intended to vary considerably from what they proposed in their application, it was expected that they would apply for a modification to their Disposition Order.

### C. THE CELGAR EPC APPLICATION

57. On August 23, 1990, Peter Ostergaard wrote to Celgar to inform it that it was required to submit an application for an EPC.<sup>88</sup> This EPC application was handled by Peter Ostergaard and my former colleague Niall McMillan.<sup>89</sup> However, I was copied on Mr. Ostergaard's earlier letter to Mr. Frank Blassetti concerning the Celgar pulp mill expansion in the context of the Major Project Review Process.

58. Mr. Ostergaard indicated in this letter that:

[P]ulp mill expansions have been identified as a very significant component of new electricity demand in British Columbia in the 1990s. As such, the Ministry wants to ensure that load displacement (i.e., co-generation, conservation and on-site woodwaste electric generation) is thoroughly explored before utilities are forced to build expensive new generation resources to serve expanded industrial loads. Therefore, the proponent should address the following items in detail: ... What are the proposed expanded mill's electricity requirements? How much of this will be generated on-site? How much will be bought from WKPL and at what cost?<sup>90</sup>

59. He would later reiterate the same concerns in his letter which informed Celgar that it was required to submit an EPC application.<sup>91</sup> Mr. Ostergaard was certainly aware

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for an Energy Project Certificate to Construct and Operate the Williams Lake Generating Station" signed 13 November, 1990 by Jack Davis, John Reynolds, and Donald Fairbairn, **R-518**.

<sup>88</sup> Letter from Peter Ostergaard to R.C. Wigen, August 23, 1990, **R-96**.

<sup>89</sup> It is my understanding that Canada has attempted to locate Mr. McMillan but was unable to do so.

<sup>90</sup> Memorandum from Peter Ostergaard to Frank Blasetti, Proposed Celgar Pulp Mill Expansion, 15 January 1990, p. 1, **R-101**.

<sup>91</sup> Letter from Peter Ostergaard to R.C. Wigen, August 23, 1990, **R-96**.

that proponents who provided information in their EPC application concerning the purpose of an energy generation project and the amount of energy it would generate would be required to “operate” the project in accordance with their application. This was a standard condition that we imposed in all of our Orders issued pursuant to section 19(1)(c). This would be the only reason why MEMPR would request the inclusion of this information in the application.

60. The Energy Project Coordinating Committee also held a meeting on August 23, 1990 which discussed the Celgar EPC application.<sup>92</sup> I was present at this meeting and prepared the meeting notes which summarized the committee’s discussion of Celgar in the following manner:

The cogeneration portion of the mill expansion will generate between 48 MW and 52 MW of power and is considered a “regulated project”. Therefore, the project will be reviewed jointly under the Major Project Review Process and the Energy Project Review Process. A letter to this effect has already been sent to Celgar. In a January 1990, letter from the MEPR to the Ministry of Economic and Regional Development, the lack of information on power generation was identified and additional information was requested. However, this was paraphrased in the Stage 1 review comments that were sent to Celgar. It is likely that a supplement to the Stage 2 information request will cover any concerns that may be raised about the cogeneration portion of the project.<sup>93</sup>

61. I do not now have a current recollection of this meeting. However, I believe that these minutes refer to the correspondence Mr. Ostergaard prepared concerning Celgar. I believe, contrary to Mr. Allan’s contention, that these contemporaneous notes indicate that MEMPR officials believed that the amount of self-generation that was used for load displacement to be an important consideration that was to be addressed in the EPC application.

62. I believe that the Energy Project Coordinating Committee considered the fact that this project would use its self-generation for load displacement to be important. The representation that Celgar would be 100% self-sufficient in normal conditions would

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<sup>92</sup> Energy Project Coordinating Committee, Meeting Notes/Action Points (August 29, 1990), **R-519**.

<sup>93</sup> [Emphasis Added] Energy Project Coordinating Committee, Meeting Notes/Action Points (August 29, 1990), p. 6, **R-519**.

have also been critical to their decision. MEMPR requested that this information be included in the Order for a reason. It aligned exactly with MEMPR policy concerning energy security and alternative energy sources.

63. Finally, I will briefly comment on Mr. Austin's argument that the Ministers' Order could not regulate the purpose of the project as it was not an "energy use project".<sup>94</sup> I have never understood the regulation of "energy use projects" to have anything to do with determining the "use" that the energy is put to. Rather, this type of regulated project had to "use, convert or process" an energy resource at a rate of more than 3 PJ under the relevant definitions of the *UCA*.<sup>95</sup> This is clearly set out in both the 1982 and 1993 Guides to the Energy Project Review Process.<sup>96</sup> In my view, the rationale for having the power to review energy use projects under Part 2 of the *UCA* was to be able to assess issues (including those relating to energy policy as well as environmental, resource, land use, social, financial and economic considerations) arising from very large new electrical loads in the province.

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<sup>94</sup> David Austin Report, ¶36.

<sup>95</sup> See *UCA*, s. 16, **R-93**. The definition of "regulated project" includes energy use projects in subparagraph (c). However, the term "energy use project" is separately defined as "a mill

<sup>96</sup> See 1982 EPRP Guide, p. 6, **R-95**; and 1993 EPRP Guide, p. 4, **R-502**. ("any new project capable of using 3PJ of energy per year, or the addition of 3 PJ to an existing project. This is equivalent to 95 MW of continuous electrical supply. Examples of existing facilities which exceed this capacity include the Alcan smelter (Kitimat), Cominco smelter (Trail), MacMillian Bloedel (Powell River), and Skeena Cellulose pulp and paper mill (Prince Rupert).")

64. I affirm that the information provided above is true and correct.

65. 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 Vancouver, )  
in the Province of British Columbia, )  
this 25<sup>th</sup> day of March, 2015. )  
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\_\_\_\_\_)  
A Commissioner for taking Affidavits for )  
British Columbia. )

 )  
\_\_\_\_\_)  
DENISE MULLEN