

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

BETWEEN:

MERCER INTERNATIONAL INC.,

Claimant / Investor

AND:

GOVERNMENT OF CANADA

Respondent / Party

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

EXPERT REPORT OF

**DAVID BURSEY
BENNETT JONES LLP**

28 March 2015

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1. My name is David Bursey and I reside in Vancouver, British Columbia. My work address is 1055 West Hastings, Vancouver, British Columbia.
2. I have no past or present involvement with the disputing parties, counsel or the Tribunal related to the matter in dispute.
3. I have reviewed the Claimant's Memorial, Canada's Counter-Memorial, the Claimant's Reply, the Claimant's Witness Statements from Peter Ostergaard, Les McLaren, Lester Dyck, John Allen, Denise Mullen and Dennis Swanson, the Expert Reports of David Austin, Elroy Switlischoff, Dr. Peter Fox-Penner, Dr. Michael Rosensweig, and related exhibits for the purpose of preparing this report.

A. PURPOSE OF THIS REPORT

4. I have been asked by the Government of Canada for my opinion, on the following issues
 - a) The basic statutory framework for British Columbia Utilities Commission ("BCUC") public utility regulation
 - b) The reasonableness of the BCUC's regulation of industrial customers' entitlement to receive utility power supply while selling self-generated power
 - c) The reasonableness of the BCUC's regulation of the Claimant's access to BC Hydro and FortisBC embedded cost power while selling self-generated power to others
 - d) Dr. Fox-Penner's criticism of BCUC regulation noted in (b) and (c)
 - e) Mr. Austin's views on the Claimant's commitment under the Ministers' Order to supply self-generated power to the Celgar mill

B. MY RELATED PROFESSIONAL BACKGROUND

5. I am a partner with the law firm of Bennett Jones LLP and am based in Vancouver, British Columbia. Appendix 4 to this report contains my *curriculum vitae*. A brief summary of my relevant experience follows.

6. I practice primarily in the area of regulatory law, with a focus on energy projects, public utility regulation, environmental assessment, and aboriginal. I was called to the bar in Ontario in 1984 and British Columbia in 1991.

7. I have represented clients in proceedings before several federal and provincial regulatory agencies. I have also represented several government agencies during energy regulatory tribunal proceedings.

8. At the federal level, I have represented clients in proceedings before the National Energy Board ("NEB"), the Canadian Transportation Agency, the Competition Bureau, and the Canadian Environmental Assessment Agency. The clients have included pipeline companies, energy companies, resource companies, industry associations, government agencies, port authorities, marine pilot associations, aboriginal groups, and end-use industrial customers.

9. I was also part of the legal branch of the NEB from 1987 to 1991, advising the NEB and acting as NEB counsel during hearings involving: pipeline facilities; rates and terms for service; and export and import permits. Subsequent to my departure from the NEB, I was engaged by the NEB to represent the NEB in a hearing related to a pipeline system in British Columbia.

10. I am also currently engaged by the Canadian Environmental Assessment Agency to represent the Federal Review Panel, appointed under the *Canadian Environmental Assessment Act*, to assess Taseko Mines Limited's New Prosperity Gold-Copper Mine in British Columbia.

11. At the provincial level, I have represented clients in proceedings before the BCUC, the Environmental Assessment Office, the Environmental Appeal Board, and the Forest Appeals Board. The clients have included public utilities, energy companies, resource companies,

industry associations, municipalities, crown corporations, telecommunications companies, industrial customers, and aboriginal groups.

12. I have also been engaged by the BCUC as commission counsel on several proceedings, including

- a) facilities and rates applications by alternate energy producers and applications to approve the related energy supply contracts entered into with Fortis Energy Inc. (an affiliate of FortisBC Inc. that is engaged in the natural gas distribution business)
- b) hearings under Part 2 of the *Utilities Commission Act* ("UCA"), related to
 - i. the removal of electricity from British Columbia by BC Hydro for export
 - ii. the construction of substantial hydropower generation facilities, known as the Kemano Completion Project, by Alcan Inc. (now Rio Tinto Alcan Inc.)
- c) an inquiry into the conduct of gas marketers.

13. I have been involved in judicial reviews and appeals arising out of various energy regulatory proceedings in which I have participated. I have also been involved in appeals to the British Columbia Court of Appeal and the Supreme Court of Canada that have interpreted the UCA and the jurisdiction of the BCUC.

C. EXECUTIVE SUMMARY

14. The conclusions of my Report are as follows

- a) The BCUC regulation of industrial customers' entitlement to receive utility power supply while selling self-generated power has been reasonable and responsive to the evolving circumstances associated with the issue.

- b) The BCUC's regulation of the Claimant's access to BC Hydro and FortisBC embedded cost power was reasonable and consistent with the UCA and provincial energy policy.
- c) The Ministers' Exemption Order issued in 1991 for the power generation facilities associated with the Celgar Modernization Project and its conditions remain in effect.
- d) The Ministers' Exemption Order permits Celgar to construct and operate power generation facilities for the purpose of supplying power to the Celgar pulp mill but does not permit sales of self-generated power to third parties.

D. ORGANIZATION OF THIS REPORT

15. I have organized the balance of my report as follows to elaborate on the analysis that supports my conclusions

- a) Section E summarizes the regulatory regime under which the BCUC operates when regulating public utilities.
- b) Section F reviews the key principles established by the BCUC to regulate industrial customers' entitlement to receive utility power supply while selling self-generated power.
- c) Section G reviews
 - i. the relationship between BC Hydro, FortisBC, and Celgar related to the arbitrage issue, and
 - ii. the BCUC's approach to regulating the Claimant's access to BC Hydro and FortisBC embedded cost power.

- d) Section H reviews the Ministers' Exemption Order for the Celgar Project and the implications for the Claimant's ability to sell power to third parties.

E. PUBLIC UTILITY REGULATION IN BRITISH COLUMBIA

16. In British Columbia, the BCUC regulates public utilities. The BCUC is an independent administrative tribunal that operates under the authority of its enabling statute, the UCA.

17. The BCUC describes its mandate as follows

We are dedicated to our mission of ensuring ratepayers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities we regulate, and affording shareholders a reasonable opportunity to earn a fair return on their invested capital. Our decisions are made in the public interest and consider all relevant legislation and regulations, as well as government policies and business needs of regulated companies.

The BC Utilities Commission regulates energy utilities in British Columbia ... and intra-provincial pipelines.

The Commission's governing act is the Utilities Commission Act and it has responsibilities under the Administrative Tribunals Act and the Freedom of Information and Protection of Privacy Act. These pieces of legislation ensure fairness, access, and transparency in the way we conduct our business.¹

18. The BCUC's governing legislation is the UCA but the BCUC also considers B.C. energy policy as part of its decision-making in the public interest. When considering government policy, the BCUC has independent discretion in how it interprets policy within its mandate under the UCA.

19. The Province may intervene in BCUC proceedings to express its perspective on specific applications and the BCUC may consider that perspective as part of the public record.

20. If the provincial government wishes to give specific directions to the BCUC, the UCA establishes a formal and transparent process to do so. Pursuant to section 3 of the UCA, the Lieutenant Governor in Council (the Cabinet) may issue a written direction to the BCUC on

¹ BCUC *Annual Report 2013/2014*, page 5.

how to exercise specified powers or duties. The BCUC must comply with these directions, which are referred to as Directions or Special Directions.

21. In a recent decision on alternative energy services, the BCUC explained its approach to regulation and its interaction with the market. It outlined the "key principles" as follows

- i. Only regulate when required.
- ii. Regulation should not impede competitive markets.²

22. Later in the same decision, the BCUC elaborated further

Regulation exists to protect consumers against the abuse of monopoly power but, in the Commission Panel's view, the superior protection for consumers is the competitive marketplace. ... This is consistent with the first principle outlined in this Section, to only regulate where required. Competitive forces are generally accepted as providing societal benefits and consumer protection more efficiently and effectively than economic regulation.

Regulation is costly, time-consuming, and limited by informational asymmetries. It is only in natural monopoly situations where consumer protection is needed that these limitations are outweighed by the benefits of regulation.

Based on the above, the Commission Panel finds as a fundamental principle that regulation is only appropriate where required and is driven by the inability of competitive forces to operate with greater efficiency and effectiveness than a sole service provider.³

23. This measured approach to regulation is important context to understand the BCUC's approach to the regulation of the sale of power by self-generating industrial customers and the setting of customer generator baselines ("GBLs").

24. Consistent with this approach, the BCUC has, in the first instance, let public utilities try to negotiate GBLs with industrial customers. Both parties have the technical understanding and capacity to do so and they are better positioned to reach a reasonable outcome efficiently. If a negotiated solution is not possible, then parties may have recourse to the BCUC.

² BCUC Report, *FortisBC Energy Inc. ~ Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives*, December 2012, pages 6-7.

³ *Ibid.*, page 14.

25. If the power purchase agreement falls within the ambit of section 71 of the UCA (explained in the next section), then the BCUC also retains the ultimate decision authority to determine whether the resulting agreement is in the public interest. The BCUC will give due weight to solutions that are negotiated between sophisticated parties.

26. The following sections outline the general statutory scheme and relevant government policy as well as the case law that interprets the BCUC's mandate.

2. General Outline of the Utilities Commission Act

27. For the purpose of this report, two parts of the UCA are most relevant: *Part 3 – Regulation of Public Utilities* and *Part 5 – Electricity Transmission*. Appendix 1 to this report outlines the basic subject matters and powers under each Part. A brief description follows.

28. Under section 2 of the UCA, a public utility is defined as follows

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

- a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or ...

29. *Part 3 – Regulation of Public Utilities* sets out the powers of the BCUC and the obligations of public utilities.

30. The basic powers of the BCUC include regulating

- a) the construction and operation of utility plant, including
 - i. reviewing plans and applications for the construction of facilities
 - ii. setting standards for facilities
- b) the business aspects of the public utility service, including
 - i. terms and conditions of service to customers
 - ii. the applicable rates for that service

- iii. the extension of service to eligible customers
- iv. the financial structure of the public utility company
- c) the resource and conservation planning of the public utility

31. The basic obligations of public utilities include

- a) serving eligible customers
- b) charging just and reasonable rates, as approved by the BCUC
- c) recording and filing relevant information about the public utility operation with the BCUC for review

32. *Part 5 – Electricity Transmission* sets out, among other things, the powers of the BCUC related to the approval of energy supply contracts entered into by public utilities.

33. Under Part 5, an energy supply contract is defined as follows

s. 68 "energy supply contract" means a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act;

34. Under section 71, an energy supply contract must be filed with the BCUC for review. The BCUC reviews the contract to determine if it should be accepted in the public interest. The factors that are relevant to the public interest are outlined in section 71 and include

- a) the applicable B.C. energy objectives outlined in the *Clean Energy Act*
- b) the long-term resource plan of the public utility that is buying the power
- c) the applicable requirements under sections 6 (energy self-sufficiency) and 19 (clean or renewable resources) of the *Clean Energy Act*⁴

⁴ Section 16 deals with the Province's goal to be energy self-sufficient. It sets out BC Hydro's obligation to be energy self-sufficient by 2016. It also sets out how the Province's heritage energy capability fits within the self-sufficiency analysis. Section 19 deals with Province's goals and targets to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity.

- d) the interests of the public utilities rate payers
- e) alternative energy sources
- f) the price, quantity and availability of the energy

3. British Columbia Energy Policy – 2002 and 2007 Energy Plans

35. The 2002 Energy Plan offers a brief history of the energy policy leading to the 2002 Plan. It is useful context for this discussion.

In 1980, the Province of British Columbia released its first energy policy. An Energy Secure British Columbia sought to manage energy resources for a secure supply, reduce oil imports and conserve resources. Direct government intervention in energy markets, from setting natural gas prices to building hydroelectric facilities, was the dominant policy direction. At the same time, the BC Utilities Commission was created to provide independent oversight of energy utilities.

The 1980s witnessed a shift from government intervention to market determination of oil and gas prices. In 1985, natural gas markets were opened up and the federal government relinquished control of petroleum markets. A second policy statement, *New Directions for the 1990s*, appeared in 1990, with two new priorities – efficient energy and clean energy; and two left over from the previous decade – secure energy and energy for the economy. The objectives of this policy were to make markets more competitive, send better price signals to consumers, encourage cleaner fuels and energy efficiency and strengthen environmental standards.⁵

36. The energy plans released in 2002 and 2007 built on this history. The policy initiatives related to electricity markets and BC Hydro give further context to the BCUC decisions on the self-generator power sales issue.

37. Key themes that emerge from the energy planning included

- a) protecting the BC Hydro historical assets – generation, storage, and transmission – as public assets. The low embedded cost of these assets was to be used to benefit B.C. residents through lower rates. In addition, the economic opportunity available through export trade in electricity

⁵ 2002 Energy Plan, page 11.

based on the low embedded cost advantage was to be captured by BC Hydro, through its trading entity Powerex, to benefit the Province and BC Hydro ratepayers

- b) achieving energy self-sufficiency – by 2016 according to the 2007 Energy Plan
- c) developing the independent power sector, particularly clean and renewable energy sources
- d) managing demand through energy conservation.

38. To achieve the ambitious energy plan objectives, BC Hydro had to procure incremental sources of power generation that fit the clean and renewable criteria. One source of incremental power was from industrial customers who had the potential develop incremental power generation ("self-generation"). BC Hydro issued several "calls for power" to secure new incremental supply for this purpose.

39. The following discussion elaborates on the energy plans that were in effect during the relevant time period.

The 2002 Energy Plan Energy for Our Future: A Plan for BC ("2002 Energy Plan")

40. In November 2002, the Province issued the 2002 Energy Plan. While the plan dealt with various forms of energy, including electricity, coal, oil and natural gas, the main focus was on electricity.

41. The 2002 Energy Plan cited the "four cornerstones of the policy" as

- a) low electricity rates and public ownership of BC Hydro
- b) secure reliable supply
- c) more private sector opportunities

- d) environmental responsibility and no nuclear power sources⁶

42. The BCUC and BC Hydro were affected by many of the policy actions, including the following ones.⁷

- a) Low electricity rates for BC Hydro ratepayers were to be achieved by a "legislated heritage contract that locks in the value of existing low-cost generation (heritage energy), and from the continued use of trading revenues to supplement domestic revenue."⁸
- b) The Province directed the BCUC to conduct an inquiry and to recommend the terms and conditions of the heritage contract legislation.
- c) The BCUC was to once again regulate BC Hydro's rates (which had been frozen since 1996 through Special Directions to the BCUC from the Province).
- d) The Independent Power Producer ("IPP") sector was supported by several policy actions
 - i. BC Hydro was restricted to developing new generation through improvements at existing plants. New electricity generation was to be developed by the private sector IPPs.
 - ii. The BC Hydro Transmission Corporation was to improve access to the transmission system and enable IPP participation in US wholesale markets.
- e) Energy conservation and efficiency were to be encouraged through better price signals in rates.

⁶ 2002 Energy Plan, page 7.

⁷ 2002 Energy Plan, page 4 - 13.

⁸ 2002 Energy Plan, page 7.

- f) Electricity distributors were to purchase at least 50 percent of their new power supply from BC Clean energy resources (resources that were renewable or resulted in net environmental improvement).

43. Pursuant to Order in Council 0253 dated 23 March 2003, the Province directed the BCUC to conduct an inquiry into a Heritage Contract for BC Hydro's existing generation resources and Stepped Rates and Transmission Access for customers served at transmission voltage.

44. The BCUC undertook the public inquiry which culminated in its report and recommendations to the Province on the Heritage Contract terms and industrial stepped rates.⁹

45. In response to the BCUC's recommendations, the *BC Hydro Public Power Legacy and Heritage Contract Act* was enacted in 2003. The Act defines BC Hydro's "protected assets" (heritage assets). The heritage assets include BC Hydro's electrical generation, storage reservoirs, and transmission and distribution systems.

46. The 2007 Energy Plan describes the Heritage Contract as follows.

Under the 2002 Energy Plan, a legislated heritage contract was established for an initial term of 10 years to ensure BC Hydro customers benefit from its existing low-cost resources. With the BC Energy Plan, government confirms the heritage contract in perpetuity to ensure ratepayers will continue to receive the benefits of this low-cost electricity for generations to come.

The Province also implemented most of the BCUC recommendations by way of Special Directions, including the establishment of the "Heritage Contract" between BC Hydro's generation line of business and its distribution line of business under Special Direction No. HC2.¹⁰

The 2007 Energy Plan – The BC Energy Plan: A Vision for Clean Energy Leadership ("2007 Energy Plan")

47. In February 2007, the Province released its 2007 Energy Plan. The plan's main themes included

⁹ BCUC Report, *An Inquiry into a Heritage Contract for BC Hydro's Existing Generation Resources and regarding Stepped Rates and Transmission Access -- BCUC Report and Recommendations to the Lieutenant Governor in Counsel*, 17 October 2003

¹⁰ Special Direction HC2 issued pursuant to OIC 1123, 27 November 2003.

- a) environmental leadership with an increased focus on clean energy,
- b) energy conservation and efficiency,
- c) energy security, and
- d) investing in innovation.

48. Some of the policy actions relevant to this discussion included

- a) All new thermal electricity projects developed in B.C. were to have zero net greenhouse gas emissions.
- b) Clean or renewable electricity generation were to continue to account for at least 90 per cent of total generation.
- c) BC Hydro was to acquire 50 per cent of its incremental resource needs through conservation by 2020.
- d) The province was to be electricity self-sufficient by 2016, and acquire an additional 3,000 gigawatt hours of "insurance" power by 2026.
- e) To encourage small B.C. Clean or high efficiency cogeneration, BC Hydro was to establishing a standing offer program with a set purchase price for power projects up to 10 megawatts.
- f) Public ownership of BC Hydro, BC Transmission Corporation and the related heritage assets would continue in perpetuity.
- g) By 2016, existing thermal generating power plants were to achieve zero net greenhouse gas emissions.
- h) Continue to support electricity trading opportunities and allocating trade revenue to BC Hydro ratepayers to keep electricity rates low.¹¹

¹¹ 2007 Energy Plan, Appendix A, page 39.

49. In January 2008, the Province released its 2008 Bio Energy Strategy.¹² The strategy was aimed at converting biowaste into clean energy. At the time, the Province was concerned about the waste timber that was accumulating as a result of the mountain pine beetle infestation. Among the policy initiatives was a plan for a BC Hydro Bioenergy Call for Power focusing on the biomass inventory in the forestry sector.¹³

4. Case Law Interpreting the Utilities Commission Act

50. In British Columbia, the BCUC's role in regulating the relationship between the public utility and its customer base has been considered several times. Appendix 2 to this report reviews the relevant case law that governs the BCUC mandate.

51. The basic themes that emerge from the case law are as follows.

- a) The BCUC must balance the interests of the ratepayers, the utility and the public.¹⁴
- b) The relationship between the public utility and its customer base is an economic and social arrangement that has been dubbed the "regulatory compact", which the case law has described as follows.

The regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.¹⁵

- c) The discretion granted to the BCUC is broad on its face, but must be grounded and limited within the main functions of the BCUC.¹⁶

¹² 2008 Bioenergy Strategy.

¹³ See Minister's Press Release dated 31 January 2008 on the 2008 Bioenergy Strategy.

¹⁴ *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, [1996] B.C.J. No. 379, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 27, (Application for leave to appeal dismissed with costs (without reasons) September 19, 1996 – [1996] S.C.C.A. No. 204) ("**BC Hydro**"); see also *B.C. Electric Railway v. Public Utilities Commission of British Columbia* (1960), [1960] S.C.R. 837; 25 D.L.R. (2d) 689 (S.C.) ("**BC Electric Railway**"); and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4. ("**Atco**")

¹⁵ *Atco*, para. 63.

¹⁶ *Atco*, para. 7.

- d) The Court will use the "doctrine of necessary implication" to interpret the statutory powers to include the incidental regulatory powers necessary to carry out the explicit grants of authority.¹⁷
- e) Rates must be fair and reasonable considering the nature and quality of the service, but the BCUC has wide discretion in setting rates, It must, however, balance the interests of the utility and the ratepayer.¹⁸
- f) The BCUC cannot usurp the public utility's role in the management of its operation. In the *BC Hydro* case, the B.C. Court of Appeal interpreted the BCUC's mandate under the Act where BC Hydro challenged the BCUC's authority to direct how it should undertake its resource planning. The court held that the management of the public utility – including an activity like resource planning in this case – rests with the company and the BCUC may not interfere with that role.

[56] It is only under s. 112 of the Utilities [*Commission*] Act that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

...

[58] Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.¹⁹

52. In keeping with these themes, the BCUC does not follow a central "command and control" approach to regulation of public utilities. The BCUC does not typically set general policy or engage in broad rule-making. The cost and effort of generic rule-making proceedings is high, so that approach is undertaken only when warranted by the circumstances. Instead, the

¹⁷ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756 S.C.R. 1722, at p. 1756; also cited with approval in *Atco* at paras. 50 and 51.

¹⁸ *B.C. Electric Railway*, *supra* note 14.

¹⁹ *BC Hydro*, *supra* note 14.

BCUC typically decides applications on a case-by-case basis. The principles evolve from the BCUC decisions on these cases. The approach is similar to the evolution of the common law, where judges decide specific cases but are reluctant to reach beyond the circumstances of the case to set broad policy.

53. While the BCUC is not bound by precedent²⁰, it strives to develop principles to guide its decision-making and to inform those who are subject to the BCUC's jurisdiction. The BCUC has expressed its perspective as follows.

In general, it is advantageous both for the Commission and those regulated companies that fall within its jurisdiction, to have a consistent and predictable body of decisions that will support informed decision-making.²¹

54. The BCUC will change the principles as the circumstances require and a greater understanding of the issues is reached based on sufficient experience.

55. The BCUC lets the market work when the circumstances warrant and will give considerable weight to arrangements that have been negotiated freely between the public utility and its customers. The BCUC acts as a surrogate for competition when required, but tries to allow the market to work to the extent possible.

56. Even in a monopoly market situation, such as within the BC Hydro service area, some aspects of the utility-customer relationship may be left to the parties to negotiate in the first instance with the BCUC being able to exercise its supervisory jurisdiction if a negotiated solution is not reached. The negotiation of GBLs is an example.

57. Similarly, public utilities retain the initial management role to decide on their company's approach. The BCUC retains the ultimate approval authority and may give directions to public utilities, but it cannot sit in the seat of the utility management.

58. The Provincial government may also issue special directions or exemptions that alter the role of the BCUC in regulating utilities. Relevant to this case, the Province enacted

²⁰ Section 75 of the UCA.

²¹ BCUC Decision for Order G-60-14, *BC Hydro – Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817*, page 64.

- a) the *BC Hydro Public Power Legacy and Heritage Contract Act* to define protected heritage assets and issued related "HC" special directions to the BCUC (discussed earlier).
- b) the *Clean Energy Act* and exempted certain energy supply agreements entered into by BC Hydro from review under section 71 of the UCA. For example, the Bioenergy Call phase 2 and the Intergrated Power Offer energy supply agreements were exempt from review under section 71.

F. BCUC PRINCIPLES GOVERNING THE ARBITRAGE OF BC HYDRO POWER

1. Review of the Key BCUC Principles

59. The BCUC has issued numerous decisions on the issue of entitlement to utility embedded cost power for customers who also have their own power generation resources ("self-generators") and wish to sell power to others.

60. A summary of the main decisions and findings is set out in Appendix 3.

61. The key themes that emerge from those decisions are as follows

- a) Arbitrage of power is not inherently negative. The BCUC is concerned only with *harmful* arbitrage. Specifically, self-generators should not be permitted to arbitrage power supplied by the public utility to the economic detriment of other ratepayers.
- b) The different conditions regarding BC Hydro accessing Heritage Power and FortisBC accessing Heritage Power precludes relying on precedents with BC Hydro experience with GBLs relative to establishing a GBL for Celgar.
- c) Since BC Hydro and FortisBC operate with a different supply resources and a different customer base, it would be inappropriate to expect FortisBC to have programs and rates that mirror those of BC Hydro.

- d) New or incremental generation capacity must be determined on a case-by-case basis.
- e) A GBL is not a necessary component of the service agreement or tariff for a public utility to supply power to an industrial customer.
- f) A customer's entitlement to service entails service at fair and reasonable rates, but those rates are not necessarily based on embedded utility cost.
- g) The restriction in section 2.1 of the BC Hydro-FortisBC PPA does not preclude FortisBC from establishing its own principles for the supply of non-BC Hydro PPA Power to its customers, including Celgar.
- h) The BCUC prefers to let the utility and industrial customer attempt to negotiate the GBL before it reviews and decides on the issue. Since the utility and the customer have the best technical understanding of the industrial site power characteristics, they are best positioned to negotiate a GBL.

62. In 2012, the BCUC reviewed and approved FortisBC's proposal to match its resource stack to sales to self-generating industrial customers (Non-PPA Embedded Cost Power ("NECP") and Matching Methodology). The BCUC summarized the history of its decisions on the "arbitrage" issue, explaining how its approach evolved.

The Commission has upheld a consistent regulatory principle, that self-generators should not arbitrage power to the detriment of other ratepayers, but has applied different mechanisms to achieve this protection in different circumstances. The mechanisms have included the GBL and net-of-load approaches. In Orders G-38-01 and G-17-02 it applied the GBL approach; in Order G-48-09 it applied the net-of-load approach.

...

In the Commission Panel's view, GBLs, net-of-load, and now entitlement with appropriate rate design are all mechanisms the Commission can use to satisfy its regulatory principle that self-generators should not arbitrage power to the detriment of other ratepayers. Different mechanisms are appropriate in this case because of the different relationships (utility-to-customer or utility-to-utility) and

the different service characteristics of the utilities, namely the Heritage Contract for BC Hydro and the APA for FortisBC.²²

2. Comments on Dr. Fox-Penner's characterizations of BCUC Regulation

63. Dr. Fox-Penner argues that the BCUC regulation was inappropriate, overly passive and that it resulted in discrimination against the Claimant. I disagree. The BCUC's regulation of this matter was appropriate and reasonable. It was also consistent with its statutory mandate and provincial energy policy.

64. The BCUC has wide discretion within its mandate to decide how it will regulate the relationship between the utility and its customer. It also has discretion decide the extent to which it is necessary to set general principles or rules to guide the relationship on issues like setting a GBL.

65. On the issues related to obligation of utilities to serve self-generators who are selling power, the BCUC

- a) responded in a reasonable and timely manner to the applications that arose,
- b) explained its approach in transparent language,
- c) followed consistent principles that were fair and non-discriminatory,
- d) considered and gave due weight to Provincial energy policy, and
- e) adapted its approach reasonably to apply different "regulatory mechanisms" as the market circumstance evolved.

66. Dr. Fox-Penner's perspective that the BCUC did not follow best regulatory practice is based on his view that the BCUC should intervene and direct the market and utility-customer relationship more aggressively than it did. His perspective is not consistent with the British

²² BCUC Decision and Order G-202-12 on *FortisBC – Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology – Compliance filing to Order G-188-1*, 27 December 2012

Columbia public utility regulatory regime and the case law that governs the BCUC in the exercise of its mandate.

67. The courts have decided that the utility management has the responsibility for resource planning. The BCUC reviews the utility decisions for prudence and cost effectiveness as part of the rate structure, but may not direct the resource planning decisions in advance.²³

68. Further, the BCUC role in reviewing energy supply contracts under section 71 is to review the contract in the public interest and then accept it or declare it unenforceable, in whole or in part. The BCUC may not prescribe the terms of the contracts.

69. The experience in B.C. is that the utilities and the industrial customers have typically urged the BCUC to let them negotiate the terms of their agreements where possible. The BCUC has also preferred this approach, rather than imposing terms.

70. In the following section, Dr. Fox-Penner's specific criticisms are shown in italics and my responses follow.

(a) The policies toward other self-generators were not consistent with Order G-38-01, but were consistent with BC and BC Hydro arbitrarily deciding how much access to arbitrage is permitted (paragraphs 51 to 74)

71. The BCUC decision in Order G-38-01 was reached following an expedited process that was driven by unusual market circumstances – an energy crisis – that created a sudden high demand for power in the U.S. market. The BCUC established a one-year "program" that would allow industrial self-generators to sell power so long as they did not arbitrage between embedded cost utility service and market prices. BC Hydro was not obliged to increase its service to these customers.²⁴

72. The BCUC responded quickly to the request of BC Hydro and the industrial customers so the market opportunity would not be missed. The decision and the selling program were intended to be short-term. The BCUC explicitly recognized that "considerable debate may

²³ See the *BC Hydro* case, *supra* note 14.

²⁴ BCUC Order G-38-01, 5 April 2001, *BC Hydro – Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*.

ensue" over whether a self-generator has met the principle the BCUC established to avoid arbitrage of the BC Hydro power supply.²⁵ To deal with that concern expeditiously, the BCUC adopted a practical approach.

- a) BC Hydro and the customer were to attempt to negotiate an agreeable customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator.
- b) If they could not agree, then the customer could file an affidavit with the BCUC committing to follow the principle. The BCUC also offered the assistance of BCUC staff to offer views on unresolved negotiating issues.
- c) The BCUC also stated it would monitor prices and complaints.
- d) The BCUC directed BC Hydro to report back on the program after 1 year.

73. In sum, the BCUC established a clear regulatory principle on the issue arbitrage of utility supply, accompanied by general guidance about how the customer baseline would be set to meet the principle. It also defined how it would assist the interested parties and exercise regulatory oversight. It did not, however, establish rigid rules to govern how the parties would achieve the core principle.

74. The participants to proceeding urged the BCUC to allow BC Hydro and the customer the flexibility to negotiate the terms of the power sales.

The Joint Industry Electrical Steering Committee proposed that "a high level of flexibility should be given to industrial customers and B.C. Hydro to attempt to achieve the solutions which are in the interests of the contracting parties and not prejudicial to other B.C. Hydro customers". B.C. Hydro agreed with many of the parties and articulated principle number four that:

"BC Hydro and its self-generating customers should negotiate the "sharing of proceeds" on a bilateral basis, with no "fall back" sharing mechanism or right-of-first-refusal. If fallbacks or rights-of-first-refusal are mandated, these must imply no obligation to purchase on the part of BC Hydro. BC

²⁵ BCUC Order G-38-01, section 1 of the Order.

Hydro does not believe that the Commission has the jurisdiction to direct BC Hydro to make particular energy purchases.”²⁶

75. BCUC Order G-38-01 was not intended to be a comprehensive review of the issues related to self-generators selling power while being supplied by utility service. It set a basic framework for the interested parties to attempt to develop this opportunity, with the BCUC retaining the authority to supervise the program and the resulting outcomes and then adapt its regulatory approach. This approach was consistent with the BCUC general approach to regulate the utility-customer relationship only to the extent needed. In this case, the negotiation of baselines for customer and power purchase agreements were reasonably left to the parties to negotiate with the BCUC retaining supervisory jurisdiction.

76. Because the market circumstances changed shortly after the decision, few applications came forward. I discuss those decisions in more detail in the next section.

77. Dr. Fox-Penner suggests that the BC Hydro approach was *ad hoc*, arbitrary and selective. That was not the case. The agreed customer baselines were not arbitrary; they were negotiated.

78. BCUC Order G-38-01 specifically contemplated a flexible case-by-case approach to determine customer baselines. This was the approach supported by interested parties. It allowed BC Hydro and interested self-generators to work out a baseline that recognized the unique characteristics of the customer site and met the interests of BC Hydro. If BC Hydro had sought to impose an arbitrary unilateral baseline, then the customer had recourse to the BCUC.

79. Each industrial site has unique attributes related to its plant characteristics, location within the BC Hydro grid, operating economics, site history, existing energy contracts, and ability to sell power to others. A prescriptive set of rules for setting the baselines would have been less flexible and would have led to suboptimal outcomes that would have not served the interests of the utility, its customers or the public. It was reasonable for the BCUC to set a high level regulatory approach and then to decide each subsequent case on its own merits.

²⁶ BCUC Order G-38-01, Staff Report, page 6.

80. In the cases that Dr. Fox-Penner discusses, the parties agreed on a baseline and that baseline was then reviewed by the BCUC. The BCUC gave weight to the negotiated outcome, but had authority to decide whether it met the principle that it had established.

81. Dr. Fox-Penner also suggests that not allowing Celgar the opportunity to access BC Hydro embedded cost power while selling power below its net load was discriminatory. That conclusion ignores two key factors.

- a) First, Celgar is not a customer of BC Hydro and only has indirect access to BC Hydro power supply through Celgar's public utility – namely, FortisBC.
 - i. The restriction that the BCUC imposed on FortisBC by amending section 2.1 of the BC Hydro-FortisBC PPA was consistent with the BCUC general principle to avoid arbitrage.
 - ii. The BCUC established a simple approach to avoid the arbitrage concern since FortisBC could not at that time readily match resources to customer consumption.
 - iii. The BCUC left open the opportunity for FortisBC to develop an approach for access by its customers to its non-RS 3808 power resources.²⁷
- b) Second, FortisBC has developed guidelines for customer entitlement to non-RS 3808 embedded cost power ("NCEP"). The BCUC approved those guidelines, and FortisBC's application for the NECP rate is currently before the BCUC.²⁸
 - i. Under those guidelines, Celgar would have access to FortisBC embedded cost power service for up to 100% of its load. This

²⁷ BCUC Order G-48-09 and Reasons for Decision, 6 May 2009, *BC Hydro – Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement*.

²⁸ Second Witness Statement of Dennis Swanson, 27 March 2015, para. 38.

access is greater than the access that the BC Hydro industrial customers enjoy.²⁹

82. The BCUC has recently commented on how the differences between the BC Hydro and FortisBC service areas can lead to different programs and rates for the two utilities.

Considerable concern was raised in this proceeding with respect to the disparity in rates and practices of BC Hydro and FortisBC. The Commission Panel's [sic] notes that the two companies operate with a different set of supply resources and a different customer base in terms of geography, population density and the residential/commercial/industrial mix. Therefore the Panel is of the view that there is no mandate nor would it be appropriate to expect FortisBC to have programs and rates that mirror those of BC Hydro.³⁰

(b) Direct subsidization of self-generators, combined with subsequent treatment of self-generators' ability to sell self-generated power, was contradictory and inconsistent with policy objectives. (paragraphs 75 to 87)

83. The BCUC has followed a consistent principle towards other self generators – i.e. self-generators should not be permitted to arbitrage utility power to the economic detriment of other ratepayers. Preventing "harmful" arbitration requires a careful balancing of the interests of the utility and the customer, while considering broader public interests established by the Province's energy plans.

84. The BCUC decided each application in a consistent and transparent manner. It reviewed the history of previous decisions and added to that history with each new decision. The BCUC issued detailed reasons with its decisions, explaining its approach and rationale for its decision. As noted earlier, the BCUC also adapted its approach to respond to the changing and differing circumstances associated with each application.

²⁹ BCUC Order G-202-12 and Reasons for Decision, 27 December 2012, *FortisBC – Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology – Compliance filing to Order G-188-1*.

³⁰ BCUC Order G-110-12 and Reasons for Decision – FortisBC Inc. ~ Application for Approval of 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan, pages 1-2.

85. The fact that the specific results in each case may differ in some respects does not negate the consistency of the regulatory principle and analytical approach applied by the BCUC. The differing results reflect the differing circumstances of each application.

Riverside Forest Products (now Tolko) – Order G-113-01³¹

86. This decision involved Riverside Forest Products who was a power service customer of the City of Kelowna, a municipal public utility that was a customer of West Kootenay Power Ltd. ("WKP") at that time. Although this decision involved the WKP's service area, not BC Hydro's, the Commission applied the approach it established in G-38-01.

87. Pursuant to section 88(3), the BCUC exempted Riverside and its purchaser from the public utility regulation and the requirement to file an energy supply contract for Incremental Power. Incremental Power was defined as power

- a) for power exported or sold to the City and others any power above the first 2 MW of generation each hour.
- b) for power sold to the City, any power that Riverside does not require at its facilities.

88. The recitals to the Order explained the basis for the decision

- a) Riverside and WKP began discussions in 1998 about how to increase its power generating capacity above 2 MW each hour for sale to brokers or others for export.
- b) Riverside modified its power plant in 2000 to increase the average generation capacity.
- c) The BCUC excluded the first 2 MW of generation each hour from the definition of Incremental Power to protect WKP and its customers from harmful arbitrage.

³¹ BCUC Order G-113-01, 1 November 2001, *Application by Riverside Forest Products Limited for a UCA Exemption*.

- d) The 2 MW baseline was set on the basis of historical capacity.
- e) No party opposed the application.

89. When reviewing the application, the BCUC sought and received comments from the City of Kelowna and WKP. Both confirmed their support for the exemption order. WKP explained that it did not object to the 2 MW baseline based on 1998 generation levels because of the "protracted discussions" with Riverside on the modifications at the site. WKP indicated that it would normally suggest that a shorter time frame be used – 2 years rather than 4 years.³²

Tembec/Skookumchuk – Order E-16-09³³

90. The BCUC approved an energy supply contract between Tembec and BC Hydro. The associated GBL of 14 MW was negotiated between BC Hydro and Tembec based on historical energy consumption at the Tembec Pulp Mill and the results of predictive modeling to account for the unique circumstances of the power generation at the site. The customer baseline was accepted by the BCUC.

91. In the recital to the Order, the BCUC refers to the approach established in G-38-01. It states that it reviewed the historic energy consumption at the Tembec Pulp Mill. The BCUC accepted the EPA in the public interest with its embedded GBL.

92. The BCUC approach explicitly conforms to the G-38-01 approach.

93. Dr. Fox-Penner criticizes BC Hydro's use of a [REDACTED]

[REDACTED]³⁴

94. Mr. Dyck explains in detail why that approach was chosen. [REDACTED]

[REDACTED]³⁵ [REDACTED]

[REDACTED]

[REDACTED]

³² See WKP letter dated 13 July 2001 to the BCUC page 1, attached to the BCUC letter dated 24 August 2001 to the Minister of Energy and Mines with the draft exemption order and supporting documents.

³³ BCUC Order E-16-09, 13 November 2009, *Application by BC Hydro for acceptance of an Energy Supply Agreement with Tembec Industries Inc. – Purcell Power Plant at Skookumchuck*

³⁴ Dr. Peter Fox-Penner, Expert Report, 16 December 2014, paragraphs 59 and 63.

³⁵ Lester Dyck, Witness Statement, 21 August 2014, paragraph 110.



95. The setting of the Tembec GBL was tailored to fit the circumstances of the customer, but the objective conformed to the G-38-01 core principle and analytical guidance.

*Tolko Industries Kelowna Division [previously Riverside] ~ Order G-198-11*³⁶

96. Tolko asked the BCUC to reaffirm its ability to sell power generation in excess of the first 2 MW of generation in each hour as outlined in Order G-113-01. Tolko filed this application to clarify its GBL in the light of the BCUC decision in G-48-09 to amend section 2.1 in the FortisBC-BC Hydro Power Purchase Agreement.

97. Tolko argued that it is not a direct customer of FortisBC so the revised section 2.1 should not apply to it. Further, Tolko argued the GBL established in G-113-01 protects against harm to WKP customers through arbitrage.

98. Celgar supported Tolko's request.³⁷

99. BC Hydro took no position on Tolko's application provided that the requested reaffirmation did not

(i) enable Tolko to arbitrage between the PPA embedded cost of service and market prices,

(ii) impact BC Hydro's GBL determinations and process, or

³⁶ BCUC Order G-198-11, 1 December 2011, *Tolko Industries Kelowna Division ~ Application for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01*.

³⁷ BCUC Order G-191-13 Reasons for Decision, *FortisBC Inc. ~ Application for a Certificate of Public Convenience and Necessity for the Purchase of the Utility Assets*, page 11

(iii) assume BC Hydro will change its decision-making process in relation to energy purchases³⁸

100. The BCUC reaffirmed Tolko's ability to sell power in excess of the first 2 MW of generation in each hour, with several variances to Order-113-01. Specifically, Tolko was first obliged to offer the power to Kelowna, FortisBC, and then Powerex.

101. The BCUC based its decision on several factors

- a) The BCUC agreed that Tolko is not a direct customer of FortisBC. For that reason, it found the restriction in amended section 2.1 of the PPA between BC Hydro and FortisBC as well as its Rate Schedule 3808 does not apply to Tolko.
- b) Since no intervener opposed the historical GBL of 2 MW, the Commission Panel also accepted the historical GBL of 2 MW as sufficient to continue to prevent harm to FortisBC and its customers from arbitrage.
- c) The BCUC also considered the requirements in section 6 of the CEA for electricity self-sufficiency by BC Hydro. The BCUC considered that sales of electricity within the province of British Columbia take first priority to sales of electricity outside of the province of British Columbia.

102. The BCUC reversed this decision in 2013 when FortisBC purchased the City of Kelowna utility assets.

Tolko GBL was revoked in favour of a net of load approach – FortisBC Purchase of the City of Kelowna Utility Assets ~ Order G-191-13³⁹

103. On 13 November 2012, FortisBC applied for BCUC approval and a Certificate of Public Convenience and Necessity for an extension of its distribution system resulting from its purchase of the electricity distribution assets of the City of Kelowna.

³⁸ *Ibid*, page 11.

³⁹ BCUC Order G-198-11, 1 December 2011, *Tolko Industries Kelowna Division ~ Application for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-0*.

104. As a result of FortisBC's purchase, Tolko became a direct customer of FortisBC.

105. The BCUC revoked Order G-198-11 and varied Order G-113-01 to establish a new GBL for Tolko based on "net of load on a dynamic basis", consistent with the approach established by Order G-48-09.

106. The BCUC explained its rationale as follows

The Commission Panel finds that a GBL, representing in its most basic form the load a self-generator is required to serve, should be tied to an agreement with the utility. Tolko's GBL was granted when Tolko was a customer of the City of Kelowna, and that fact was specifically referenced by the Commission at the time it reaffirmed Tolko's GBL. The Commission Panel notes that Celgar does not have a GBL, nor do any other FortisBC customers.

The Panel finds that a utility offering one self-generating customer service on the basis of a GBL which is less than load and offering another self-generating customer service on a net of load basis will create a situation of "undue discrimination, preference, prejudice or disadvantage in respect of a rate or service," within the meaning of section 59(4)(b) of the *Utilities Commission Act*. The Panel further finds that, with the removal of the intermediary of the City of Kelowna, Tolko and Celgar, as two self-generating customers of the same utility, will be offered service "under substantially similar circumstances and conditions" within the meaning of section 59(4)(c).⁴⁰

107. The BCUC also commented on the use of GBLs in the BC Hydro service area, noting its efforts to balance competing interests

GBLs address the potentially competing interests of a utility's obligation to serve and its need to accurately forecast the load it must serve. In the Panel's view, the history relating to GBLs in BC Hydro's service territory is consistent with the existence of these competing interests which the Commission has attempted to recognize and balance over the years. An electric utility needs to be in a position to serve what it forecasts to be its maximum or peak load at any given time. Planning horizons are necessarily long, particularly where increased generation is required and must be constructed.⁴¹

108. Dr. Fox-Penner accepts that this decision attempts to correct his concerns about G-113-01 and G-198-11, but nonetheless argues that the previous treatment of Tolko was less favourable to Celgar. This decision, however, renders those concerns academic.

⁴⁰ BCUC Order G-191-13 and Reasons for Decision, *supra* note 34, page 3.

⁴¹ BCUC Order G-191-13 and Reasons for Decision, *supra* note 34, pages 18 and 19.

109. On this point, it worth noting that Tolko submitted evidence in this proceeding that it has consistently used its generation to serve all or a portion of its load and never attempted to make use of its GBL. It sold only on a net of load basis. The export market for the preceding decade had not supported Tolko generating power for export.⁴²

Howe Sound 2010 EPA

110. [REDACTED]
[REDACTED] This approach was in keeping with the approach established in G-38-01.

111. Dr. Fox-Penner argues that this approach was *ad hoc* since [REDACTED] was not used for other self-generators. He notes the comments by Mr. Dyck [REDACTED] [REDACTED] He suggests the implication is that, [REDACTED] [REDACTED]⁴³

112. He accepts that [REDACTED]
[REDACTED]⁴⁴ He argues that, since it is not adequately explained (to his satisfaction) and was not applied to Celgar or Tembec, [REDACTED] is therefore arbitrary.

113. In fact, Mr. Dyck does explain why [REDACTED] was chosen as a reasonable approach. He explains that the parties [REDACTED] [REDACTED] After reviewing the available information, BC Hydro and HSPP agreed that [REDACTED] would best represent normal operating conditions.⁴⁵ They exercised reasonable judgment. Given [REDACTED] the exercise of careful judgment after reviewing the available information is an entirely reasonable approach and not arbitrary.

⁴² *Ibid*, page 22.

⁴³ Fox-Penner Expert Report, paragraph 65.

⁴⁴ Fox-Penner Expert Report, paragraph 66.

⁴⁵ Dyck Witness Statement, paragraph 128.

Celgar

114. Dr. Fox-Penner's main criticisms were that

- a) BC Hydro based the Celgar GBL on Celgar's load in 2007 only but, for other self-generators, BC Hydro considered load history from other years.
- b) BC Hydro included power that Celgar purchased from FortisBC, but did not do so for others.

115. The approach established in G-38-01 was explicitly intended to be flexible, which was at the urging of the parties to the proceeding. The BCUC established a core principle about avoiding harmful arbitration, and then established general guidelines about how to calculate a customer baseline to use to determine incremental power. The BCUC did not prescribe a specific number of years to consider.

116. As detailed later in section (c), Celgar's position on how its GBL has changed numerous times. When BC Hydro initially set the GBL for the Bioenergy Phase 1 EPA with Celgar, however, both parties agreed to the GBL.

117. The setting of the GBL in that case was relevant only to the Bioenergy Phase 1 EPA. Celgar is not a customer of BC Hydro. BC Hydro was determining the amount of incremental power Celgar could reasonably offer for sale. BC Hydro reviewed the historical information, with Celgar's input, to determine a baseline for Celgar that represented the reasonably expected load and generation characteristics at the site in the future.

118. The approach BC Hydro followed to calculate the Celgar GBL had the same objective as the other GBL calculations. The differing outcomes were a natural consequence of the variation in the site characteristics and the need to apply reasonable judgment. Order G-38-01 contemplated precisely this sort of thoughtful and flexible approach.

119. As noted earlier in (a), FortisBC has developed proposal to allow Celgar access to FortisBC embedded cost service for up to 100% of its load.

(b) The BCUC provided only broad guidance. Because there was no specific guidance, BC Hydro "over-exercised" significant discretion to choose (1) the historical GBL period and (2) GBL methodology. BC Hydro was delegated governmental authority – i.e. the power to establish GBLs. (para. 98)

120. Dr. Fox-Penner argues that the BCUC delegated its decision-making authority to BC Hydro and only offered broad or vague guidance.

121. Dr. Fox-Penner is incorrect to conclude that the BCUC delegated governmental authority to BC Hydro. He acknowledges that his conclusion is based on his experience as a "regulatory practitioner" rather than a lawyer.⁴⁶ He does not explain how, through operation of law or otherwise, a delegation of authority has occurred.

122. Under Canadian law, the BCUC's practice of allowing BC Hydro to negotiate with its customer in the first instance is not a delegation – explicitly or implicitly – of the BCUC's statutory decision-making authority or otherwise a delegation of governmental authority.

123. It is good regulatory practice, and certainly the practice in British Columbia, for the BCUC to allow BC Hydro and its industrial customers the first opportunity to work out technical bilateral issues, like setting a customer GBL. Both parties have a sophisticated technical understanding of the power consumption at the industrial site. Whatever decision-making role the BCUC had in relation to the energy supply contract and the GBL, it retained. It did not delegate any of its decision-making to BC Hydro at any time.

124. BC Hydro was able to work out GBLs with all the industrial customers, including Celgar, through negotiation and agreement.

125. Celgar has subsequently challenged how its GBL was set and sought to clarify its entitlement to utility service. The BCUC, not BC Hydro, has been the decision-maker in those proceedings.

⁴⁶ Fox-Penner Expert Report, para. 38.

(c) The BCUC regulatory process was insufficiently proactive and lacked province-wide policy implementation (paras. 88 to 97)

126. Much like common law courts, the BCUC will rarely extend its decision beyond the scope of the application record before it to try to set provincial-wide rules. There are good reasons to avoid over-reaching, including the limits of the record and the fact that other interested parties who would have a stake in a provincial-wide rule would not have notice of that potential outcome from the review of a specific application.

127. Moreover, the differences between the BC Hydro and the FortisBC operating conditions and customer bases may make a provincial-wide approach inappropriate. FortisBC and BC Hydro have each developed proposals for their service areas following consultations with their customers.

128. After the initial interest in 2001, the setting of GBLs did not emerge as a pressing and wide-spread issue requiring BCUC attention until relatively recently. The summary that follows illustrates the point.

- a) In 2001, the BCUC convened an expedited proceeding to consider the issue of self-generators selling power to the market. This proceeding was prompted by short-term, unusual market demand for power arising from an energy crisis in the Western United States. The BCUC responded quickly so the market opportunity could be realized. The entire proceeding and the decision were completed in about 5 weeks.
 - i. In the G-38-01 Order, the BCUC established an industrial power sales "program" for 1 year. The BCUC directed
 - (1) BC Hydro to allow customers with idle self-generation capability to sell excess self-generated electricity, so long as they do not arbitrage between embedded cost utility service and market prices, but

- (2) BC Hydro is not required to supply increased embedded cost of service to self-generator customers who are selling their self-generation output to market.
- ii. The BCUC also directed BC Hydro to file a full report on the program by 1 March 2002.⁴⁷ On 1 March 2002, BC Hydro reported that
- a. Howe Sound Pulp and Paper entered into an agreement with Powerex (BC Hydro's energy trading subsidiary company).
 - b. Powell River Energy Inc. ("PREI"), owned by Pacifica Papers, sold power while its mill was shut down for maintenance.
 - c. There was little experience from which to draw any new conclusions about the program.
 - d. The energy shortage had subsided and the market prices were lower, so there were fewer opportunities for self-generators to sell power at a profit.
- iii. BC Hydro requested and the BCUC agreed to extend the program.⁴⁸
- b) In 2001, Riverside also applied for and was granted an exemption order for power sales above a baseline of 2 MW.⁴⁹ Riverside never used its GBL to sell power, however.⁵⁰

⁴⁷ BC Hydro letter dated 1 March 2002, *BC Hydro Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability – Commission Order no. G-38-01*.

⁴⁸ BCUC Order G-17-02, *Decision on BC Hydro report – BC Hydro Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*

⁴⁹ G-113-01, 1 November 2001, *Application by Riverside Forest Products Limited for a UCA Exemption*.

⁵⁰ BCUC Order G-191-13 and Reasons for Decision, *supra* note 34, page 22.

- c) The GBL issue did not arise again until the proceeding that led to the BCUC Order G-48-09 on the Nelson-FortisBC agreements and BC Hydro's request to amend section 2.1 of the PPA.⁵¹ The BCUC also reviewed the Bioenergy Call Phase 1 EPAs concurrently.⁵²
- d) On 27 November 2009, the BCUC wrote to BC Hydro to develop GBL setting guidelines to be filed as part of its next major EPA filing that involves GBL's or next Long Term Acquisition Plan filing.⁵³
- e) The subsequent energy supply contracts that BC Hydro negotiated pursuant to the Integrated Power Offer were exempt from the section 71 filing requirement and BCUC review.
- f) On 27 July 2011, BC Hydro responded to BCUC's November 2009 letter. It did not file GBL guidelines, explaining that it did not have an EPA or Long Term Acquisition Plan filing to make. BC Hydro committed to develop GBL guidelines based on consultations that it had undertaken in October and December 2010.⁵⁴
- g) BC Hydro filed its proposed GBL setting guidelines and its response to the BCUC questions in 2012.⁵⁵

129. Celgar became engaged in this issue when it responded to BC Hydro's Bioenergy Call in 2008. In several regulatory proceeding afterwards, the BCUC responded to the interests raised on this issue, including the interests raised by Celgar in its interventions. In all cases, the BCUC has responded expeditiously to regulatory interventions and applications advocated by Celgar.

130. During the course of its advocacy before the BCUC, Celgar has changed its position on the issues several times. The following summary explains.

⁵¹ G-48-09, 6 May 2009, BC Hydro, *Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement*.

⁵² E-8-09, 31 July 2009, *Decision on BC Hydro Biocall EPA's – Approval under section 71 of the UCA*.

⁵³ L-106-09, 27 November 2009, *BCUC Letter to BC Hydro – BC Hydro Electricity Purchase Agreements – Generator Baselines*.

⁵⁴ BC Hydro letter dated 27 June 2011, *Generator Baselines (GBLs) Guidelines*.

⁵⁵ BC Hydro letter dated 20 June 2012, *Transmission Service Rate (TSR) Customer Generator Baselines (GBLs) Information Report*.

- a) In 2008, Celgar proposed a GBL of 33 MW for the purposes of its EPA with BC Hydro.⁵⁶
- b) In its EPA with BC Hydro signed on 27 January 2009, Celgar agreed to a GBL of 349 GWh/year. BC Hydro based this GBL on Celgar's 2007 generation and load data.
- c) In the 2010 hearing on FortisBC Rate Design application (which led to BCUC Order G-156-10), Celgar argued it was entitled to a GBL of zero (for the purpose of establishing a service agreement with FortisBC). Alternatively, it requested a GBL with an energy component of 13, 474 MWh and an average capacity component of 1.5 MW.⁵⁷
- d) In the 2011 hearing of Celgar's complaint (which led to BCUC Order No. G-188-11), Celgar sought a GBL of 1.5 MW "or such other level as may be established in accordance with applicable regulatory parameters delineating Celgar's self-supply obligation". In its final submission, Celgar continued to seek a GBL of 1.5 MW, but also indicated that the GBL should not exceed 16 MW.⁵⁸
- e) In the 2012 hearing on FortisBC Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (which led to BCUC Order G-202-12), Celgar supported FortisBC's proposal that industrial customers are entitled to 100% of their expected plant load from non-PPA embedded cost power. This implies a GBL of zero.⁵⁹

⁵⁶ Brian Merwin's letter to the BC Hydro RFP Administrator, 7 May 2008.

⁵⁷ BCUC Order G-156-10 and Reasons for Decision, 19 October 2010, *Application by FortisBC Inc. for Approval of a 2009 Rate Design and Cost of Service Analysis*, pages 92 and 104.

⁵⁸ BCUC Order G-188-11, and Reasons for Decision, 14 November 2011, *Zelstoff Celgar ~ Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges*, page 4. Celgar Final Submissions in the G-188-11 proceeding, 15 August 2011, page 47.

⁵⁹ BCUC Order G-202-12 and Reasons for Decision, 27 December 2012, *FortisBC – Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology – Compliance filing to Order G-188-1*, page 3.

(d) BC Hydro's process in establishing GBLs lacked timelines and transparency (paras. 99 to 102)

131. As noted in the previous section, only a few applications came forward after G-38-01. The electricity markets changed dramatically following the decision and the interest in exports of power was low. The BCUC responded to the few applications that came forward on a case-by-case basis.

132. Following the G-38-01 decision, BC Hydro had few examples to draw upon to establish a comprehensive set of GBL setting guidelines.

133. Approaching the issue on a case-by-case basis in the interim while experience grows is consistent with good regulatory practice. As noted earlier, the BCUC developed several mechanisms to deal with the issues, adapting to the circumstances that arose.

(e) The process that determined Celgar's self-generation policy was deficient in several respects (paras. 103 to 112)

134. In the G-48-09 decision, the BCUC approved BC Hydro's application to amend section 2.1 of the PPA to prohibit FortisBC from selling any RS 3808 power to any FortisBC customer when that customer is selling self-generated electricity that is not in excess of load. The BCUC also clarified that excess of load means "net load on a dynamic basis".

135. Dr. Fox-Penner's criticisms, in summary form, and my responses follow.

a) *The BCUC did not follow past decisions. This decision was inconsistent with the historical usage afforded to customers under G-38-01 and G-113-01. BC Hydro may have made arrangements that are inconsistent with G-38-01.*

i. In the G-48-09 decision, the BCUC discussed G-38-01 decision and the associated background. It also reviewed the subsequent decisions. With that background in mind, the BCUC decided on a reasonable and practical approach to deal with the application

before it, explaining how it extended the principles in G-38-01 to the current circumstances. In the end, the BCUC followed the past approach to the extent it fit the current circumstances and adapted the approach where required.⁶⁰

- ii. The BCUC was clear that the G-38-01 Order was a short term response to a pressing need at the time.
- iii. From the outset, the G-38-01 program was intended to be flexible and adaptive. The BCUC's decision was consistent with the flexible and adaptive approach.
- iv. The BCUC decided that the general principles in G-38-01 should be applied in this case. However, the BCUC recognized the challenge of identifying a baseline to determine incremental power in the FortisBC service area. The BCUC decided to simplify the approach for the reasons it explained as follows

In the end, the Commission Panel has decided that there must be a simple definition of what constitutes “excess power” and we define that term to mean power “net of load on a dynamic basis.” The Commission Panel determines that any self-generators, as owners of the generation facilities, should have the flexibility to reduce domestic load as they see fit in the commercial circumstances at hand in order to optimize the export of self-generated power. What will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market.⁶¹

- b) *The BCUC also noted that a more global solution or rule may be preferred, but it cannot do so.*
 - i. On this point it is helpful to consider the BCUC's own words.

⁶⁰BCUC Order G-48-09 and Reasons for Decision, 6 May 2009, *BC Hydro – Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement*.

⁶¹*Ibid*, page 29.

The Commission Panel is of the view that a more global solution to the issue of reselling or “arbitrage” of power would be preferable and that a Commission “rule” or “regulation” might have been a viable way to proceed. However, in the end, the Commission Panel decided that the record in this proceeding and the limited number of parties participating [*sic*], did not permit or support a more general solution or remedy. As the power export market for BC generators and their agents (BC Hydro, Powerex, FortisBC, IPPs, resellers and marketers etc.) matures, the Commission or the Government may choose to establish guidelines, rules or regulations to deal with the markets and to spell out the permitted roles and operational rules that will be open to the various players province-wide.⁶²

- ii. The BCUC decided that the record was not sufficient to support a more general solution. Given that view, it would have been inappropriate to attempt to set general rules. It also would have been a disservice to the parties in the proceeding to decline to decide the application before it and then reset the proceeding to become a generic rule-making proceeding.
 - iii. The BCUC explicitly allowed for the possibility of pursuing a more global rule-making approach as the power export market matures. As noted earlier, there were very few applications by self-generators following the G-38-01 decision up to the time of the G-48-09 decision.
- c) *The BCUC states that Celgar should not benefit unduly at expense of other BC Hydro customers, but BC Hydro customers include Celgar competitors*
- i. The BCUC has consistently applied the principle of prohibiting self-generators from engaging in "harmful" arbitrage of utility embedded cost power in both the BC Hydro service area and the FortisBC area.

⁶² *Ibid*, page 22.

- ii. As noted earlier, FortisBC has proposed an approach under which Celgar would have access to FortisBC embedded cost power service for up to 100% of its load. This access is greater than the access that the BC Hydro industrial customers enjoy.
- d) *By considering only the cost to BC Hydro and its customers, the BCUC ignored the potential economic benefits the FortisBC customers may receive and bring to the province as a whole – the provincial cost/benefit is not assessed. The approach approved in the decision simply aimed at saving ratepayers and BC Hydro money*
- i. In this decision and the others dealing with self-generators selling power, the BCUC was concerned with ratepayer interests and broader public interests, including provincial energy objectives.
 - ii. As BC Hydro issued its calls for power, it was seeking incremental sources of power generation that fit the energy plan objectives. The arbitrage of BC Hydro's embedded cost power was a concern when procuring new power supply. If BC Hydro were to acquire power from self-generating customers who were merely increasing their consumption of BC Hydro's industrial power service to free up self-generated power to sell to BC Hydro or Powerex, then BC Hydro would suffer a net loss. Such procurement would not be in the rate payer or public interest because it would
 - a. transfer value from BC Hydro to the industrial customer, and add cost to BC Hydro since it must continue or add power supply to meet the industrial load that it otherwise could avoid.
 - b. fail to achieve the B.C Energy Objectives since it would not add new power generation to Province and would

not assist in achieving the targets for energy self-sufficiency and clean or renewable energy.

- c. fail a prudency review before the BCUC under Part 3 when setting BC Hydro rates, because the energy procurement would simply add costs but not add to the power supply resources.

G. THE RELATIONSHIP BETWEEN BC HYDRO, FORTISBC, AND CELGAR

136. The relationship between BC Hydro, FortisBC, and Celgar is important because the obligations between a utility and its customers when supplying power under a tariff differ from the obligations between a utility and a self-generator when purchasing power. The utility-customer relationship is governed under Part 3 of the UCA and the energy supply agreement relationship is governed under Part 5 of the UCA.

137. Energy supply contracts are governed under Part 5 of the UCA. The BCUC's role is less involved in the sense that the parties are free to negotiate the terms of the energy supply agreement, subject to review under section 71 when the agreement is filed for acceptance. The public interest considerations relate to broad public interests, including the interests of other ratepayers.

138. Fortis BC is a privately-owned public utility and its power generation assets are also privately-owned. FortisBC

- a) sets rates and terms of service for its customers, including Celgar, and
- b) decides how to arrange its power supply portfolio to serve its customers.

139. FortisBC purchases part of its power supply from BC Hydro under an agreement and tariff, known as BC Hydro Rate 3808. FortisBC (including its predecessors) has in fact purchased power from BC Hydro since the 1970's. The BCUC approved the current version of Rate 3808 and its related agreements in 2014 by Order G-60-14.

140. In its G-60-14 decision, the BCUC reviewed the history of Rate 3808 and the FortisBC power purchases. The BCUC made several findings that are relevant to this discussion

- a) The BCUC gave weight to the fact that the new PPA and associated agreements were a result of an extensive and complex negotiation process by two sophisticated parties involving a series of trade-offs.⁶³
- b) The relationship between FortisBC and BC Hydro continues to be unique, one that is characterized as a hybrid, in which FortisBC is partly a customer of BC Hydro and partly an independent utility. BC Hydro's obligation to serve FortisBC as a customer is limited, and beyond those limits the relationship is that of two independent utilities. As an independent utility, FortisBC has the responsibility for its own resource planning at rates reflective of fair market arrangements.⁶⁴
- c) The BCUC settled on the transmission class of customer rate as the appropriate comparison for Rate 3808.
- d) An evaluation under the Bonbright Principles (as set out in the decision) is appropriate for agreements that describe the utility to customer relationship. For agreements that describe the utility to utility relationship, the Panel finds the reliance on the sophistication of the parties negotiating the agreements should be given considerable weight and a Bonbright evaluation is not required.⁶⁵
- e) FortisBC agreed to the power export restrictions.⁶⁶

141. FortisBC has the discretion, subject to BCUC oversight to decide how it will acquire power to serve its customers. FortisBC is not captive to BC Hydro for its power supply – it has other supply options.

⁶³ G-60-14 Decision, page ii.

⁶⁴ G-60-14 Decision, page 32.

⁶⁵ G-60-14 Decision, page 34.

⁶⁶ G-60-14 Decision, page 57.

142. Celgar is a customer of FortisBC, not BC Hydro. Celgar's only access to BC Hydro power is indirectly through FortisBC.

143. Celgar may intervene in the BCUC review of RS 3808, but otherwise has no say on the terms of purchase that FortisBC may negotiate with BC Hydro.

144. The BCUC has confirmed that FortisBC may establish its own principles to set a GBL for a customer being supplied with non-3808 power. For example, in the decision in Order G-188-11 deciding on a complaint by Celgar ("*Celgar Complaint Decision*"), the BCUC noted the following.

The Commission Panel agrees with FortisBC that a GBL is not a necessary component of a GSA. In the RDA Decision, the Commission declined to establish a GBL between FortisBC and Celgar and stated: "The parties are at liberty to establish their own GBL and, should they desire, to incorporate it into a general service agreement and submit it to the Commission for approval." (RDA Decision, p. 115; emphasis added)

The Commission Panel reaffirms the Commission's previous determination that, while a GBL may be incorporated into a GSA between FortisBC and Celgar, it leaves the issue of whether to incorporate such a GBL into a GSA up to the parties.

If FortisBC chooses to establish a GBL for Celgar it must do so taking into account the conditions regarding FortisBC's access to BC Hydro PPA Power included in section 2.1 of the BC Hydro PPA. It should be emphasized that section 2.1 of the PPA only provides restrictions on FortisBC's access to BC Hydro PPA Power. This does not preclude FortisBC from establishing its own principles regarding the supply of non-BC Hydro PPA Power in its resource stack when establishing GBLs with its customers.⁶⁷

145. In the *Celgar Complaint Decision*, the BCUC directed FortisBC to

- a) consult with its customers to determine the level of entitlement to non-BC Hydro 3808 embedded cost power by eligible self-generating customers.
- b) establish a methodology to match sales of non-3808 power to Celgar when Celgar is selling power.

⁶⁷ Reasons for Decision on BCUC Order G-188-11 - *Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges*, November 14, 2011, p. 28

146. Following this decision, FortisBC filed a proposal for review by the BCUC which led to a decision and Order G-202-12.⁶⁸ In brief, FortisBC proposed that

- a) an Eligible Customer, as defined in the Access Principles Application (APA), may have a right that up to 100 percent of its expected plant load be served by NECP, but the actual percentage of load served is to be nominated by the customer. The balance of a self-generating customer's plant load is to be served by either self-generation or other third party sources of supply.⁶⁹
- b) 100 percent of a customer's nomination could be matched from alternate sources or surplus Company-owned capacity.⁷⁰
- c) it would develop a stepped transmission rate design (to be filed later) for industrial customers that would encourage conservation.

147. Celgar supported the FortisBC proposal about entitlement to NECP, but disagreed with FortisBC's proposal on resource matching.⁷¹

148. I understand that FortisBC has indicated that it would source NECP electricity from all of its other resources excluding BC Hydro PPA electricity.⁷² FortisBC has also indicated that the NECP would not be more expensive than FortisBC's traditional embedded cost rates.⁷³

149. To date, the BCUC has reviewed numerous complaints by Celgar about the nature and extent of its entitlement to utility service and its right to sell its own generation. The BCUC has responded in an appropriate manner, consistent with its statutory mandate.

150. FortisBC has also responded to the directions from the BCUC to develop a FortisBC proposal for its customers to give its customers, including Celgar, access to the embedded cost of its non-RS 3808 (BC Hydro PPA) power supply. Celgar does not agree with the BCUC's

⁶⁸ Reasons for Decision on BCUC Order G-202-12 - 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).

⁶⁹ *Ibid*, page 3.

⁷⁰ *Ibid*, page 12.

⁷¹ *Ibid*, See pages 4 and 13

⁷² Second Witness Statement of Dennis Swanson, 27 March 2015, paragraphs 28-36.

⁷³ FortisBC Letter to the BCUC, 4 June 2014, p. 2.

rulings on its complaints or the FortisBC resource matching, but Celgar has had full opportunity to present its case.

H. THE MINISTERS' ORDER UNDER PART 2 OF THE UCA

151. In May 1991, the Minister of Energy, Mines and Petroleum Resources ("MEMPR") and the Minister of Environment issued to Celgar an exemption ("Ministers' Order") from the requirement to obtain an Energy Project Certificate ("EPC") under the UCA for the Celgar Pulp Mill Expansion thermal electric power plant. The exemption was issued following a project review under Part 2 of the UCA. The Ministers and Celgar accepted and signed the Order.

152. A discussion of the background to the Ministers' Order and its implications follows.

The Energy Project Certificate Process – Part 2 of the UCA

153. When the Ministers' Order was issued in 1991, the EPC process was governed under Part 2 of the UCA. Part 2 of the UCA was repealed in 1995 when the British Columbia *Environmental Assessment Act* was enacted to establish a new regime for the environmental assessment of major projects. A brief overview of Part 2 follows.

154. Section 16 of Part 2 defined a "regulated project" to include a hydro or thermal power plant of 20 MW or higher or an addition to an existing plant of 20 MW or higher.⁷⁴

155. Section 17 stated that no person could construct or operate a "regulated project" except in accordance with an EPC or Energy Operation Certificate.

156. Section 18 and the related regulations outlined the application procedures⁷⁵

- a) Applications for an energy project certificate or for modification of it or of an energy operation certificate were to the Minister of Energy, Mines and Petroleum Resources
- b) The application was to include information about

⁷⁴ British Columbia Ministry of Energy, Mines and Petroleum Resources, *Guide to the Energy Project Review Process*, 1982 ("EPC Guide"), page 5.

⁷⁵ *Ibid.*, page 6 and Appendix 2.

- i. the applicant and the project, including its purpose and cost
- ii. any new or expanded infrastructure made necessary by the project
- iii. energy supply and demand forecasts
- iv. the impacts of the project on the physical, biological, and social environments, and proposals to reduce the negative impacts and maximize the positive impacts
- v. project justification

157. Section 19 established three alternative review procedures

- a) The Minister of MEMPR and Minister of Environment may refer the application to the BCUC for review, with the ultimate decision being made by Cabinet.
- b) The Minister of MEMPR may order that an application by a public utility be dealt with by the BCUC as an application for a Certificate of Public Convenience and Necessity.
- c) The Minister of MEMPR and Minister of Environment may exempt the regulated project from the provisions of the UCA.⁷⁶

158. The administrative framework for the review process included the following committee structure to coordinate the provincial agencies technical assessment of the application.⁷⁷

- a) An Energy Project Coordinating Committee ("EPCC") to review the regulated projects. The EPCC comprised three members
 - i. The Director of Project Analysis Branch, Ministry of Energy, Mines and Petroleum Resources
 - ii. The Director of Assessment Branch, Ministry of the Environment

⁷⁶ *Ibid*, page 6.

⁷⁷ *Ibid*, page 8.

iii. A representative of the BCUC.

159. Following the review, the EPCC would report to the Ministers with its recommendations on the application.

Celgar Expansion and Modernization Project

160. Celgar proposed a substantial expansion and modernization of its pulp mill ("Modernization Project"). The Modernization Project was reviewed jointly under the British Columbia Major Project Review Process and the Canadian Environmental Assessment and Review Process.

161. As part of the Modernization Project, Celgar proposed to build and operate a new power generation plant. Since the power plant capacity exceeded the 20 MW threshold for a regulated project under section 16 of the UCA, an EPC review was required under Part 2 of the UCA.

162. By letter dated 23 August 1990, Peter Ostergaard, Acting Assistant Deputy Minister, Energy Resources Division of MEMPR notified Celgar of the EPC requirements under Part 2 of the UCA. In that letter, Mr. Ostergaard explains that Ministry support is based on the fact that the generation facilities would increase the self sufficiency of the Celgar mill and reduce the burden on the power utilities to build new generation to supply the mill.

The Ministry and B.C. Hydro have identified pulp mill expansions as a significant component of incremental electricity demand in British Columbia during the 1990s. The Ministry wants to ensure that load displacement (e.g. through conservation, energy efficiency measures, self-generation and cogeneration) is thoroughly explored before utilities are forced to build new generation resources to serve expanded industrial loads. For this reason, the Ministry supports initiatives to increase the energy efficiency and self-sufficiency of Celgar's proposed mill expansion.⁷⁸

163. In response to the letter, Celgar submitted an application for an Energy Project Certificate under Part 2 of the UCA. Celgar confirmed in several places that the new generation would supply most of the power requirements of the new mill, making it energy self sufficient under normal conditions. In the "Project Description" and "Project Justification" sections, Celgar explained the purpose of the new generation facilities as follows.

⁷⁸ P. Ostergaard, MEMPR, letter dated 23 August 1990 to R. C. Wigen, Celgar, page 1.

(b) Project Description

...

The existing recovery boiler will be shut down. **The heavy black liquor, which contains the lignin and spent cooking chemicals from the digester, will be burned in a new recovery boiler (27).** The recovery boiler will burn the organic material (i.e. lignin) in the heavy black liquor and converts the inorganic chemicals primarily to sodium carbonate and sodium sulphide. The inorganic chemicals will be removed as a molten smelt. **The heat generated in burning the black liquor will be used to produce steam. This steam, when passed through a turbo-generator, will under normal conditions supply 100% of the modernized mill's electrical power requirements**⁷⁹

...

(c) Project Justification

... This increased tonnage creates additional fuel in form of black liquor which is burned in the recovery boiler. This fuel, combined with a larger, higher pressure and more efficient recovery boiler affords the opportunity to increase the power generating potential and make the mill more energy self sufficient. The present mill relies on West Kootenay Power for the majority of its electrical power requirements – approximately 22 MVA. The existing mill operates a 2.5 MW extraction/condensing turbogenerator which supplies the balance. The modernized mill will require approximately 50 megawatts of power. The new turbogenerator will be capable of producing 50 megawatts. An additional tie-transformer (20 MVA) is proposed to allow the purchase of the additional power requirements necessary to run the modernized mill during the infrequent, but essential, outages of the 50 megawatts turbogenerator.⁸⁰

164. The application included a letter from Lorne Parnell, vice president of Power Consolidated (China) Pulp Inc. (one of the joint venture partners and co-owner of the Celgar project), that responded to a letter from Peter Ostergaard, MEMPR, requesting more information about the Celgar project. In that letter, Mr. Parnell explains the purpose of the proposed power generation plant in these terms.

The Celgar thermal electric generation project is part of the much larger modernization and expansion of the pulp mill. The total cost of the modernization and expansion project is estimated at approximately \$675 million. The feasibility of the modernization project is derived from the reduction in operating costs and additional revenues from increased capacity. Operating costs

⁷⁹ Celgar, *Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the Utilities Commission Act*, October 1990, page 10.

⁸⁰ *Ibid*, page 17.

are reduced because of more efficient use of chemicals and improved productivity. Additionally, the pulp mill will be essentially self-sufficient in energy as purchased power will be significantly reduced after the implementation of the electric generation plant.

165. In Celgar's application under the joint federal-provincial project review, Celgar confirmed the purpose of the new power plant in similar terms. In its Stage II Report, Celgar noted the following in a section of the report entitled "Special Issues and Public Concerns".

Celgar's Prospectus Report on its proposed modernization generated many comments and requests for additional information. After reviewing the submissions, the Major Project Steering Committee and federal agencies identified the following matters as being of particular general interest. Celgar's responses accompany the questions.

...

3. **The government seeks an Indication that energy alternatives, such a co-generation, conservation and on-site woodwaste electric generation, will be thoroughly explored.**

Celgar Response

The modernized mill, as designed, will be 90% energy self-sufficient. This is a large improvement over the existing mill that produces only 11% of the energy it requires. Only a small amount of electrical energy will be purchased to operate the modernized mill, in addition to stand-by power for start-up requirements. Natural gas will be purchased for the lime kiln and as supplementary fuel for the power and recover boilers.

Celgar will continue to explore all energy alternatives that it believes will help it to achieve even more complete self-sufficiency in energy and to maximize the efficiency of its energy usage.

166. Several important points are prominent in the exchange between Celgar and MEMPR on this application.

- a) Celgar was clear in both the EPC application under Part 2 of the UCA and in the overall Modernization Project application that
 - i. the new power plant was an integral part of the overall Modernization Project,

- ii. the power plant was being built for the purpose of supplying power to the modernized and expanded mill, and
 - iii. although the Celgar mill would remain tied into the West Kootenay Power transmission network, Celgar would significantly reduce its purchase of power from West Kootenay Power.
- b) MEMPR was clear that
- i. MEMPR was intent on exploring load displacement options for pulp mill expansions to avoid utilities being forced to build new generation to serve the increased industrial load.
 - ii. MEMPR supported Celgar's efforts to increase the energy efficiency and self-sufficiency at the Celgar mill because it served the goal of reducing the burden on utilities to build new generation.
 - iii. The exemption order under section 19(c) of the UCA was based on the foundational premise that the purpose of the new power plant was to supply power to the Celgar mill.

167. The Ministers' Order, issued on 23 May 1991 pursuant to section 19(2) of the UCA,

- a) exempted Celgar from sections 19(1)(a) and 17(1) of the UCA
 - b) authorized Celgar to construct and operate the power plant
- subject to the conditions listed in the Ministers' Order, including the following,
- 1. Celgar shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with
 - (a) the Application; ...

168. The stated purpose of the power plant was a central factor for MEMPR in its assessment of the public interest associated with the project. If the sale of power to third parties had been

within the scope of the EPC application, then the analysis of the power project justification and the public interest would have been different.

- a) The expanded Celgar mill required 50 MW of power. If that supply was to come from West Kootenay power rather than the new Celgar power plant, then new supply would have been needed. The justification for the Celgar power plant would have been quite different.
 - i. The information requirements for an EPC required a description of "any new or expanded public works, undertakings or infrastructure that would be entailed by the project ..." ⁸¹
 - ii. The EPC Guide stated that the project justification should include an energy supply and demand forecast.⁸² Appendix 2 of the EPC Guide elaborated on how that information was used in the justification for the project.

1.1 Supply/Demand Forecasts,

In order to demonstrate the need for energy provided by the project, and/or the availability of energy for the project, relevant forecasts of energy demand and supply are to be provided.⁸³

- iii. West Kootenay Power did not have sufficient generation to meet its customer demand and had to buy power from BC Hydro and others. It would have needed to add more power supply to serve the increased the Celgar mill load.
- iv. As discussed earlier, MEMPR's support for the project was explicitly based on the fact that the generation facilities would increase the self sufficiency of the Celgar mill and reduce the burden on the power utilities to build new generation to supply the

⁸¹ *Energy Project Certificate Regulation, Reg. 388/80,*

⁸² *EPC Guide, supra note 57, page 13.*

⁸³ *Energy Project Certificate Guide, supra note 57, see Appendix 2 Information Requirements.*

mill.⁸⁴ If the power plant had a different purpose, then MEMPR's perspective on the power plant would have been different.

- b) Selling power to a third party would have brought Celgar within the definition of "public utility" under the UCA. Celgar would have been obliged to apply for an exemption from public utility regulation under the UCA or to file an application for a certificate of public convenience and necessity to build the facilities.
- c) If Celgar had intended to export power out of the Province, then it would have required an Energy Removal Certificate under Part 2 of the UCA.

169. In summary, a different alternative for assessing the application under Part 2 may have been necessary. Additional approvals under Part 3 also may have been necessary.

Environmental Assessment Act – consolidation of the various major project review processes in 1995

170. The EPC process changed when the British Columbia *Environmental Assessment Act* ("1995 EAA") and its associated regulations were enacted in 1995.⁸⁵ The 1995 EAA consolidated the separate ministry review processes into a single forum for the environmental assessment of major projects. The 1995 EAA established the Environmental Assessment Office as the central agency to fulfill the environmental assessment role.

171. On 30 June 1995, the EPC sections under Part 2 of the UCA were repealed and the EPC process was subsumed within the 1995 EAA process.⁸⁶ The existing EPCs and Ministers' Orders, including Celgar's, were continued and administered under the 1995 EAA.

⁸⁴ P. Ostergaard, MEMPR, letter dated 23 August 1990 to R. C. Wigen, Celgar, page 1.

⁸⁵ *Environmental Assessment Act*, RSBC 1996, c 119.

⁸⁶ *Environmental Assessment Reviewable Projects Regulation*, BC Reg 276/95.

Continuation of the Celgar Ministers' Order – Transition to the EAA Regime

172. Pursuant to section 93(8) of the 1995 EAA, all certificates, orders, approvals, or decision made before 30 June 1995 under the UCA were deemed to have been issued under the EAA and continued in force until they expired or, under the EAA, suspended or cancelled.

173. Under this transition scheme, Celgar's Ministers' Order was continued under the authority of the EAO and deemed to have been issued under the 1995 EAA as of 1995. The administration and enforcement of Celgar's Ministers' Order fell under the EAO mandate under the 1995 EAA.

174. On 30 December 2002, the 1995 EAA was repealed and replaced by the current version *Environmental Assessment Act* ("Current EAA").⁸⁷

175. Section 51(8) of the Current EAA deems all certificates, orders, approvals, or decision in effect under the 1995 EAA to have been issued under the Current EAA.

176. The Current Act contains a number of mechanisms to enforce an order, including the following

- a) Section 34(2) enables the Minister of Environment to order a person to comply with the original order, and specify measures in the original order to address the non-compliance and the time within which it must be remedied.
- b) Section 35(1) enables the Minister of Environment to apply to the BC Supreme Court for an order directing compliance with the original order.
- c) Section 41 provides that failure to comply with an order of the Minister of Environment under section 34(2) or an order from the BC Supreme Court under section 35(1) is an offence punishable under section 43 by fines (in the case of a corporation) and fines or imprisonment (in the case of an individual).

⁸⁷ *Environmental Assessment Act*, SBC 2002, c. 43, s. 58, and B.C. Reg 370/2002.

177. Celgar's Ministers' Order and its conditions remain in effect for the life of the Celgar Pulp Mill Expansion Thermal Electric Power Plant.

178. The Current EAA also establishes a process to amend a certificate. The EAO User Guide describes the amendment process this way.

From time to time, proponents that have received an environmental assessment certificate wish to have the certificate amended. This may occur, for example, if the project is sold to a new owner or if the project design requires an unanticipated change. Any such applications for an amendment must be submitted to the Executive Director in writing. Both the Minister of Environment and the Executive Director have the power to amend a certificate, upon application by the certificate holder.⁸⁸

179. By letter dated 16 February 2005 to the EAO, the Claimant requested that the Ministers' Order be modified to reflect the purchaser's name change to "Zellstoff Celgar Limited" effective on 14 February 2005 following the Claimant's acquisition of Celgar's assets. The Claimant expressly renewed its commitments under the Ministers' Order without requesting any change to the conditions. The Environmental Assessment Office confirmed that it "will look to the new holder, Zellstoff Celgar Limited, for compliance with the conditions" in the Ministers' Order.⁸⁹

Condition 1(a) in the Ministers' Order is clear

180. Mr. Austin argues that the language used in the Celgar application and the Ministers' Order was not specific enough to create a binding obligation on Celgar.⁹⁰ He further argues that the terms "power", "self-sufficient", "requirements", and "normal operating conditions" are not defined by Celgar.⁹¹ Mr. Austin is reading the condition in the wrong context. The Ministers' Order was permissive, not restrictive.

181. Celgar did not have a general right to build the proposed power plant. Celgar required approval – an EPC or an exemption – under the UCA to construct and operate the power plant. The Ministers' Order did not impose any restrictions on what Celgar otherwise had a right to do. The Ministers' Order granted Celgar a right.

⁸⁸ *Environmental Assessment Office User Guide*, 2009 (updated March 2011), page 37.

⁸⁹ Letter dated 2 March 2005 from Joan Hesketh, Executive Director of the Environmental Assessment Office, to Tom Theodorakis, lawyer for Zellstoff Celgar Limited.

⁹⁰ David Austin Expert Report, 15 December 2014, para. 21.

⁹¹ Austin Expert Report, para. 17.

182. The language in the Ministers' Order condition 1(a) is clear. Celgar was to design, locate, construct and operate the power plant in accordance with the application. Celgar's application described the power plant and its purpose in consistent and clear terms. The power plant was being built to supply power to the modernized and expanded Celgar mill. No other purpose for the power plant is mentioned.

183. Any reasonable interpretation of condition 1(a) can only lead to the inescapable conclusion that the Ministers' Order is subject to Celgar designing, constructing, and operating the power plant to supply power to the Celgar mill. Celgar committed to that condition when it signed the Ministers' Order.

184. The Ministers' Order was only restrictive in the sense that the permission for the power plant was conditional on Celgar designing, constructing and operating it as it had proposed in its application – i.e. to supply power to the Celgar mill. There is no need to define the terms that Mr. Austin cites since compliance is assessed in simpler terms. As long as the power plant is being used solely to supply the mill with power, it is complying with condition 1(a).

185. There is no need to measure the level of supply or a requirement for Celgar to achieve a defined level of supply. The Ministers' Order does not restrict Celgar from receiving FortisBC power if the power plant cannot supply all the power the Celgar mill requires. Celgar's application specifically contemplated a continued connection to the FortisBC power grid for that purpose.

186. There is also no need for complicated monitoring to enforce the condition. If Celgar sells to a third party, then the general public utility regulation (Part 3) under the UCA applies. The Energy Supply Contract obligations under section 71 of Part 5 also apply.

A change in purpose required authorization

187. If Celgar wished to change the purpose of the power plant permitted by the Ministers' Order, then the UCA (as it was in 1991) and the subsequent EAA allowed Celgar to apply to amend the Ministers' Order and justify the new purpose in an application to amend the Ministers' Order.

188. Upon receiving such an application, the EAO would consider whether the new purpose of the power plant – selling power to third parties – was within the scope of the original project review.

189. For example, in the *Halalt First Nation* decision, the BC Supreme Court considered a challenge to an environmental assessment certificate approved under section 16 of the Current EAA which involved the construction and operation of a well field adjacent to the Reserve of the Halalt First Nation to extract groundwater from the Chemainus Aquifer. The certificate approved the construction of two wells and the operation of one well during the winter months. In considering the process that would be required if the certificate holder wished to revise the Project to include the extraction of groundwater in the summer months, the court stated that the certificate holder "need only apply under s. 19".⁹² In other words, an amendment to an environmental assessment certificate under section 19 of the Current EAA is required where the scope of the original certificate restricted the time period within which an activity may be conducted.

190. Further, in the *Bennett Environmental* case, the Federal Court of Appeal considered the intended use of specialized waste treatment facility that was being reviewed under the *Canadian Environmental Assessment Act* and the *New Brunswick Clean Environment Act*. The court stated that Bennett's high-temperature thermal oxidizer was "designed specifically for its intended purpose" (to treat impacted soils from brownfield site remediation projects in North America) and that "a change in the use the facility would not be permitted without provincial approval", noting that the draft Approval to Operate had a condition to that effect.⁹³

⁹² *Halalt First Nation v British Columbia (Ministry of Environment)*, 2011 BCSC 945, rev'd on other grounds, 2012 BCCA 472 leave to appeal to SCC refused, 2013 CarswellBC 4169.

⁹³ *Bennett Environmental Inc v Canada (Minister of Environment)*, 2005 FCA 261.

Condition 1(a) did not permit Celgar to sell power, nor did it exempt it from public utility regulation

191. Mr. Austin's also cites the *Kitimat*⁹⁴ case for the proposition that a restriction on the sale of electricity could only arise based on "clear language". The circumstances of *Kitimat* case and Rio Tinto Alcan's power generation differ in several substantial respects.

- a) Rio Tinto Alcan has an aluminum smelter in Kitimat and a 1000 MW hydro-electric power generation facility to serve the smelter.
- b) Rio Tinto Alcan is not a customer of BC Hydro or any other public utility. It is a stand-alone independent power producer.
- c) Rio Tinto Alcan's right to sell power was granted under the 1950 Agreement between the Province and Alcan, which was authorized under the *Industrial Development Act*, S.B.C. 1949, c. 31.
- d) The Province and Rio Tinto Alcan contemplated the sale of power to third parties from the outset of the project. At the time of the construction of the power generation facilities and smelter in the 1950s, there was no other source of power to serve the local community that grew up around the smelter. Clause 9 was included in the 1950 Agreement to allow Alcan to supply power to others without becoming a regulated public utility. In other words, the clause explicitly contemplated and enabled Alcan's sale of power to others.
- e) The clause in question – clause 9 of the 1950 Agreement – was not a restriction on Alcan's right to sell power, but an authorization for Alcan to sell power without being regulated as a public utility.
- f) The court explained the effect of Clause 9 was to permit the sale of power, not restrict it.

⁹⁴ *Kitimat (District) v. British Columbia (Minister of Energy)*, 2008 BCCA 81, 2008 Carswell BC 316.

[34] I am not, on the plain meaning of the words of Clause 9 read in the context of the Agreement as a whole, and having regard for its object of encouraging Alcan's investment, able to conclude Clause 9 precludes Alcan from selling its power even if it compromises the production of aluminum to do so. In my view, Clause 9 is wholly concerned with permitting Alcan to sell power without being regulated. [Underlining added]

- g) The clause is not comparable to condition 1(a) in Celgar's Ministers' Order. Condition 1(a) does not permit Celgar to sell power, nor does it exempt Celgar from public utility regulation under the UCA if it began to sell power to others
- h) The Celgar EPC application does not mention or contemplate the sale of power to others. As noted earlier, Celgar would have been a public utility and subject to BCUC regulation as a public utility if that use had been intended.

192. Finally, the language in condition 1(a) was typical of other EPCs granted during that time. For example, the language in the EPC granted on 27 December 1991 to Ocelot Chemicals Inc. to construct and operate a methyl tertiary butyl ether terminal and pipeline was identical

- 1. Ocelot shall, subject to this Order, cause the Project to be designed, located, constructed and operated in accordance with:
 - a) the Application; ...⁹⁵

Regulation of the Use of Power

193. Mr. Austin argues that the Ministers lacked the authority to impose any energy self-sufficiency requirement on a thermal electric power plant.⁹⁶ He suggests that the Celgar mill's energy use could only have been regulated under the UCA if it consumed 3 PJ or more so it would have fallen within the "energy use" project definition. The foundation of his argument is flawed because he misconstrues the nature of the review under Part 2 and the Ministers' Order.

⁹⁵ Energy Project Certificate granted on 27 December 1991 to Ocelot Chemicals Inc. to construct and operate a methyl tertiary butyl ether terminal and pipeline.

⁹⁶ David Austin Expert Report, para. 8 e..

194. The EPC Guide explained the function of the Part 2 review

The Act establishes a review process by which major energy projects obtain certification. Regulated projects, as defined under Section 16, include any large-scale project in the energy field, whether or not the proponent is a public utility normally regulated by the Commission. A regulated project must receive and Energy Project Certificate before construction, and an Energy Operation Certificate before operation.⁹⁷

195. The definition of "energy use project" was as follows

"*energy use project*" means a mill, factory, plant, smelter, oil refinery, metal refinery, or other undertaking or facility designed to use, convert or process an energy resource or coal, or any combination of them, at the rate of 3 PJ or more a year, ...⁹⁸

196. The Celgar power plant fell within the definition of "thermal electric power plant", which was as follows

"*thermal electric power plant*" means a facility for the generation of electricity from the combustion of natural gas, oil, petroleum products, coal, wood or plant products ...

197. Part 2 did not establish a different regulatory approach and powers for two types of projects – i.e. energy use projects and thermal electric power plants. The Part 2 regime was the same for both.

198. The Part 2 review and certification was complementary to the public utility regulatory powers under the UCA. The Part 2 was an initial review early in the project planning stage to consider the social, economic and environmental impacts of the proposed project, including its purpose and justification, to determine if it was in the public interest.

199. The purpose of the project, including the use of the power that would be generated, was very much part of the assessment. The EPC Guide and the related *Energy Project Certificate Regulation*⁹⁹ required project proponents to provide information about the purpose. Appendix 2

⁹⁷ *Energy Project Certificate Guide*, supra note 57, page 3.

⁹⁸ UCA (1991), Part 2, section 16.

⁹⁹ *Energy Project Certificate Regulation*, Reg. 388/80.

of the EPC Guide refers to energy supply and demand forecasts as part of the project justification.¹⁰⁰ This information was required whether the project *generated* or *used* electricity.

200. As explained in the earlier analysis, the Ministers' Order allowed Celgar to construct and operate a project with a defined purpose – as set out in Celgar's application.

201. The sale of power to others was subject to a comprehensive regulatory regime under the UCA. If Celgar proposed to generate and sell power to others, then it would have triggered Part 3 and Part 5 regulation in addition to Part 2 regulation.

E. CONCLUSIONS

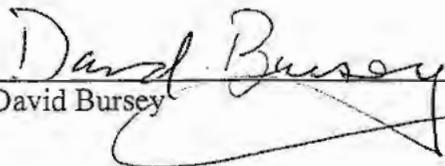
202. The conclusions of my Report are as follows

- a) The BCUC regulation of industrial customers' entitlement to receive utility power supply while selling self-generated power has been reasonable and responsive to the evolving circumstances associated with the issue.
- b) The BCUC's regulation of the Claimant's access to BC Hydro and FortisBC embedded cost power was reasonable and consistent with the UCA and provincial energy policy.
- c) The Ministers' Exemption Order issued in 1991 for the power generation facilities associated with the Celgar Modernization Project and its conditions remain in effect.
- d) The Ministers' Exemption Order permits Celgar to construct and operate power generation facilities for the purpose of supplying power to the Celgar pulp mill and does not permit sales of self-generated power to third parties.

¹⁰⁰ *Energy Project Certificate Guide*, *supra* note 57, see Appendix 2 Information Requirements.

SIGNED at Vancouver, British Columbia

28 March 2015


David Bursey

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APPENDIX 1.
SUMMARY OF THE *UTILITIES COMMISSION ACT* AND THE *CLEAN ENERGY ACT*

Utilities Commission Act

203. Under section 2 of the UCA, a public utility is defined as follows

"**public utility**" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

- a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or ...

204. *Part 3 – Regulation of Public Utilities* sets out the powers of the BCUC and the obligations of public utilities, including the following

- a) granting exemptions from Part 3 (s. 22)
- b) general supervision of public utilities (s. 23)
- c) improving service and setting standards (s. 25 and 26)
- d) ordering or extending service (s. 28, 29, 30, and 34)
- e) regulating agreements for service (s. 31)
- f) ceasing service (41)
- g) reviewing resource and conservation plans and expenditures (s. 44.1 and 44.2)
- h) reviewing the construction and operation of public utility plant and extensions to that plant – approved by a certificate of public convenience and necessity ("CPCN") (s. 45 to 47)
- i) supervision of service franchise rights (s. 48)
- j) setting accounting and record requirements (s. 49)
- k) supervising the issuance and transfer of securities, debt and transfer of utility ownership or assets (s. 50 to 54)

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- l) appraising utility property, setting depreciation rates, and reserve funds (s. 55 to 57)
- m) setting rates and terms of service (s. 58 to 64)

Public utility obligations

- a) public utility obligation to serve (s. 28, 38)
- b) duty to keep records and provide information to the BCUC (s. 43 and 44)
- c) long-term resource planning and conservation planning (s. 44.1 and 44.2)
- d) charging just and reasonable rates, approved by the BCUC (s. 59 to 60)
- e) filing rate schedules with the Commission and charging only approved rates (s. 61 to 63)

205. *Part 5 – Electricity Transmission* sets out, among other things, the powers of the BCUC related to the approval of energy supply contracts entered into by public utilities.

206. Under Part 5, an energy supply contract is defined as follows

s. 68 "energy supply contract" means a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act;

207. Under section 71, an energy supply contract must be filed with the BCUC for review. The BCUC reviews the contract to consider the following factors which relate to public interests other than private interests of the two contracting parties

s.71 (2.1) In determining under subsection (2) whether an energy supply contract filed by a public utility other than the authority is in the public interest, the commission must consider

- a) applicable B.C. energy objectives [as set out in the Clean Energy Act],
- b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,

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- c) the extent to which the energy supply contract is consistent with the applicable requirements under sections 6 and 19 of the Clean Energy Act,
- d) the interests of persons in British Columbia who receive or may receive service from the public utility,
- e) the quantity of the energy to be supplied under the contract,
- f) the availability of supplies of the energy referred to in paragraph (e),
- g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
- h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

Clean Energy Act

208. Section 2 of the *Clean Energy Act* sets out British Columbia's energy objectives, and includes the following

- a) to achieve electricity self-sufficiency (s. 2(a))
- b) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity (s. 2(c))
- c) to ensure BC Hydro's ratepayers receive the benefits of the heritage assets (s. 2(e))
- d) to reduce BC greenhouse gas emissions (s. 2(g))
- e) to be a net exporter of electricity from clean or renewable resources (s. 2(n))
- f) to ensure the BCUC continues to regulate BC Hydro with respect to domestic rates but not with respect to expenditures for export except as provided for in the Clean Energy Act (s. 2(p))

209. Section 3 describes BC Hydro's obligation to deliver an integrated resource plan every 5 years. The integrated resource plan must be consistent with good utility practice and include a description of the following

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- a) BC Hydro's forecasts of energy and capacity requirements to achieve self-sufficiency (s. 3(1)(a))
- b) what BC Hydro plans to do to achieve electricity self-sufficiency and to respond to British Columbia's other energy objectives (s. 3(1)(b))
- c) the consultations carried out by BC Hydro respecting the development of the integrated resource plan (s. 3(1)(c))
- d) the expected export, the potential for British Columbia to meet that demand, the actions that BC Hydro has taken to seek suitable opportunities for the export of electricity from clean or renewable resources, and the extent to which BC Hydro has arranged for contracts for the export of electricity (s. 3(1)(d))
- e) the amount of, and the rationale for, any planned expenditure for export (s. 3(1)(e))

210. Under section 6(2), BC Hydro must achieve electricity self-sufficiency by holding, by the year 2016 and each year after that, the rights to an amount of electricity that meets the electricity supply obligations solely from electricity generating facilities within British Columbia, assuming no more in each year than the heritage energy capability and without relying on the BC Hydro Burrard Thermal gas-fired generation facility.

211. Section 7 exempts certain energy supply contracts entered into by BC Hydro from section 71 of the UCA, which requires that an energy supply contract must be filed with the BCUC for review. These exempted energy supply agreements include

- a) a bio-energy phase 2 call to acquire up to 1,000 gigawatt hours per year of electricity (s. 7(e))
- b) agreements with pulp and paper customers eligible for funding under Canada's Green Transformation Program under which up to 1,200 gigawatt hours per year of electricity are required (s. 7(f))

212. *Part 5 – Energy Efficiency Measures and Greenhouse Gas Reductions* sets out, among other things, measures to facilitate British Columbia's goal to reduce greenhouse gas emissions (s. 18) and generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit that electricity (s. 19).

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APPENDIX 2.
SUMMARY OF CASE LAW GOVERNING THE BCUC MANDATE UNDER THE
UTILITIES COMMISSION ACT

213. In *Atco*, the Supreme Court of Canada considered similar public utility legislation in Alberta and described how the broadly worded powers must be grounded in the main function of the Board.

[7] ... The Board's seemingly broad powers to make any order and to impose any additional conditions that are necessary in the public interest has to be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The limits of the powers of the Board are grounded in its main function of fixing just and reasonable rates ("rate setting") and in protecting the integrity and dependability of the supply system.¹⁰¹

214. In *Bell Canada*, the Supreme Court of Canada considered the Canadian Radio-Television and Telecommunications Commission's power to order a refund based on the sparse wording in enabling statute. The Court established the doctrine of jurisdiction by necessary implication.

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.¹⁰²

215. In *Atco*, the Court also defined the concept of the "regulatory compact" in the following terms.

[63] These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price — nothing more. As I will further explain, it does not transfer onto the customers any property right. Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for

¹⁰¹ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, 2006 SCC 4, para. 7.

¹⁰² *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at p. 1756S.C.R. 1722, at p. 1756; also cited with approval in *Atco* at paras. 50 and 51.

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their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated (see *Black*, at pp. 356-57; *Milner*, at p. 101; *Atco Ltd.*, at p. 576; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186 (“*Northwestern 1929*”), at pp. 192-93).

216. Many years earlier, the Supreme Court of Canada interpreted the BCUC's mandate for rate-making in the *B.C. Electric Railway*¹⁰³ case. Although the court did not use the expression "regulatory compact", it expressed a similar idea when it spoke of the balance between public utility and ratepayer interests.

217. In that case, the Supreme Court of Canada considered s.16 (1)(b) of the *Public Utilities Act* which contains similar language to section 59(5) of the current Act. The Court reviewed the legislative history of the Act and its predecessor and also considered the common law and American case law.

218. The Court concluded the Commission had unlimited discretion as to matters which it may consider as affecting the rate, but that it must balance the interests of the ratepayers and the public utility.

Clause (b) of subs. (1) [of section 16] does not use the word "consider" which is used in clause (a), but directs that the Commission "shall have due regard", among other things, to two specific matters. These are:

- a) The protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and
- b) to giving to the public utility a fair and reasonable return upon the appraised value of the its property used or prudently and reasonably acquired to enable the public utility to furnish service.

As I read them, the combined effect of the two clauses is that the Commission, when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (b). It would appear, reading ss. 8, 16 and 20 together, that the Act contemplates these two matters to be of primary importance in the fixing of rates.¹⁰⁴

¹⁰³ *B.C. Electric Railway v. Public Utilities Commission of British Columbia* (1960), [1960] S.C.R. 837; 25 D.L.R. (2d) 689 (S.C. C.).

¹⁰⁴ *Ibid*, pages 855-856.

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219. More recently in *Hemlock Valley*¹⁰⁵, the B.C. Court of Appeal considered provisions in the Act that are virtually the same as the current provisions and similar to the older provisions considered in *B.C. Electric Railway*. The Court of Appeal cited extensively from the *B.C. Electric Railway* case and noted the following at page 12.

Any discussion of the scope of the commission's rate-making powers begins, of necessity, with the seminal decision of the Supreme Court of Canada in *B.C. Electric Railway v. Public Utilities Commission of British Columbia* ...

220. Later, in the *BC Hydro* case, the BC Court of Appeal interpreted the BCUC's mandate under the Act in a case where BC Hydro challenged the BCUC's authority to direct how it should undertake its resource planning and specifically the BCUC's requirement that BC Hydro follow the BCUC's Integrated Resource Planning ("IRP") Guidelines.

221. The court considered the purpose of the UCA, the reason for the BCUC's existence, the expertise of its members and the nature of the problem before the BCUC. The court described the public utility and customer relationship in similar terms to the "regulatory compact" described in the *Atco* case, without using that expression expressly.

[46] In this light the Utilities Act is a current example of the means adopted in North America, firstly in the United States, to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition. The grant of monopoly through certification of public convenience and necessity was accompanied by the correlative burden on the monopoly of supplying service at approved rates to all within the area from which competition was excluded.¹⁰⁶

222. The court also noted that the Commission does not have broad policy making powers.

[52] I have already described the reason for the existence of the tribunal. The expertise or skills of its members vary. Experience has demonstrated skills associated with accounting, economics, finance and engineering have been frequently utilized. Unlike labour relations tribunals where past experience in the field of labour relations is a virtual prerequisite, past experience in the regulatory field is not necessary. A similar observation may be made with respect to securities commissions. Both labour relations tribunals and securities

¹⁰⁵ *Hemlock Valley Electrical Services Ltd. v. B.C. (Utilities Commission)* (1992), 66 B.C.L.R. (2d) 1 (B.C.C.A.)

¹⁰⁶ *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, [1996] B.C.J. No. 379, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 27, (Application for leave to appeal dismissed with costs (without reasons) September 19, 1996 – [1996] S.C.C.A. No. 204).

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commissions are expressly conferred with policy making powers. None such are conferred on the Commission.¹⁰⁷

223. Further, the court noted that the management of the public utility – including an activity like resource planning – rests with the company and the BCUC may not interfere with that role.

[56] It is only under s. 112 of the Utilities [*Commission*] Act that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

...

[58] Taken as a whole the Utilities Act, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

¹⁰⁷ *British Columbia Hydro and Power Authority v. British Columbia Utilities Commission*, [1996] B.C.J. No. 379, para. 53.

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APPENDIX 3.
SUMMARY OF KEY BCUC DECISIONS ON THE SALE OF POWER BY SELF-GENERATING INDUSTRIAL CUSTOMERS

224. The BCUC has issued numerous decisions on the issue of the entitlement to utility power by customers who wish to sell their own self-generated power ("self-generators").

225. A brief summary of the key decisions and findings follows.

Order G-27-93 – 23 April 1993 – BC Hydro – Approval of Rate 3808 and Revised Power Purchase Agreement with West Kootenay Power Ltd.¹⁰⁸

- a) The BCUC confirms the unique "hybrid" relationship between WKP (now FortisBC) and BC Hydro – i.e. part utility-customer and part utility-utility.
- b) The BCUC imposed a 200 MW Customer Demand Limit on Rate 3808, which established WKP's maximum entitlement to Rate 3808 power. This limit came into effect in 1995. Any power that WKP wished to take above that limit would set by negotiation between BC Hydro and WKP on a utility to utility basis.
- c) The BCUC confirmed the RS 3808 tariff provision that prohibits FortisBC from exporting power in any hour in which it is also purchasing power from BC Hydro under RS 3808.
- d) The BCUC directed BC Hydro and FortisBC to negotiate and file a revised Power Purchase Agreement to incorporate the directions set out in the BCUC Decision.

¹⁰⁸ BCUC Order G-27-93 and Reasons for Decision, 23 April 1993, *BC Hydro – Approval of Rate 3808 and Revised Power Purchase Agreement with West Kootenay Power Ltd*

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Order G-85-93 – 30 September 1993 – Approval of BC Hydro and FortisBC Power Purchase Agreement¹⁰⁹

- a) The BCUC confirmed that electricity purchased under the 1993 PPA was solely for the purposes of supplementing FortisBC's resources to meet its service area load requirements and was not available to export or store.
(page 13)
- b) FortisBC was prohibited from exporting any electricity out of its service area during any given hour while FortisBC was taking energy requirements from RS 3808 for that hour.

Order G-38-01 – 5 April 2001 – BC Hydro –Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability¹¹⁰

- a) This proceeding was prompted by short-term, unusual market demand for power arising from an energy crisis in the Western United States.
- b) In response to a request from BC Hydro on 23 February 2001, the BCUC convened a workshop and subsequent written process to review the issues associated with industrial customers selling self-generated power at market prices.
- c) By Order G-27-01 dated 28 February 2001¹¹¹, the BCUC established an expedited process because the interested parties expressed concern that the BCUC act urgently so self-generators could participate in the unique market conditions.
- d) The BCUC convened the workshop on 19 March 2001 and established a written comment period that ended on 26 March 2001.

¹⁰⁹ BCUC Order G-85-93, 30 September 1993, *Approval of BC Hydro and FortisBC Power Purchase Agreement*

¹¹⁰ BCUC Order G-38-01, 5 April 2001, *BC Hydro –Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*

¹¹¹ BCUC Order G-27-01 dated 28 February 2001, *BC Hydro –Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*

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- e) The BCUC issued its decision on 5 April 2001 in Order G-38-01. In that order, the BCUC established a "program" on a short term basis to respond to the unique market circumstances. Section 2 of the order explains

2. Due to the unique circumstances of that currently exist and without prejudice to the resolution of long-term rights of self-generators to take their generation to the market, this program is established until March 31, 2002 and may be continued after that date if conditions warrant.

- f) The BCUC directed

(1) BC Hydro to allow customers with idle self-generation capability to sell excess self-generated electricity, so long as they do not arbitrage between embedded cost utility service and market prices, but

(2) BC Hydro is not required to supply increased embedded cost of service to self-generator customers who are selling their self-generation output to market.

- g) The BCUC also stated in section 1 of the order

The Commission recognizes that considerable debate may ensue over whether a self-generator has met this principle, but the Commission expects B.C. Hydro to make every effort to agree on a customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator. In instances where the parties cannot agree on an appropriate baseline, an affidavit may be required from the self-generator that it will not adjust its consumption of electricity under Rate Schedule 1821 to take advantage of market sales from its self-generation.

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- h) The BCUC also directed
 - i. self-generators and BC Hydro/Powerex¹¹² may request the views of Commission staff on any unresolved issues before negotiations of contracts are terminated.
 - ii. BC Hydro to file a full report on the program by 1 March 2002.

Order G-113-01 – 1 November 2001 – Application by Riverside Forest Products Limited for a UCA Exemption¹¹³

- a) This decision involved Riverside Forest Products who was a power service customer of the City of Kelowna, a municipal public utility that was a customer of West Kootenay Power Ltd. ("WKP") at that time. Although this decision involved the WKP's service area, not BC Hydro's, the Commission applied the approach it established in G-38-01.
- b) Pursuant to section 88(3), the BCUC exempted the Riverside and its purchaser from the public utility regulation and the requirement to file an energy supply contract for Incremental Power. Incremental Power was defined as power
 - i. for power exported or sold to the City and others any power above the first 2 MW of generation each hour.
 - ii. for power sold to the City, any power that Riverside does not require at its facilities (essentially a net of load approach)
- c) The recitals to the Order explain the basis for the decision
 - i. Riverside and WKP began discussions in 1998 about how to increase its power generating capacity above 2 MW each hour for sale to brokers or others for export.
 - ii. Riverside modified its power plant in 2000 to increase the average generation capacity.

¹¹² Powerex was BC Hydro's wholly-owned power trading company.

¹¹³ BCUC Order G-113-01, 1 November 2001, *Application by Riverside Forest Products Limited for a UCA Exemption*.

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- iii. The BCUC excluded the first 2 MW of generation each hour from the definition of Incremental Power to protect WKP and its customers from harmful arbitrage.
- iv. The 2 MW baseline was set on the basis of historical capacity.
- v. No party opposed the application.

Order G-17-02 – Decision on BC Hydro report – BC Hydro Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability¹¹⁴

- a) BC Hydro filed a report on 1 March 2002 in which it reported as follows.¹¹⁵
 - i. Howe Sound Pulp and Paper took advantage of the opportunity initially, but then changed its plans and entered into an agreement with Powerex (BC Hydro's energy trading subsidiary company).
 - ii. Powell River Energy Inc. ("PREI"), owned by Pacifica Papers, sold power while its mill was shut down for maintenance.
 - iii. There is little experience to from which to draw any new conclusions about the program.
 - iv. The energy shortage had subsided and the market prices were lower, so there were fewer opportunities for self-generators to sell power at a profit.
- b) BC Hydro requested and the BCUC agreed to extend the program and the G-38-01 approach until BCUC determines otherwise.

¹¹⁴ BCUC Order G-17-02, *Decision on BC Hydro report – BC Hydro Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*.

¹¹⁵ BC Hydro letter dated 1 March 2002, *BC Hydro Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability – Commission Order no. G-38-01*.

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Order E-8-09 – 31 July 2009 – Decision on BC Hydro Biocall EPA's – Approval under section 71 of the UCA¹¹⁶

- a) The BC Hydro – Celgar EPA was one of four Energy Supply Agreements filed for acceptance under section 71 of the UCA.
- b) All EPAs were accepted for filing as energy supply contracts
- c) Celgar did not dispute BC Hydro's determination of the Celgar site GBL.

Order G-48-09 – 6 May 2009 – BC Hydro – Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement¹¹⁷

- a) The BCUC approved BC Hydro's application to amend section 2.1 of the PPA to read as follows

(a) The electricity purchased under this agreement is solely for the purpose of supplementing FortisBC's resources to enable it to meet its service area load requirements and, shall not be exported or stored, provided that nothing contained herein shall prohibit FortisBC from storing its entitlement resources in its entitlement account pursuant to the Canal Plant Agreement; and

(b) shall not be sold to any FortisBC customer when such customer is selling self-generated electricity which is not in excess of load.

- b) The BCUC explained further

For greater certainty, paragraph (b) above is to prevent FortisBC self-generating customers from purchasing power at regulated embedded cost rates and simultaneously selling an equivalent

¹¹⁶ BCUC Order E-8-09, 31 July 2009, *Decision on BC Hydro Biocall EPA's – Approval under section 71 of the UCA*

¹¹⁷ BCUC Order G-48-09 and Reasons for Decision, 6 May 2009, *BC Hydro – Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement*

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amount of power into available domestic and export markets” (p. 31)

- c) The BCUC clarified what constitutes “excess self-generated electricity” as set out in Order G-38-01, Section 1

In the end, the Commission Panel has decided that there must be a simple definition of what constitutes “excess power” and we define that term to mean power “net of load on a dynamic basis.” The Commission Panel determines that any self-generators, as owners of the generation facilities, should have the flexibility to reduce domestic load as they see fit in the commercial circumstances at hand in order to optimize the export of self-generated power. What will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market” (p. 29)

- d) BCUC also confirmed that
- i. new or incremental generation capacity must be determined on a case-by-case basis (p. 30)
 - ii. BC Hydro’s heritage assets benefit all British Columbians including the customers of FortisBC:

Nelson residents, as British Columbians, do share in the overall benefits of the Heritage Power framework but should not be permitted to benefit unduly at the expense of other customers of BC Hydro. (page 25)

Order E-16-09 – 13 November 2009 – Application by BC Hydro for acceptance of an Energy Supply Agreement with Tembec Industries Inc. – Purcell Power Plant at Skookumchuck¹¹⁸

- a) The BCUC approved an energy supply contract between Tembec and BC Hydro. The associated GBL of 14 MW was negotiated between BC Hydro and Tembec based on historical energy consumption at the Tembec

¹¹⁸ BCUC Order E-16-09, 13 November 2009, *Application by BC Hydro for acceptance of an Energy Supply Agreement with Tembec Industries Inc. – Purcell Power Plant at Skookumchuck*

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Pulp Mill [REDACTED] to account for the unique circumstances of the power generation at the site. The GBL was accepted by the BCUC.

- b) In the recital to the Order, the BCUC refers to the approach established in G-38-01. It states that it reviewed the historic energy consumption at the Tembec Pulp Mill. The BCUC accepted the EPA in the public interest with its embedded customer base line.
- c) The BCUC approach explicitly conforms to the G-38-01 approach.

Letter L-106-09 – 27 November 2009 – BCUC Letter to BC Hydro – BC Hydro Electricity Purchase Agreements – Generator Baselines¹¹⁹

- a) By letter dated 27 November 2009, the BCUC wrote to BC Hydro requesting it to develop guidelines for establishing GBLs.
- b) The BCUC reviewed the history of the issue dating back to the G-38-01 decision and the subsequent continuation in G-1702 of the G-38-01 conditions until the Commission determined otherwise.
- c) The BCUC noted that the concepts were now being applied to longer term EPAs. Further, it noted that BC Hydro had filed a report in compliance with section 6.2 of the G-48-09 decision, in which BC Hydro described how it determines a GBL on a case by case basis for each customer with self-generation who sells power.
- d) The BCUC concluded that it may be helpful and timely for BC Hydro to develop guidelines for establishing GBLs.
- e) The BCUC requested BC Hydro to develop guidelines to be filed as part of its next major EPA filing that involves GBL's or next Long Term

¹¹⁹ BCUC Letter L-106-09, 27 November 2009, *BCUC Letter to BC Hydro – BC Hydro Electricity Purchase Agreements – Generator Baselines*

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Acquisition Plan filing. The BCUC also listed questions that it asked BC Hydro to address.

- f) On 27 July 2011, BC Hydro responded to L-106-09. It did not file GBL guidelines, explaining that it did not have an EPA or Long Term Acquisition Plan filing to make. BC Hydro did commit to develop GBL guidelines based on consultations that it had undertaken in October and December 2010.
- g) BC Hydro filed its report on 20 June 2012.¹²⁰

Order G-156-10 – 19 October 2010- Application by FortisBC Inc. for Approval of a 2009 Rate Design and Cost of Service Analysis¹²¹

- a) In this proceeding, Celgar pressed the BCUC to find that it has a right to embedded cost power under RS 3808 and to set a GBL for the Celgar site.
- b) The BCUC refused the request, and explained its rationale as follows.

The Commission Panel is of the view that the Commission's determination at page 31 of Order G-48-09 is clear, and sets out to prevent exactly what Celgar is proposing to do.

Accordingly, the Commission Panel considers that defining what is precisely meant by "arbitrage" is irrelevant. It is clear from Exhibits B-35 and B-37 that the effect of Celgar's proposal that it be allowed to purchase the full mill load at embedded rates from FortisBC will require FortisBC to purchase an additional \$8.9 million of power from BC Hydro under RS 3808 at embedded (heritage) rates.

While FortisBC might be indifferent financially to this proposal, it is clear that BC Hydro and its ratepayers would not be indifferent as it would oblige BC Hydro to pay incremental prices for the power or lose export opportunities. The Commission Panel considers that this would not be in the public interest. (pages 102 and 103)

¹²⁰ BC Hydro Report dated 20 June 2012.

¹²¹ BCUC Order G-156-10 and Reasons for Decision, 19 October 2010, *Application by FortisBC Inc. for Approval of a 2009 Rate Design and Cost of Service Analysis*

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...

By the same token, the Commission Panel does not find an unconditional obligation on a utility to provide service to all persons at embedded costs. ...The Commission Panel considers that section 39(i) of the UCA gives the Commission the power to establish rates for service to FortisBC's customers, and that sections 60-61 give the Commission the power to set rates that may not necessarily be based on embedded costs. (page 113)

*Order G-3-11 – 12 January 2011 – Application by Zellstoff Celgar Limited Partnership for Reconsideration of Commission Order G-156-10 and the Reasons for Decision regarding the FortisBC Inc. 2009 Rate Design and Cost of Service and Analysis Application*¹²²

- a) BCUC clarified that in the G-156-10 Order it
 - i. considered only the impact of Order G-48-09 on BC Hydro's sales under its Power Purchase Agreement ("PPA") with FortisBC and on FortisBC's sales to Celgar. It did not consider whether the findings in G-48-09 and G-38-01 had general application or referred to BC Hydro and its customers only. The BCUC decided that issue [of equity between pulp mills in BC] fell outside its jurisdiction.
 - ii. "left the door open" for FortisBC and Celgar to negotiate a new service agreement for FortisBC to supply Celgar with some or all of the mill load from "non-RS 3808 sources".
- b) FortisBC has access to BC Hydro PPA power at all times, but cannot sell it to Celgar when Celgar sells power. FortisBC is to develop a notional matching methodology to prevent such sales.

¹²² BCUC Order G-3-11 and Reasons for Decision, 12 January 2011, *Application by Zellstoff Celgar Limited Partnership for Reconsideration of Commission Order G-156-10 and the Reasons for Decision regarding the FortisBC Inc. 2009 Rate Design and Cost of Service and Analysis Application*

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- c) Celgar is entitled to some amount of FortisBC's non-PPA embedded cost power when selling its own power, but FortisBC is to determine guidelines for establishing specific amount.
- d) FortisBC is to file an application for a two-tier stepped transmission rate [the rationale being that the self-generator is to bear the costs of incremental power incurred when customer sells power not in excess of its load.]
- e) a GBL is not required for a general service agreement and is subject to negotiation between the parties.

Order G-188-11 – 14 November 2011 – Zelstoff Celgar ~ Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges¹²³

- a) Celgar complained that FortisBC failed to complete a General Service Agreement ("GSA") with Celgar. Celgar asked the BCUC to establish a GSA that included the following elements listed at page 4.
 - i. a GBL of 1.5 aMW under the authority of section 25 of the UCA
 - ii. a right to service under Rate Schedule 31 (Large Commercial Transmission Service) base on rolled-in costs when Celgar sells power above its GBL
 - iii. a contract demand equal to Celgar's Mill load less the GBL
 - iv. access to non-firm power above the Contract Demand.
- b) The BCUC denied Celgar's complaint.

¹²³ BCUC Order G-188-11, and Reasons for Decision, 14 November 2011, *Zelstoff Celgar ~ Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges*

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- c) The BCUC decided the complaint was not about the nature and level of service (FortisBC never denied service to Celgar), but the rate that Celgar was being charged.
- d) In the RDA Decision, the Commission Panel directed FortisBC to provide service to Celgar under RS 31, effective 2 January 2011. A GSA was not a pre-condition to service under RS 31.
- e) FortisBC is directed to develop a rate for Celgar and other self-generators by May 31, 2012 based on RS 31 but excluding BC Hydro PPA Power from its resource stack (page 14).
- f) The BCUC referred to the G-48-09 Decision finding that BC Hydro Heritage Assets benefit all British Columbians, but FortisBC customers should not benefit unduly at the expense of BC Hydro customers. (page 26)
- g) The BCUC held that the different conditions regarding BC Hydro accessing Heritage Power and FortisBC accessing Heritage Power precludes relying on precedents with BC Hydro experience with GBLs relative to establishing a GBL for Celgar. Also, there was insufficient evidence filed to assess the relevance of the BC Hydro experience. (page 26)
- h) The BCUC reaffirmed its earlier ruling in the RDA decision (G-156-10) that a GBL is not a necessary component of a GSA. (page 28)
- i) The restriction in section 2.1 of the BC Hydro - FortisBC PPA does not preclude FortisBC from establishing its own principles for the supply of non-BC Hydro PPA Power in its resource stack when establishing GBLs with its customer. (page 28)
- j) The Commission Panel directed FortisBC to establish a methodology for notionally matching sales to Celgar in service of its load when Celgar is

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selling power, to FortisBC's supply of energy from its resource stack of non- BC Hydro PPA Power, and submit it by 31 March 2012 to the Commission for approval. (page 32)

Order G-198-11 – 1 December 2011 – Tolko Industries Kelowna Division ~ Application for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01¹²⁴

- a) Tolko asked the BCUC to reaffirm its ability to sell power generation in excess of the first 2 MW of generation in each hour as outlined in Order G-113-01. Tolko filed this application to clarify its GBL in the light of the BCUC decision in G-48-09 to amend section 2.1 in the FortisBC-BC Hydro Power Purchase Agreement.
- b) Tolko argued that it is not a direct customer of FortisBC so the revised section 2.1 should not apply to it. Further, Tolko argued the GBL established in G-113-01 protects against harm to WKP customers through arbitrage.
- c) Celgar supported Tolko's request.¹²⁵
- d) BC Hydro advised, in summary, that it took no position on Tolko's application provided that the reaffirmation requested did not:
 - i. enable Tolko to arbitrage between the PPA embedded cost of service and market prices,
 - ii. impact BC Hydro's GBL determinations and process, or
 - iii. assume BC Hydro will change its decision-making process in relation to energy purchases¹²⁶

¹²⁴ BCUC Order G-198-11, 1 December 2011, *Tolko Industries Kelowna Division ~ Application for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01*.

¹²⁵ BCUC Order G-191-13 Reasons for Decision, *FortisBC Inc. ~ Application for a Certificate of Public Convenience and Necessity for the Purchase of the Utility Assets*, page 11.

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- e) The BCUC reaffirmed Tolko's ability to sell power in excess of the first 2 MW of generation in each hour, with several variances to Order-113-01. Specifically, Tolko was first obliged to offer the power to Kelowna, FortisBC, and then Powerex.
- f) The BCUC based its decision on several factors
 - i. The BCUC agreed that Tolko is not a direct customer of FortisBC. For that reason, it found the amended section 2.1 of the PPA between BC Hydro and FortisBC as well as its Rate Schedule 3808 does not apply to Tolko.
 - ii. Since no Intervener opposed the historical GBL of 2 MW, the Commission Panel also accepted the historical GBL of 2 MW as sufficient to continue to prevent harm to FortisBC and its customers from arbitrage.
 - iii. The BCUC also considered the requirements in section 6 of the CEA for electricity self-sufficiency by BC Hydro. The BCUC considered that sales of electricity within the province of British Columbia take first priority to sales of electricity outside of the province of British Columbia.

Order G-202-12 – 27 December 2012 – FortisBC – Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology – Compliance filing to Order G-188-11¹²⁷

- a) The BCUC reviewed the history of the BCUC decisions related to self-generators within BC, particularly as they relate to the potential arbitrage of power.

¹²⁶ *Ibid*, page 11.

¹²⁷ BCUC Order G-202-12 and Reasons for Decision, 27 December 2012, *FortisBC – Guidelines for Entitlement to Non-PPA Embedded Cost Power and Matching Methodology – Compliance filing to Order G-188-1*.

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- b) FortisBC proposed that
 - i. an Eligible Customer, as defined in the Access Principles Application (APA), may have a right that up to 100 percent of its expected plant load be served by NECP, but the actual percentage of load served is to be nominated by the customer. The balance of a self-generating customer's plant load is to be served by either self-generation or other third party sources of supply. (page 3)
 - ii. 100 percent of a customer's nomination could be matched from alternate sources or surplus Company-owned capacity. (page 12)
 - iii. a stepped transmission rate design (to be filed later) for industrial customers to encourage conservation.
- c) Celgar supported the FortisBC proposal about entitlement to NECP, but disagreed with FortisBC's proposal on resource matching. (pages 4 and 13)
- d) The BCUC approved the FortisBC proposal. (page 3)
- e) The BCUC reaffirmed that it has consistently upheld the principle that other utility ratepayers should not be harmed by self-generators' arbitrage of embedded cost power. (page 10)
- f) The BCUC explained further at page 11.

The Commission has upheld a consistent regulatory principle, that self-generators should not arbitrage power to the detriment of other ratepayers, but has applied different mechanisms to achieve this protection in different circumstances. The mechanisms have included the GBL and net-of-load approaches. In Orders G-38-01 and G-17-02 it applied the GBL approach; in Order G-48-09 it applied the net-of-load approach.

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In the Commission Panel's view, GBLs, net-of-load, and now entitlement with appropriate rate design are all mechanisms the Commission can use to satisfy its regulatory principle that self-generators should not arbitrage power to the detriment of other ratepayers. Different mechanisms are appropriate in this case because of the different relationships (utility-to-customer or utility-to-utility) and the different service characteristics of the utilities, namely the Heritage Contract for BC Hydro and the APA for FortisBC.

- (g) The BCUC also explained that it was not in a position to impose a GBL.

GBLs exist between BC Hydro and its self-generating customers because they have been able to reach agreement on their GBLs. FortisBC and Celgar have been unable to reach such an agreement, notwithstanding the repeated encouragement by the Commission to do so. There is currently no basis upon which the Commission is able to force such an agreement or dictate what a GBL should be. (page 11)

Order G-191-13- FortisBC Inc. – Application for a Certificate of Public Convenience and Necessity for the Purchase of the Utility Assets – Reasons for Decision – Purchase of the City of Kelowna Utility Assets¹²⁸

- a) On 13 November 2012, FortisBC applied for BCUC approval and a Certificate of Public Convenience and Necessity (CPCN), for an extension of its distribution system resulting from its purchase of the electricity distribution assets of the City of Kelowna.
- b) As a result of WKP's purchase, Tolko became a direct customer of FortisBC.
- c) The BCUC revoked Order G-198-01 and varied Order G-113-01 to establish a new GBL for Tolko based on "net of load on a dynamic basis", consistent with the approach established by Order G-48-09.
- d) The BCUC explained its rationale as follows

¹²⁸ BCUC Order G-191-13 Reasons for Decision, *FortisBC Inc. ~ Application for a Certificate of Public Convenience and Necessity for the Purchase of the Utility Assets*.

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The Commission Panel finds that a GBL, representing in its most basic form the load a self-generator is required to serve, should be tied to an agreement with the utility. Tolko's GBL was granted when Tolko was a customer of the City of Kelowna, and that fact was specifically referenced by the Commission at the time it reaffirmed Tolko's GBL. The Commission Panel notes that Celgar does not have a GBL, nor do any other FortisBC customers.

The Panel finds that a utility offering one self-generating customer service on the basis of a GBL which is less than load and offering another self-generating customer service on a net of load basis will create a situation of "undue discrimination, preference, prejudice or disadvantage in respect of a rate or service," within the meaning of section 59(4)(b) of the *Utilities Commission Act*. The Panel further finds that, with the removal of the intermediary of the City of Kelowna, Tolko and Celgar, as two self-generating customers of the same utility, will be offered service "under substantially similar circumstances and conditions" within the meaning of section 59(4)(c).¹²⁹

- a) The BCUC also commented on the use of GBLs in the BC Hydro service area, noting its efforts to balance competing interests

GBLs address the potentially competing interests of a utility's obligation to serve and its need to accurately forecast the load it must serve. In the Panel's view, the history relating to GBLs in BC Hydro's service territory is consistent with the existence of these competing interests which the Commission has attempted to recognize and balance over the years. An electric utility needs to be in a position to serve what it forecasts to be its maximum or peak load at any given time. Planning horizons are necessarily long, particularly where increased generation is required and must be constructed.¹³⁰

¹²⁹ BCUC Order G-191-13 and Reasons for Decision, page 3.

¹³⁰ BCUC Order G-191-13 and Reasons for Decision, pages 18 and 19.

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*Order G-60-14 – BC Hydro – Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817*¹³¹

- a) BCUC reaffirmed concepts in G-38-01 and G-48-09.
- b) FortisBC supported the application.
- c) BCUC directed BC Hydro to initiate a consultation process that would result in an application for the New PPA Section 2.5 Guidelines by November 1, 2014.
- d) BCUC directed FortisBC Inc. to initiate a concurrent consultation process in its service territory to address or ensure:
 - (i) the potential benefits of self-generation;
 - (ii) the 1999 Access Principles in the context of self-generating customers;
 - (iii) if the GBL methodology is proposed, GBL Guidelines for both idle historic self-generation and new self-generation; and
 - (iv) arbitrage is not allowed.

¹³¹ BCUC Order G-60-14 and Reasons for Decision, 6 May, 2014, *BC Hydro – Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817*

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APPENDIX 4.
DAVID BURSEY *CURRICULUM VITAE*

EDUCATION

University of Ottawa	
<i>Bachelor of Law</i>	1982
<i>Bachelor of Arts</i>	1980
Memorial University of Newfoundland	
<i>Bachelor of Arts</i>	1978

PROFESSIONAL QUALIFICATIONS

Law Society of British Columbia	1991
Law Society of Upper Canada	1984

WORK HISTORY

BENNETT JONES LLP

Vancouver, BC

Partner

September 2014 – Present

- Advise clients on public utility, energy, environmental, water, and aboriginal law
- Advise clients on the regulatory approval of major infrastructure projects
- Represent clients before federal and provincial regulatory tribunals, such as the National Energy Board and the British Columbia Utilities Commission, and government review panels during the environmental review of major projects
- Represent clients in court proceedings arising out of challenges to administrative proceedings

BULL HOUSSER & TUPPER LLP

Vancouver, BC

Partner

1991 – 2014

- Advised clients on public utility, energy, environmental, water, and aboriginal law
- Advised clients on the regulatory approval of major infrastructure projects
- Represented clients before federal and provincial regulatory tribunals, such as the National Energy Board and the British Columbia Utilities Commission, and government review panels during the environmental review of major projects
- Represented clients in court proceedings arising out of challenges to administrative proceedings
- Headed the energy law practice, aboriginal law practice and environmental law practice
- Served on the firm's executive committee

National Energy Board (Government of Canada)

Ottawa, Ontario

Lawyer

1987 – 1991

- Advised the Board on regulatory law related to pipeline facilities applications, economic regulation of pipelines, and the export and import of energy
- Advised the Board on environmental assessment matters
- Acted as Board counsel on administrative proceedings, including written and oral hearings
- Reviewed contracts for the engagement of consultants

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Energy Mines and Resources (Government of Canada)
Commerce Officer/Analyst

Ottawa, Ontario
1984 – 1987

- Member of the Canadian Ownership and Control Determination section within the Petroleum Incentive Administration under the National Energy Program
- Assessed the Canadian Ownership levels of energy companies in accordance with the legislation
- Audited companies that had received incentives under the National Energy Program

MEMBERSHIPS

Canadian Bar Association

Canadian Institute of Energy

Canadian Water Resource Association

Inter-Pacific Bar Association

RECOGNITIONS

BV Peer Review Rated through LexisNexis – Martindale-Hubble

2014, Lexpert/Report on Business Special Edition - Canada's Leading Energy Lawyers
Recognized as a leading energy lawyer in Canada

2014, Canadian Legal Lexpert Directory
Consistently recommended – Energy (Electricity) and repeatedly recommended – Energy (Oil & Gas)

2014, Best Lawyers in Canada
Recognized as a leading lawyer in the area of Energy Law, Aboriginal Law, and Environmental Law

2014, Chambers Global: The World's Leading Lawyers for Business
Recognized – Aboriginal Law