

Before the

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

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 In the Matter of Arbitration between: :
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 MERCER INTERNATIONAL INC., :
 :
 Claimant, :
 : ICSID Case No.
 and : ARB(AF)/12/3
 :
 GOVERNMENT OF CANADA, :
 :
 Respondent. :
 :
 - - - - - x Volume 1

HEARING ON JURISDICTION AND THE MERITS

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INFORMATION

Tuesday, July 21, 2015

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

The hearing in the above-entitled matter came
on, pursuant to notice, at 9:30 a.m. before:

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

11:01:56 1 fundamental respects:

2 First, it failed to base Celgar's GBL on its
3 normal level of self-supply. Here is the formula
4 Mr. Dyck used for Celgar:

5 First, Mr. Dyck's starts with Celgar's total
6 generation for 2007 using a one-year baseline, not the
7 [REDACTED]>> used for Howe Sound. At least
8 that's what he says in his First Statement. His
9 Second Statement tells a somewhat different story.

10 Next, Mr. Dyck subtracts sales made by Celgar
11 to FortisBC and NorthPoint. That's the 23.9 gigawatt
12 hours and you arrive at net generation for
13 self-supply, 326.7. So far so good. This is exactly
14 what BC Hydro did for <<[REDACTED] [REDACTED]
15 [REDACTED].>> It did not stop for Celgar.
16 For Celgar, Mr. Dyck uses different arithmetic. He
17 adds back in purchases Celgar made from FortisBC, the
18 22.6 gigawatt hours in 2007, to arrive at Celgar's
19 load and GBL of 349.

20 It makes no sense under the principle they
21 articulate to add in FortisBC purchases. Mr. Dyck's
22 tests requires self-generation used for self-supply.

11:03:22 1 FortisBC generation is not Celgar's self-generation.

2 It's a nonsensical calculation.

3 One other important point I need to make
4 here: The effect of this special Celgar-only
5 calculation is to include in Celgar's GBL most of its
6 sales to NorthPoint and FortisBC. All but
7 1.3 megawatts which you get by subtracting the 23.9 in
8 sales and the 22.6 in purchases. So, Celgar is not
9 getting credit for its sales to NorthPoint and
10 FortisBC. << [REDACTED]

11 [REDACTED],>> but they're included in Celgar's GBL.

12 This, too, is a gross mistake and violation
13 of the principle. Celgar at the time was only selling
14 its excess electricity, electricity it generated in
15 excess of its load. Remember my beaker chart. This
16 was the green energy at the top that B.C. allows you
17 to sell under all conditions. There is no
18 justification for including that energy in Celgar's
19 GBL. Physically, it was not even possible for Celgar
20 to use it to meet its load. Its load was already met
21 at the time that electricity was generated.

22 Mr. Dyck tries to explain why Celgar's sales

11:04:47 1 were not fully subtracted, and he says in his First
2 Statement that Celgar was using the 52-megawatt
3 generator to serve the Mill's entire load. Well, that
4 may be true in some hours, but it certainly wasn't
5 true in all hours; and, to the extent he was using a
6 2007 calendar year baseline, Celgar only generated
7 327.7 gigawatt hours toward--that it used to sell
8 supply, not 349. That's what the prior page showed
9 you.

10 Indeed, Celgar's GBL improperly reflects its
11 optimal self-supply level, what it achieved in hours
12 when it was running optimally. It is not a normal
13 level it achieved in any year. How do we know that?
14 Let's look at the result. Recall the chart for Howe
15 Sound. You saw the GBL line running below the
16 self-supply level in most years. This is what the
17 comparable chart looks like for Celgar. The GBL level
18 is higher than the level of self-supply Celgar ever
19 achieved.

20 Let me repeat: The GBL BC Hydro says is to
21 measure the level normally used for self-supply for
22 Celgar was higher than any level Celgar ever had used

11:06:03 1 for self-supply. As you can see, BC Hydro defined
2 normal for Celgar quite differently than it defined
3 normal for Howe Sound. For Howe Sound, normal was
4 lower than 11 of the 12 years. For Celgar, normal was
5 higher than in any year.

6 The second problem with Celgar's GBL was that
7 BC Hydro used the wrong baseline period. Under
8 G-38-01, the baseline is to be established at the time
9 the self-generator approaches its utility about
10 selling its electricity. How do we know that? We
11 know that from the BCUC's own decision involving
12 Riverside (Tolko) in 2001. That's the sawmill.
13 Riverside first approached the BCUC in 2001 and it
14 obtained its GBL in 2001, that was the same year
15 Order G-38-01 was issued. At the time, its
16 self-supply levels were 4.7 megawatts. That was in
17 2000. In 2001, part-year data, it was even higher.
18 The BCUC, on the other hand, set the GBL at
19 2 megawatts.

20 Why did it do that? Turn only to
21 Mr. Burse's Witness Statement, their expert witness
22 on the BCUC, in Paragraph 89, he explains that the GBL

11:07:29 1 was set at 2 megawatts because that was the level of
2 generation at the time Riverside began discussions
3 with its utility, then West Kootenay Power, about
4 selling its self-generated electricity. Celgar was
5 treated differently.

6 Celgar properly approached FortisBC, as Gaela
7 mentioned in the timeline, in 2007 about selling its
8 self-generated electricity and obtaining replacement
9 energy, it did so before its Blue Goose improvements
10 were in place and as it was supposed to do under
11 G-38-01 in order to establish a baseline. That should
12 have been the baseline period. It should have been
13 the year before they approached their utility. It
14 should have been 2006, not 2007.

15 In summary, the GBL BC Hydro established for
16 Celgar violated the general principle that Mr. Dyck
17 articulates. BC Hydro used Celgar's load. It did not
18 use the level of generation Celgar actually used for
19 self-supply. BC Hydro failed to consider that Celgar
20 had approached FortisBC in 2007 about selling its
21 electricity and, therefore, he used the wrong baseline
22 period.

11:08:46 1 As a result, BC Hydro arrived at a
2 349 gigawatt hour a year load-displacement requirement
3 on Celgar without compensation equal to its entire
4 mill load in 2007. BC Hydro in the EPA prohibited
5 Celgar from selling any electricity below its load and
6 engaging in any arbitrage.

7 Let me turn, finally, to BC Hydro's treatment
8 of Tembec's Skookumchuck, both in the 1997 EPA and in
9 the 2001 EPA.

10 The 1997 EPA, as you may recall, had no GBL
11 and contained no displacement obligation. BC Hydro
12 permitted Tembec to sell <<[REDACTED]>> 10.8 megawatts of
13 electricity it generated and buy 10-megawatt hours of
14 replacement energy from BC Hydro engaging in
15 arbitrage. Now, Canada argues that this Agreement was
16 implemented under a prior legal regime since it was
17 signed in 1997 and ordered G-38-01, as the last two
18 digits indicate, was not issued until 2001.

19 But what they neglect to mention, is that in
20 order for that agreement to be implemented, it
21 required Tembec and BC Hydro to negotiate an energy
22 supply agreement. Tembec's Mr. Lague mentions that in

11:10:15 1 his statement. That energy supply agreement with
2 Tembec was not signed until 14 September 2001 after
3 Order G-38-01 was issued. It contains provisions
4 relevant to the EPA, so BC Hydro had an opportunity to
5 conform the EPA to the new GBL regime and failed to do
6 so.

7 Let's fast-forward to 2009. This is
8 Figure 29 in the Reply Memorial. It shows the average
9 hourly generation level Skookumchuck actually achieved
10 every month. Even if you subtracted 10.8-megawatt
11 hours that BC Hydro sold--sorry, that Tembec sold to
12 BC Hydro, again starting with total generation minus
13 sales equals a self-supply level, if you do that
14 calculation, you still get an average that's usually
15 over << [REDACTED] >> megawatts in every month. Yet, Mr. Dyck in
16 2009, gave Tembec a GBL of 14 megawatts, some
17 << [REDACTED] >> lower than its average self-supply level in
18 any relevant period. That necessarily means that BC
19 Hydro treated as new or incremental energy in 2009
20 electricity the Mill had been consistently generating
21 in every year since 2001.

22 Recall Canada's central defense: The GBL

11:11:43 1 ostensibly was such that BC Hydro would purchase only
2 new and incremental generation. It would not purchase
3 generation already being used to self-supply. That
4 principle is not reflected in Celgar's GBL, and it's
5 not reflected in Tembec's GBL. Tembec was allowed to
6 sell and arbitrage generation that was not new and was
7 not idle. It was existing generation actually being
8 used for self-supply.

9 How did they manage that trick? Tembec
10 claimed but never established that << [REDACTED]
11 [REDACTED]
12 [REDACTED]>> so they ran a model showing what << [REDACTED]
13 [REDACTED],>> and that
14 was used to determine the GBL. But what analysis did
15 BC Hydro conduct of Tembec's claim? The null set is
16 the analysis that they performed. They rejected
17 Tembec's actual generation data without analysis or
18 substantiating Tembec's << [REDACTED]>>
19 hypothesis which we will refer to throughout this case
20 as the hog-and-bull tale.

21 In order to understand the absurdity of the
22 hog-and-bull tale, you have understand the symbiotic

11:13:08 1 relationship between pulp mills and sawmills. Because
2 Tembec operated two sawmills in the vicinity of its
3 pulp mill. Sawmills obtain logs which they run
4 through highly sophisticated computer controlled saws
5 to generate three products. It generates lumber which
6 is the highest value product and that is sold mostly
7 for home construction. It generates wood chips. That
8 is the second highest value component, and that is the
9 principle input material used by pulp mills to produce
10 pulp. It also generates wood waste. This consists of
11 the bark from the trees that have no use, it consists
12 of sawdust and shavings and other wood residue. This
13 is referred to as hog fuel, but it's important to
14 understand that it's a waste product. It has a
15 disposal cost. It is not a product sold with a
16 variety of uses that people line up to buy in their
17 supermarket.

18 We have samples on the table by the doors of
19 wood chips, hog fuel, pulp, so you can get a sense for
20 what we're talking about. We avoided bringing lumber
21 because it was too big to fit on the table, but we
22 assume you have all seen it.

11:14:23 1 What are the problems with the hog-and-bull
2 story? First, BC Hydro failed to consider Tembec's
3 need to keep its sawmills operating by having
4 Skookumchuck dispose of their wood waste as well as
5 hog fuel that Skookumchuck itself produces.

6 Second, BC Hydro completely failed to
7 substantiate the claim that << [REDACTED]
8 [REDACTED] .>>

9 Third, BC Hydro failed to consider that
10 << [REDACTED] [REDACTED] >>
11 even under Tembec's unsubstantiated assumption. BC
12 Hydro's approach to Tembec demonstrates its GBL
13 principle has no integrity. Existing generation
14 actually used for self-supply was treated for GBL
15 purposes as if it was idle when it wasn't, and with no
16 analysis at all of Tembec's unproven hypothesis that
17 it might be < [REDACTED] .>>

18 Well, you might ask, what about Canada's
19 experts? They have a pulp mill Expert and a financial
20 Expert? What analysis did they do? Let's turn first
21 to Mr. Stockard's analysis.

22 His analysis paralleled BC Hydro's. He did

11:15:49 1 nothing. Indeed, it's even unclear what
2 Mr. Stockard's analytic methodology is. As best we
3 can tell, he questions and analyzes everything Mercer
4 claims but accepts without question or analysis
5 anything Tembec or any other mill claims. In my 32
6 years of practicing law, I have never seen an
7 independent expert present such an unbalanced
8 analysis.

9 What about Dr. Rosenzweig? He falls in line,
10 too. His analysis consists of nothing.
11 Dr. Rosenzweig, their financial Expert, also simply
12 accepts Tembec's claims about the << [REDACTED]
13 [REDACTED]>> makes no attempt whatsoever to substantiate or
14 perform any independent analysis. As you listen to
15 the testimony of BC Hydro and Canada's experts, just
16 ask yourself what they did to test Tembec's << [REDACTED]
17 [REDACTED] [REDACTED]
18 [REDACTED] [REDACTED]
19 [REDACTED]
20 [REDACTED]>>

21 Canada must have realized it could not
22 substantiate its claims about Tembec's << [REDACTED]>>, so

11:17:08 1 for the Rejoinder they trotted out witness from
2 Tembec, Mr. Lague. Mr. Lague is the person who
3 presented the hog-and-bull story to BC Hydro in 2009.
4 Like Canada's witnesses, he presents no documentation
5 or analysis of how Tembec concluded in 2009 that the
6 << [REDACTED] .>> Indeed,
7 after reviewing Mr. Lague's totally unsubstantiated
8 testimony, we asked Canada to have the Mill produce
9 the documents on which Tembec relied to conclude that
10 the << [REDACTED] .>> As we expected, there
11 is no such analysis. We received three documents
12 which we will review for you with both Mr. Switlishoff
13 and Mr. Lague. None of them is capable of supporting
14 any conclusion regarding the << [REDACTED]
15 [REDACTED] >> to Tembec. None of them even analyzes the
16 question. << [REDACTED] >> issue is nothing but a
17 pretext for BC Hydro to disregard the Mills historical
18 self-supply levels and allow it to increase its energy
19 sales to BC Hydro by over << [REDACTED] >> percent over the levels
20 in the 1997 EPA solely through increased arbitrage.
21 You will hear about how BC Hydro sold Tembec more
22 embedded-cost power so it could buy back the same

11:18:30 1 volume of electricity at << [REDACTED] >> the price.

2 In summary, what can we conclude about BC
3 Hydro's consistently applied GBL approach? We know
4 that for one mill it used << [REDACTED] >> of self-supply
5 data and used actual data. For another mill, Celgar,
6 it used a one-year load figure. For Tembec, it relied
7 on an unsubstantiated hypothesis inconsistent with
8 Tembec's codependent sawmilling and pulping
9 operations. This is not consistent application of any
10 uniform methodology. Indeed, it is even a gross
11 departure from the central element of the purported
12 general GBL principle. If this is a consistent
13 methodology, ask yourselves what an inconsistent
14 methodology would look like?

15 ARBITRATOR DOUGLAS: Just before you move to
16 another topic, I just want to understand one of the
17 charts, I'm going back to the Howe Sound Pulp and
18 Paper, and there is a chart on Page 75 of your
19 presentation, and I would have expected that the
20 figures for electricity production would have come
21 from the spreadsheet on the previous page, but I can't
22 line them up. I wonder if you could help me with

11:19:45 1 that. If you want to come back to it, by all means
2 do.

3 MR. SHOR: No, I'm happy to address it.

4 So, you're comparing--okay, well, part of the
5 problem is that some of these are not years, but 2007
6 and 2008 are annual data, the first and fourth columns
7 are part-years, August to December for 2007, and
8 January to July for 2009.

9 ARBITRATOR DOUGLAS: Oh, I see.

10 MR. SHOR: So, the 2007 and 2008 numbers of
11 total generation are the--

12 ARBITRATOR DOUGLAS: Doesn't quite work,
13 but--even for those years. Maybe it's something--

14 MR. SHOR: We will take a look at it and
15 respond.

16 ARBITRATOR DOUGLAS: It's the obvious reason

17 that in << [REDACTED] [REDACTED]

18 [REDACTED]

19 [REDACTED] [REDACTED]

20 [REDACTED] [REDACTED] [REDACTED]

21 [REDACTED].>>

22 MR. SHOR: Yeah, I don't think that's

11:21:02 1 actually the reason, Professor Douglas, I think.
2 Recall that they had a GBL established in the 2001
3 Consent Agreement, following Order G-38-01 the GBL was
4 <<[REDACTED]>> megawatts, so Howe Sound was only permitted to sell
5 when it was generating above <<[REDACTED]>> megawatts, so it may
6 not have had those sales to make or it may not have
7 been economical for it.

8 The other thing you have to understand is BC
9 Hydro's own entire system for charging for power
10 changed in 2006. That's when they implemented the
11 stepped rates, so what happened was whatever the
12 market opportunity for selling electricity, it was
13 more advantageous for Howe Sound to avoid the cost of
14 the high Tier 2 step rate in 2007, so that's why it
15 switched. And that's one of the complaints we make in
16 our Memorial, is that BC Hydro allowed Howe Sound to
17 <<[REDACTED] [REDACTED] [REDACTED]
18 [REDACTED] [REDACTED] [REDACTED]
19 [REDACTED] [REDACTED].>> That harms other ratepayers just as
20 much as selling the electricity.

21 ARBITRATOR DOUGLAS: Thank you.

22 MS. GEHRING FLORES: Turning to Mercer's

11:22:24 1 Article 1105 claim, Canada's treatment of Mercer has
2 been non-transparent, unjust, unfair and
3 idiosyncratic, arbitrary and discriminatory denying
4 Mercer the Minimum Standard of Treatment under
5 customary international law provided in NAFTA Article
6 1105.

7 Let's first address the proper legal
8 framework to evaluate Mercer's 1105 claim. On the
9 slide before you is a quotation from Waste Management
10 II. This passage effectively summarizes the
11 international law standard for the Minimum Standard of
12 Treatment, or MST in shorthand. Let's walk through it
13 step by step.

14 The first element is that there must be
15 conduct attributable to the State and harmful to the
16 Claimant, that point should not be particularly in
17 dispute. And the conduct may take several forms,
18 arbitrary conduct breaches the standard, grossly
19 unfair, unjust or idiosyncratic conduct breaches the
20 standard, discriminatory conduct also breaches the
21 standard. A lack of due process, a complete lack of
22 transparency and candor and Government processes also

11:23:37 1 breaches the standard. And these put together are
2 what we have called the four pillars of the Minimum
3 Standard of Treatment under international law.

4 As this next slide depicts and I'm really
5 providing these for your reference, these four pillars
6 have been widely discussed and adopted, most recently
7 in the Bilcon versus Canada Case, and we have listed
8 some of the tribunals here that have based their
9 awards on breaches of each of the pillars. For
10 questions of time, I won't belabor the point, but you
11 do have that as your reference.

12 Also for your reference, we have provided
13 Canada's acts and omissions which run afoul of each of
14 the pillars. For instance, Canada's conduct has been
15 discriminatory, and it's not just discriminatory.
16 Canada's treatment has also been arbitrary. It's also
17 been grossly unfair. And Canada's treatment has been
18 completely non-transparent.

19 And just to step back a moment before Canada
20 might assert that this is simply a throw-away claim of
21 ours, it is not. What we have here is a violation of
22 the Minimum Standard of Treatment in its clearest

11:25:08 1 expression. Celgar, in its attempts to receive fair
2 treatment has been singled out for the absolute worst
3 treatment of all pulp mills in British Columbia. This
4 is unfair and discriminatory, period. And all the
5 while that Celgar was receiving this unfair treatment,
6 ironically, it was being reassured by all British
7 Columbia players involved that it was being treated
8 fairly, justly. BC Hydro told Celgar that it was
9 treating it the same as all other pulp mills. Not so.

10 The Ministry told Celgar that it did not
11 support arbitrage in British Columbia at all. Not so.

12 And all the time that Celgar was being told
13 that it was being treated fairly, all relevant British
14 Columbia actors effectively blindfolded Celgar to the
15 regulatory rules and standards that would supposedly
16 apply to Celgar in selling its electricity. And, of
17 course, British Columbia kept under wraps the
18 treatment that other pulp mills received.

19 You want to talk about transparency? To this
20 day, Mercer still doesn't know the extent to which it
21 has been subject to such grossly unfair, arbitrary,
22 and discriminatory treatment. Only Mercer's counsel

11:26:29 1 and experts know. If Canada's behavior doesn't breach
2 the minimum standard, frankly I don't know what does.

3 Moving on to jurisdictional issues, Canada
4 has raised various jurisdictional objections, and we
5 will explore these in turn. It should be noted up
6 front, however, that Canada raises no jurisdictional
7 objection to Mercer's claim concerning measures taken
8 by the BCUC. To reiterate, there are two measures at
9 issue: Celgar's unfair GBL set by BC Hydro, and BCUC
10 Order G-48-09. All of Canada's jurisdictional
11 objections deal with BC Hydro: The procurement
12 exception, delegated Government authority, and the
13 limitations period exception. There are no
14 jurisdictional objections to BCUC Order G-48-09.

15 The first of Canada's objections is that the
16 conduct at issue in this arbitration falls under the
17 procurement exception in NAFTA. But Canada's
18 procurement argument is premised upon a
19 mischaracterization of both Mercer's claim and of the
20 GBL-related provisions of the EPA. The EPA restricts
21 Celgar's below-GBL sales to third parties, parties
22 other than BC Hydro. We are not talking about

11:27:55 1 anything BC Hydro is purchasing.

2 Note on the slide that the GBL, the number of
3 the GBL and the number associated with what BC Hydro
4 is purchasing, are different numbers. They're in red.
5 It's about BC Hydro's obligation to serve, not what BC
6 Hydro is obligated to purchase.

7 Also, contrary to Canada's suggestions,
8 Mercer is not arguing that BC Hydro was required to
9 purchase a certain amount of electricity to establish
10 Mercer's claims on liability. Canada's arguments in
11 this regard are a red herring. I will discuss this in
12 more detail shortly when I review Mercer's damages
13 claims, but for now it's important to simply note that
14 Celgar's discussion of what BC Hydro would purchase is
15 in the context of damages, not liability.

16 Canada also contends that BC Hydro was not
17 exercising delegated Government authority in
18 establishing GBLs. Canada makes this meritless
19 argument despite the fact that, through Order G-38-01,
20 the BCUC expressly "directs" BC Hydro to determine
21 GBLs for its customers.

22 But Canada's argument really is beside the

11:29:26 1 point. Both Parties agree that the GBL and related
2 provisions were approved and made effective by the
3 BCUC, which approval independently provides a basis
4 for finding State action. Canada's argument is
5 plainly contradicted by the BCUC's very own rulings as
6 recently as July of 2014.

7 As you can see on the slide, in proceeding
8 G-106-14, the BCUC explained that "the genesis of the
9 GBL was under Order G-38-01," and that "the amount
10 that BC Hydro has an obligation to serve under RS 1823
11 is set by the GBL as established in Order G-38-01."
12 It doesn't get any clearer than that.

13 Of course, BC Hydro was acting pursuant to
14 delegated governmental authority. GBLs limit the
15 utility's obligation to serve a self-generator, an
16 inherently regulatory function. BC Hydro does not
17 itself have the authority to limit its obligation to
18 serve.

19 In its final argument regarding jurisdiction,
20 Canada briefly argues that Mercer's claims are
21 time-barred under NAFTA Articles 1116(2) and 1117(2).
22 The requirement under NAFTA is that a claim should be

11:31:00 1 brought three years from the date on which Mercer
2 first acquired, or should have first acquired,
3 knowledge of the alleged breach and knowledge of loss
4 or damage.

5 That standard is met here. Let's walk
6 through the dates. The Request for Arbitration in
7 this case was filed on April 30, 2012. This means
8 that the cut-off date for the challenged action would
9 have been April 30, 2009. As I've already mentioned,
10 there are no jurisdictional objections to G-48-09.
11 The Measure Canada does have an issue with, namely
12 Celgar's discriminatory and unfair GBL, was approved
13 by the BCUC on July 31, 2009. Logically,
14 discrimination claims require both treatment of Celgar
15 and treatment of a comparator.

16 In context, the BCUC approved Celgar's GBL
17 on July 31, 2009, and this is critical because, as
18 Canada argues: "The GBL remains of no force until it,
19 like the other EPA terms and conditions, receives the
20 approval of the BCUC." And that's in their
21 Counter-Memorial at Paragraph 330.

22 In terms of comparators, the Tembec EPA was

11:32:21 1 approved on November 13, 2009, and the Howe Sound EPA
2 was signed on September 7, 2010. All of these events
3 occur within the three-year limitation period.

4 Finally, we offer a word on damages. Mercer
5 has submitted the analysis of Mr. Brent Kaczmarek of
6 Navigant. He submitted two detailed reports and we
7 encourage the Tribunal to review them carefully.

8 One of the issues not in dispute in this case
9 is the legal standard for damages. The Parties agree
10 with the Chorzów Factory principle. In this case, the
11 inquiry is quite simple: But for the discriminatory
12 and unfair treatment of Celgar, Celgar would have been
13 assigned a GBL of zero, or at the very least a GBL
14 lower than 349 gigawatt hours. Simply, Celgar would
15 never have been required to displace its load without
16 compensation. Other pulp mills like Canfor agreed to
17 and were paid for their load-displacement services,
18 either through GBLs or Load Displacement Agreements.

19 It is also worth recalling that BC Hydro, in
20 accordance with its own policies, would have purchased
21 all of Celgar's electricity generated above Celgar's
22 GBL.

11:33:45 1 Of course, Canada's damages argument that BC
2 Hydro would not have purchased any of Celgar's
3 below-GBL electricity assumes that BC Hydro computed
4 Celgar's GBL in a non-discriminatory and fair manner.
5 But the Tribunal will only reach the issue of damages
6 if it concludes that the process by which the Celgar's
7 GBL was set violates NAFTA's obligations. Contrary to
8 Canada's damages argument, the issue is not whether BC
9 Hydro would have paid for electricity below Celgar's
10 GBL, but rather where Celgar's GBL would have been set
11 but for Canada's discriminatory and unfair treatment.
12 This electricity would have been above GBL electricity
13 but for BC Hydro's discriminatory measures in
14 establishing an excessive GBL for Celgar.

15 As Mr. Scouras explains in his Witness
16 Statements, BC Hydro demands that it be the exclusive
17 purchaser of all eligible electricity. This is why BC
18 Hydro requires exclusivity in its EPAs. If Celgar had
19 additional electricity available for sale, BC Hydro's
20 own contract terms would require BC Hydro to purchase
21 it.

22 Therefore, the issue here is quite simple:

11:35:12 1 If the Tribunal finds that discriminatory and unfair
2 conduct set Celgar's GBL too high, the difference
3 between the GBL of 349 gigawatt hours per year and
4 Celgar's proper GBL reflects the additional
5 electricity that by definition is eligible electricity
6 that BC Hydro would have purchased.

7 In the face of these facts, Canada has
8 created a diversion with arguments regarding Celgar's
9 transmission access and ability to sell its
10 electricity at green energy prices in the United
11 States. These arguments are misplaced and have no
12 impact on Mercer's damages claims.

13 Celgar is entitled to a GBL of zero, and
14 there are two principal paths which leads to this
15 outcomes. First, BC Hydro subjected Celgar to
16 discriminatory and unfair treatment in forcing Celgar
17 to displace its load without compensation while
18 compensating other pulp mills for load-displacement
19 services. But for this discriminatory and unfair
20 treatment, Celgar would have been given a GBL of zero.

21 The second is that, due to BC Hydro and
22 BCUC's discriminatory and unfair treatment of Celgar,

11:36:29 1 there was no consistently applied methodology used in
2 establishing Celgar's GBL; therefore, Celgar is
3 entitled to the best treatment of all pulp mills with
4 a GBL, which is a GBL of zero.

5 This chart illustrates the two paths to a
6 zero GBL. As you can see, path one represents the
7 damages caused by Celgar's forced load displacement.
8 This is illustrated with the Canfor Load Displacement
9 Agreement in which BC Hydro paid Canfor to displace
10 its load. As Mr. Shor explained, Canfor was not
11 required to provide any load displacement for free.
12 And this is analogous to a zero GBL.

13 The same result is reached with path two. If
14 the Tribunal finds that there was no consistently
15 applied GBL methodology, Mercer would get the best
16 treatment afforded any comparator. That was the type
17 afforded to Tembec in their 1997 EPA. << [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] >>

22 Should the Tribunal determine that another

11:37:52 1 comparator received the best treatment, Mercer
2 provides those damages scenarios here as well. You
3 can see here we have the Tolko 2001 BCUC GBL. We note
4 that Tolko is a sawmill, and we did not present Tolko
5 as a comparator in the initial instance, but Canada in
6 its Counter-Memorial invited us to consider it as a
7 comparator, so we did. They had a GBL of 2 megawatts,
8 and they were allowed to arbitrage 57.4 percent of
9 their electricity. If Celgar were able to arbitrage
10 57.4 percent of its electricity that would be
11 equivalent of a GBL of 148.7 gigawatt hours per year,
12 and you can see the resulting damages figure which
13 represents the additional electricity that it could
14 have sold.

15 The same goes for Howe Sound, the 2010 EPA,
16 and Tembec in the 2009 EPA. You have the different
17 arbitrage percentages and the damages figures
18 associated with those.

19 If the Tribunal concludes that British
20 Columbia applied the GBL standard in a consistent and
21 evenhanded manner to everyone except Celgar, the
22 Tribunal should apply that same standard in

11:39:15 1 calculating Celgar's GBL. This is difficult for us to
2 assess because we are truly at pains to understand
3 what supposed methodology was consistently applied to
4 all comparators, but here we provide you with our best
5 guess, consistent with the reasons Mr. Shor provided.

6 And one last note: Should the Tribunal find
7 that the Ministers' Order created some sort of
8 restriction on Celgar's electricity sales, that
9 conclusion would not eliminate Mercer's damages claim.
10 It would at most only cap it. Mercer's damages would
11 be capped by the industrial load that Mercer would be
12 required to self-supply from the generation assets and
13 mill configuration that it described in its 1990
14 electricity project certificate application, which led
15 to the Ministers' Order. The purported commitment
16 could not extend into the increased electricity
17 generation resulting from subsequent investments like
18 Project Blue Goose.

19 ARBITRATOR DOUGLAS: Just before you move on,
20 if you're right that BC Hydro has to purchase all
21 eligible electricity, then doesn't changing the GBL
22 essentially determine how much electricity it is going

11:40:36 1 to be obliged to purchase?

2 MS. GEHRING FLORES: Yes.

3 ARBITRATOR DOUGLAS: In which case, doesn't
4 that feed into the procurement issue?

5 MR. SHOR: We are using--it doesn't fit into
6 the procurement issue, it doesn't make it a
7 procurement, because we are not using any terms of any
8 procurement to require--to establish liability. We
9 are using GBLs and the purchase price only to
10 establish damages. So, we would have been allowed
11 that to sell that power to a third party, but BC Hydro
12 would also have purchased it from us, and it's more
13 advantageous for us to do business with BC Hydro
14 because then we don't have to deal with transmission
15 access and line losses.

16 So, the way to think about the procurement
17 issue is we are not using BC Hydro's purchase to
18 establish liability. It's only to establish damages.

19 MS. GEHRING FLORES: And just as an
20 additional matter, if the Tribunal concludes that
21 Canada is liable for its discriminatory and unfair
22 conduct, then it necessarily is going to determine

11:41:52 1 that the GBL was set too high, and it will determine
2 where the GBL should have been set. And in
3 accordance--from a damages approach, in accordance
4 with BC Hydro's own policies and contractual terms, BC
5 Hydro would have had to purchase everything above the
6 GBL.

7 PRESIDENT VEEDER: I had one question going
8 back to your Slide 126. There it said the below-load
9 access arbitrage percentage, 23.2 percent, was your
10 best guess. Do we have that in evidence or in
11 Mr. Kaczmarek's Report?

12 MR. SHOR: Yes, we do. That was the scenario
13 I outlined, Mr. President, in my statement where
14 that's using 2006 as the baseline year, and that is
15 one of the scenarios Mr. Kaczmarek has analyzed.

16 THE WITNESS: Can you give me the reference
17 later to Mr. Kaczmarek's Report?

18 MR. SHOR: Hopefully.

19 PRESIDENT VEEDER: Thank you.

20 MR. SHOR: By way of conclusion this morning,
21 we would like to leave the Tribunal with a series of
22 questions. We ask you to keep these questions in mind

11:43:09 1 as you listen to Canada's opening presentation and as
2 you will evaluate the testimony you will hear over the
3 next eight days. We believe they highlight the key
4 factual issues before you.

5 Question 1: How can compelling Celgar to
6 provide load displacement without compensation when
7 B.C. pays others to provide the identical service not
8 be less favorable treatment?

9 Question 2: Does Order G-48-09 subject
10 Celgar to less favorable arbitrage restrictions than
11 are applied to Canadian and third-country pulp mills
12 under Order G-38-01?

13 Question 3: What concrete measures did B.C.
14 implement to ensure that its self-generator arbitrage
15 policy was applied fairly by BC Hydro so as not to
16 favor some mills over others? And that is a direct
17 reference to NAFTA Article 1503(2) obligation, in the
18 case of a Government-owned enterprise, the Government
19 is obligated to impose measures to ensure that it
20 meets its NAFTA obligations.

21 Question 4: Is the post hoc current normal
22 GBL concept a detailed objective methodology capable

11:44:26 1 of uniform and consistent application?

2 Question 5: Did BC Hydro exercise its
3 discretion--and it had vast discretion--in determining
4 GBLs so as to treat Celgar less favorably than it
5 treated Howe Sound and Tembec?

6 Question 6: What analysis did BC Hydro
7 perform to validate Tembec's [REDACTED]

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

11 Question 7: What clear and unambiguous
12 language in the 1991 Ministers' Order creates a
13 prohibition on Celgar's electricity sales, and what
14 actions did the B.C. Government take since 1991 to
15 enforce that prohibition?

16 Question 8: Why would BC Hydro not have
17 purchased all of Celgar's electricity above a fair
18 GBL?

19 Question 9: Is it procurement for the BCUC
20 and BC Hydro to limit Celgar's access to embedded-cost
21 utility power while selling self-generated
22 electricity?

11:45:28 1 Thank you, Mr. President and Members of the
2 Tribunal. That concludes Mercer's Opening Statement.

3 PRESIDENT VEEDER: Thank you very much. I'm
4 sure we will have questions for you later, but we will
5 leave those until later.

6 We now turn to the opening submissions from
7 the Respondent.

8 But, first, for administrative purposes, we
9 understand you will be less than two hours, but how
10 long will you be and are you prepared to have a break
11 for lunch, or would you rather complete your
12 submission before the lunch break?

13 MR. OWEN: Well, it's 10 to 12:10 now,
14 Mr. Chair. I think it would probably be a great time
15 for lunch, and then we could start then. Is that fine
16 with the Claimants?

17 PRESIDENT VEEDER: It may be a little bit
18 early for lunch.

19 What would you like to do?

20 MR. OWEN: We're certainly in your hands, Mr.
21 President. I am very comfortable starting now. Maybe
22 if I could just have five minutes before we start?

11:46:35 1 PRESIDENT VEEDER: Let's take a 10-minute
2 break, and we need to change the atmosphere, chairs
3 and papers.

4 Thank you.

5 (Brief recess.)

6 PRESIDENT VEEDER: Let's resume.

7 The Respondent has the floor for its opening
8 oral submissions.

9 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

10 MR. OWEN: Thank you, Mr. President, Members
11 of the Tribunal. And thanks to my friends from Mercer
12 International for their presentation.

13 MR. SHOR: Excuse me, Mr. Owen, can we have
14 copies of your slides?

15 MR. OWEN: Oh, I'm sorry. I think they're
16 coming out just right now. Perhaps getting a bit
17 ahead of myself.

18 (Pause.)

19 MR. OWEN: May I begin?

20 Mr. President, Members of the Tribunal, in
21 light of the large volume of materials filed in this
22 case, it's easy to lose sight of what this case is

12:00:24 1 really about: The Claimants filed over 600 pages of
2 pleadings, and its allegations lack focus. Canada has
3 attempted to narrow the issues; and, in our view,
4 they're actually quite simple. This case is about
5 procurement of electricity by a State enterprise,
6 BC Hydro.

7 Now, I was listening to the presentation by
8 my friends on the other side, and one of the things
9 that struck me as I was listening to it, and I think
10 it's something that you need to bear in mind when
11 you're hearing all the detailed evidence on this case
12 is the policy context. There wasn't one mention of
13 policy throughout the entire presentation. So, that's
14 a critical thing to understand in terms of this case.
15 BC Hydro has a larger resource portfolio so that it
16 can supply its customers.

17 In the early 2000s, BC Hydro, for the first
18 time, projected a resource deficit. That is, it
19 didn't have enough electricity to supply its customer
20 needs. And, indeed, that resource deficit was going
21 to grow. It was going to get bigger and bigger and
22 bigger. In order to make up the shortfall, it would

12:01:38 1 have to purchase electricity from outside the
2 Province, which can be subject to market fluctuations
3 or less reliable. The other thing that it could do is
4 it could demand-side management measures. It could
5 get different industrial customers and other entities
6 in its service area to adopt conservation measures and
7 manage its demand.

8 In 2007, the Province released an Energy
9 Plan. That wasn't in their presentation at all. And
10 it provided BC Hydro with a mandate to procure new
11 electricity. The goal was for B.C. as a province to
12 be energy self-sufficient by 2016, and BC Hydro at
13 that time was required to acquire insurance energy,
14 another 3,000 gigawatts by 2026.

15 In the Energy Plan, British Columbia provided
16 guidance as to how BC Hydro was to assist in achieving
17 self-sufficiency. BC Hydro was directed to issue an
18 expression of interest for a Call for Power for
19 biomass electricity. Again, when you're considering
20 these claims, don't lose sight of where you are.
21 You're in the middle of a Call for Power, and we're
22 talking about Electricity Purchase Agreements.

12:03:00 1 Many NBSK or kraft pulp mills in British
2 Columbia were already self-generating electricity for
3 their own business reasons. These mills generate
4 electricity because their pulping operations produce
5 large amounts of high-pressured steam, and they pass
6 it through turbines to lower the pressure of that
7 steam so that it can be used in the pulping process.

8 And that's sort of a key point. The steam
9 has multiple uses throughout the plant.

10 BC Hydro was required to procure new or
11 incremental energy; and, to this end, it sought to
12 incentivize incremental generation from
13 self-generators. If they could produce a little bit
14 more, it could procure it. Only incremental
15 generation would increase BC Hydro's resource
16 portfolio; so, again, this is about procurement of
17 electricity and incremental generation by a State
18 Enterprise.

19 The Claimant, however, argues that this case
20 is about something else entirely. It claims that this
21 is about the Celgar Mill's ambition to sell all of its
22 self-generated electricity to BC Hydro or another

12:04:05 1 third party at high renewable energy prices, despite
2 the fact that they have been producing this
3 electricity for years without any incentive so that
4 they didn't have to purchase their own power from
5 FortisBC. The electricity would not be incremental
6 electricity and would, thus, not add anything to BC
7 Hydro's resource stock.

8 The purchase of the electricity would result
9 in harmful arbitrage as well--and I'll get to this in
10 detail in a minute--at the expense of other ratepayers
11 in British Columbia, other customers, residential,
12 industrial. And BC Hydro would be buying the
13 electricity and getting nothing in return.

14 British Columbia is a regulated electricity
15 market, both BC Hydro and FortisBC have monopolies in
16 their respective jurisdictions, and in the energy
17 sector this isn't uncommon. In exchange for having a
18 monopoly, the rates they charge customers are highly
19 regulated.

20 BC Hydro's regulated rates are low as a
21 result of something called its heritage generation
22 assets. These are giant dams. They were built in the

12:05:11 1 Peace and Columbia Rivers in the 1960s and Seventies.
2 They costs hundreds and hundreds of millions of
3 dollars, and they were built at great taxpayer
4 expense. The Claimant hoped to take advantage of the
5 low regulator prices from these assets by buying
6 electricity from one utility and then selling it at a
7 higher market price. Since 2007, the Claimant has
8 been relentless in its ambition to engage in harmful
9 arbitrage through--of low-cost regulated power.

10 Now, what is arbitrage? Arbitrage, in its
11 simplest sense, involves buying a commodity at a low
12 price and selling it at a higher price. It, in and of
13 itself, is not illegal and it's not necessarily a
14 pejorative term. The Claimant, however, seeks to
15 arbitrage between BC Hydro's regulated embedded cost
16 rates, its low-cost rates, and market prices. This
17 would result in nothing more than a wealth transfer or
18 a subsidy from BC Hydro to the Claimant. There would
19 be absolutely no increase in the amount of electricity
20 generated by the Claimant, and the Claimant is seeking
21 to engage in harmful arbitrage, and the costs would be
22 borne by all of BC Hydro's customers.

12:06:25 1 No mill or self-generator in the Province is
2 allowed to engage in harmful arbitrage. And for good
3 reason: They would be getting something for nothing.
4 The Claimant alleges that the terms and conditions of
5 its Electricity Purchase Agreement with BC Hydro are
6 inconsistent with Articles 1102, 1103, and 1105. In
7 particular, it compares its EPA and the EPAs that were
8 signed with Tembec's Skookumchuck and Howe Sound, and
9 we also have reference to Canfor and Tolko, the
10 sawmill from the Claimant, and asserts that they're in
11 like circumstances, but they aren't.

12 This case shouldn't be before this Tribunal.
13 From the perspective of jurisdiction and
14 admissibility, the Claims pertain to the negotiation
15 of procurement contracts by a State Enterprise and are
16 outside the bounds of an appropriate NAFTA claim.
17 Canada enjoys a broad discretion to implement
18 procurement policies under the NAFTA. The Claimant's
19 claims with respect to BC Hydro are barred for three
20 reasons:

21 First, they fall within a procurement
22 exception;

12:07:28 1 Second, BC Hydro is a State Enterprise that
2 was acting commercially. It was looking to buy
3 something new. It didn't want to buy something that
4 already existed.

5 And it was not exercising delegated
6 Governmental authority when it negotiated the terms of
7 the EPA.

8 And we've heard a lot about G 38-01, and I'll
9 get to that in detail in a second because the
10 submissions there are somewhat misleading.

11 Third, the Claimant's EPA-related claims are
12 time-barred because BC Hydro and the Claimant
13 negotiated the EPA more than three years before the
14 Claimant submitted the claim to arbitration. And,
15 indeed, the EPA's Effective Date in the Contract was
16 outside of the limitation period.

17 A word about load displacement. Claimant has
18 shifted again, and it has not focused as much on Howe
19 Sound and Tembec as it was in its Reply; now it is
20 focusing back on the idea of load displacement. Load
21 displacement is demand-side management by utility.
22 How are they going to manage their demand?

12:08:28 1 Think about this: Does BC Hydro have an
2 obligation to manage the demand for FortisBC? Celgar
3 is in FortisBC's service area. It is a
4 privately-owned utility. It is considered a public
5 utility for the purposes in law, but it has a
6 monopoly. Fortis responsible for managing its demand,
7 not BC Hydro.

8 Another point on load displacement is the
9 Claimant talked about how they had to pay for their
10 assets, and the Claimant rightly pointed out that when
11 they're talking about their assets, they're not
12 talking about the new turbine, the 48-megawatt turbine
13 that the Government of Canada paid \$57.7 million for.
14 They're talking about their old turbine, the 1993
15 turbine, and they say they had to pay for that. They
16 didn't have to pay for that. That was purchased by
17 the Celgar Pulp Company in 1993. That's the
18 predecessor of the Claimant. They spent \$800 million
19 on a plant upgrade. The Claimant bought this pulp
20 mill in 2005 for \$210 million out of bankruptcy.

21 All right. Let's get into the presentation.

22 Two things I'd like to cover today. The

12:09:51 1 first is: Has the Claimant proven the facts necessary
2 to make out its claims?

3 The second is: Do the Measures that Claimant
4 challenge amount to NAFTA violations? And, indeed,
5 when I get halfway through, I neglected to mention, my
6 colleague, Mr. Douglas, will be presenting from the
7 exclusivity provision onwards, and perhaps,
8 Mr. President, that is a good place to break. So,
9 let's go over the relevant factual background, and
10 I'll try and make this as simple as possible.

11 This is a map of the Province of British
12 Columbia, and here you can see two service areas. The
13 first in green is BC Hydro's service area. It's
14 responsible for serving 95 percent of the Province.
15 The small blue area in the southern Interior of the
16 Province right by the U.S. border is FortisBC's
17 service area. That's the location of the Celgar Mill
18 and also the Tolko (Riverside) sawmill.

19 Now, throughout the Province there are a
20 number of other NBSK pulp mills that the Claimant
21 requested documents concerning. They requested
22 documents concerning Cariboo, and Domtar Kamloops, a

12:11:06 1 U.S.-owned NBSK mill. Canfor Northwood, Canfor Prince
2 George. Really their case focuses now almost
3 exclusively on Howe Sound, and Skookumchuck. Although
4 in their most recent presentation they have gone back
5 to Canfor Prince George and made some additional
6 submissions there.

7 The red line you can see there is actually
8 the transmission path from where the Celgar Mill is
9 located approximately through to the Bonneville Power
10 Administration Authority. And you can see that it's a
11 long path because the actual area at the border where
12 the transmission crosses is close to Vancouver, so it
13 has to travel quite a ways in British Columbia before
14 it gets to the border.

15 Let's start with the 2007 Energy Plan.

16 British Columbia's 2007 Energy Plan required
17 the Province to become self-sufficient and required it
18 to acquire another 3,000 gigawatt hours of insurance
19 energy. It had to procure this electricity from clean
20 or renewable sources, and it was issued a Request for
21 Expressions of Interest for a Call for Power based on
22 biomass which targeted the pulp and paper industry.

12:12:26 1 Now, there was another reason for this, too. As
2 Mr. Veeder will be familiar, we had a mountain pine
3 beetle problem at the time, and it made good policy
4 sense to target biomass for that reason as well.

5 Self-generation by kraft pulp mills. Kraft
6 pulp mills have the capacity to self-generate
7 electricity. The pulp production process produces
8 something called black liquor, and what happens in the
9 pulp production process is that the wood chips are
10 deposited into something called a digester, and the
11 cellulose which is used to make pulp is separated from
12 the lignins and other chemicals, and the lignins and
13 the other chemicals, spent chemicals from that
14 process, are what is called black liquor. Black
15 liquor has to be burned in a recovery boiler. It must
16 be burned in a recovery boiler. You have to get rid
17 of it. But it's somewhat useful because, through
18 burning it through a recovery boiler, you can recover
19 all of the chemicals. After going through another
20 process, you can recover almost all of the chemicals
21 that you use in the digester in the first place.

22 So, it's a chemical recovery cycle.

12:13:35 1 Essentially the chemicals in the lignins are separated
2 out from the pulp, and then after being burned in the
3 recovery boiler, they're recycled back so that they
4 can be used again to separate the cellulose from the
5 lignins.

6 The other thing that's important about black
7 liquor is you can burn it, and you can use it to
8 produce steam, and the steam has two uses.
9 Originally, when kraft pulp mills were designed, you
10 would just have a pressure, a wet or other methods of
11 reducing steam pressure. It would essentially come
12 off the boiler, and they would reduce the steam
13 pressure, and then the steam would be used throughout
14 the pulping process.

15 What's changed is, the steam is still used
16 throughout the pulping process. You can't produce
17 pulp without steam. What's changed is they've decided
18 to run the steam through a turbine, and that reduces
19 the temperature and the pressure of the actual steam,
20 and that way they can get electricity for their actual
21 pulp mill.

22 So, there are three things that come out of

12:14:38 1 this process: The first is recovered chemicals, the
2 second is steam for the production process, and the
3 third is you can generate electricity as a byproduct
4 of that process.

5 BC Hydro and its Calls for Power. As I've
6 touched on it, BC Hydro wanted new or incremental
7 electricity it could procure to add to its resource
8 portfolio to meet policy objective of becoming
9 self-sufficient.

10 So, what was it doing when it was procuring
11 this electricity? Well, it wanted to incent a pulp
12 mill to generate more electricity--and that's the
13 green on your screen right there--above its historical
14 level of generation. In return, BC Hydro can receive
15 that incremental generation, and it would pay the Mill
16 for that. It doesn't procure existing generation for
17 a simple reason. The existing generation would go to
18 BC Hydro, but BC Hydro would also replace the existing
19 generation, and money would go to the pulp mill. So,
20 it doesn't add anything new to the resource stack, it
21 does not contribute to the policy of becoming
22 self-sufficient, and procuring existing

12:15:58 1 self-generation facilitates harmful arbitrage.

2 Let's talk about the GBL methodology for a
3 minute. A GBL is a self-generation used for
4 self-supply under normal operating conditions in the
5 absence of a contract. Self-generation above a GBL is
6 eligible for purchase in an EPA.

7 Now, there will be something later on that we
8 will get to about, we will call them the FortisBC GBL,
9 and that's going to be a little bit different, but
10 what I'm talking about here when I refer to a GBL is a
11 Generator Baseline in an Electricity Purchase
12 Agreement with BC Hydro.

13 The GBL methodology also protects against
14 harmful arbitrage. BC Hydro developed the GBL
15 methodology, and this is a critical point, in the 2002
16 customer-based generation Call for Power. None of the
17 self-generators in that call were ultimately
18 successful, and BC Hydro set its first GBLs in the
19 Bioenergy Call for Power.

20 This is the 2012 Information Report that the
21 Claimants made a big deal about. I can say that this
22 was being developed to its claim under the NAFTA, that

12:17:13 1 is untrue, it was in response to a British Columbia
2 Utilities Commission order. The reason why it took
3 some time is the BCUC set certain parameters around
4 when the Report should be filed, and, indeed, those
5 parameters were that it would be in the next major
6 procurement process in which the BCUC was involved or
7 the next time there was a major filing for what's
8 called the Long-Term Acquisition Plan. Neither of
9 those events transpired until around this time in
10 2012.

11 But let's see what it says. It talks
12 conceptually about what BC Hydro is doing. It's first
13 establishing a GBL for the customer that reflects 365
14 days of generation. The annual GBL is determined in
15 consultation with the customer, using the best
16 available information they have, including the
17 customer's historical self-generation, its energy
18 consumption data, and information about its unique
19 manufacturing processes.

20 The annual GBL represents a reasonable
21 estimate of the annual self-generated energy normally
22 used by the customer for self-supply under current

12:18:25 1 conditions and in the absence of a contract.

2 Now, BC Hydro developed the baseline because
3 it had to figure out what was new and incremental and
4 it did so because it wanted to buy what was new and
5 incremental. But it wanted to do so fairly, so it
6 looked very carefully at each customer that it dealt
7 with. It looked at the relationship between the
8 customer's industrial production process and its
9 self-generation. It looked at thermal balance
10 requirements, the fuel type, supply and cost, and fuel
11 type here I mean black liquor as a fuel. We've talked
12 about hog fuel or the wood waste that can be used as a
13 fuel, and you will also hear about natural gas being
14 used as a supplemental fuel. They call it an
15 auxiliary fuel. So firing natural gas can become
16 expensive and you don't want to do it too often.

17 Customer's historical sales of electricity to
18 BC Hydro and others were considered; type, age and
19 efficiency of the generator; changes in control,
20 changes in management made that affect the operations;
21 abnormal events such as force majeure, and we saw that
22 in the calculation that Mr. Shor put up with respect

12:19:35 1 to << [REDACTED] >>; and market conditions, including
2 abnormal market curtailment events.

3 The Claimant alleges the BCUC Order G-38-01
4 directed BC Hydro to set GBLs. This is false. BCUC
5 Order G-38-01 concerns BC Hydro's obligation to serve
6 self-generators exporting electricity. It has nothing
7 to do with procurement. It's under a separate section
8 of the Utilities Commission Act.

9 Now, there has been some loose language
10 around this Order because this Order was definitely a
11 principle or a reference document that BC Hydro went
12 to, that the Commission has gone to, that people have
13 made lots of arguments over, but let's put this to bed
14 right now.

15 Can I have G-38-01? Second page, please.
16 Can you call up the text?

17 I would like to direct you to the second
18 sentence of Paragraph 1 here: "The Commission
19 recognizes that considerable debate"--yes, thank you.

20 So, starting with the first highlighted
21 paragraph: "This means BC Hydro is not required to
22 supply increased embedded cost of service to supply

12:21:07 1 additional electricity to its industrial customers,
2 its RS 1821 customers," as they were at that time,
3 "selling its self-generation output to market." This
4 doesn't have to do with procurement.

5 Can you bring up the second paragraph,
6 please.

7 Okay. Here, the Commission says that it's
8 going to establish a short-term program until
9 March 31, 2002. It did so, and then in 2002 it
10 renewed that program. Howe Sound is the only
11 comparator ever. And when I say Howe Sound, I mean
12 Howe Sound in 2001, there was a separate agreement in
13 2001, was the only mill ever to be involved in this
14 program. I'm not talking about Howe Sound's 2010 GBL
15 here.

16 None of the other comparators that they are
17 referring to fall under this program, and all you have
18 to do is look at the Call for Power documentation.
19 None of it says that this relates to short-term
20 program in G-38-01.

21 Negotiation of Electricity Purchase
22 Agreements. We'll focus on three. First, we will

12:22:36 1 focus on the Claimant's EPA with BC Hydro, then
2 Tembec's EPA, and then Howe Sound's EPA, and we will
3 close with a little bit about the Ministers' Order.

4 BC Hydro's first Call for Power was--the
5 Bioenergy Call was BC Hydro's first Call for Power
6 under the 2007 Energy Plan, and its goal for that Call
7 for Power was to procure an additional 1,000 gigawatts
8 hours per year. The Bioenergy Call received 20
9 proposals but only four were successful, and BC Hydro
10 awarded two of those EPAs to Domtar and Celgar, which
11 were both U.S.-owned companies. The Claimant received
12 the largest EPA for firm energy sales in the Bioenergy
13 Call. But the Call only procured 579 gigawatt hours a
14 year.

15 Now, remember this: BC Hydro had no
16 incentive to treat Celgar differently. In fact, what
17 it wanted to do was procure additional electricity.

18 Now, the Claimant made two proposals in the
19 Bioenergy Call for Power. The first is the Arbitrage
20 Project. The second is the Green Energy Project. So,
21 I'm going to start with the Arbitrage Project.

22 So, this related to its plan to engage in

12:24:11 1 harmful arbitrage by selling all of its electricity
2 self-generated from its 52-megawatt turbine. The
3 Celgar Mill had historically used its 52-megawatt
4 turbine to self-supply its load in accordance with the
5 Ministers' Order.

6 And just a note on that, there is no
7 evidence--the Claimants said that there is no evidence
8 about complying with the Ministers' Order, but it
9 wasn't until 2007 that the Claimant ever considered
10 that the Celgar pulp mill, I should say, because it
11 predates the Claimant's involvement in 2005, that the
12 Celgar pulp mill ever sold anything other than surplus
13 electricity.

14 So, it always met its own load, it had a
15 little bit extra, it would sell it usually to FortisBC
16 and later to NorthPoint, but will we get to that.

17 BC Hydro rejected the Arbitrage Project as it
18 did not involve the procurement of new or incremental
19 electricity and made no commercial sense. Let's take
20 a look at why. So, this is what the Arbitrage Project
21 involved: First, there would be a sale of electricity
22 under BC Hydro's 1993 PPA with FortisBC. Essentially

12:25:21 1 at BC Hydro's long-term cost, \$29.52 a megawatt hour.
2 FortisBC would then resell that electricity at \$36 a
3 megawatt hour. And finally, Celgar planned to sell
4 back to BC Hydro for <<[REDACTED]>> a megawatt hour.

5 But in reality, this electricity wouldn't
6 flow this way. What would actually happen is this:
7 There would be a series of accounting transactions,
8 money for electricity that was notionally purchased at
9 <<[REDACTED]>> a megawatt hour would flow to the Celgar mill.
10 The Celgar mill would only have to pay to FortisBC
11 approximately \$36 a megawatt hour. And there would be
12 a final accounting transaction back to BC Hydro at
13 only \$29.52 a megawatt hour. What they wanted was
14 something for nothing.

15 Now, the Claimant--

16 ARBITRATOR DOUGLAS: Could I just ask on
17 that, is it possible to differentiate the BC Hydro
18 electricity supply cost basis to Fortis and the energy
19 secured by Fortis some other way? Is this in reality
20 something that we can differentiate?

21 MR. OWEN: As of now, yes. At this time, no.
22 And the way that Celgar, and Mr. Swanson who was the

12:26:51 1 former Director of Regulatory Affairs for FortisBC, he
2 will come here and you can talk to him about it. What
3 happened at the time was Fortis looked at this
4 transaction and it planned to source all of the
5 electricity from BC Hydro, and that was easy for it to
6 do so. It was sort of a supplemental supply. But
7 things have shifted since 2007 and 2008, and now
8 actually Mid-C market prices are much lower and the
9 percentage that the PPA Power actually is of
10 FortisBC's portfolio has fallen, and I believe, and
11 I'll have to check these figures, it was 28 percent
12 around 2008, and it fell--BC Hydro's contribution of
13 FortisBC fell to about 15 percent more recently, and
14 they often buy off of Mid-C because it's cheaper. In
15 addition, they have the Waneta Dam expansion coming on
16 line.

17 So, what FortisBC has more recently proposed
18 and my colleague will touch on this, is a rate that
19 will essentially exclude BC Hydro's electricity. The
20 Claimant has claimed that that proceeding is
21 suspended, and that's true, but they've left out one
22 critical fact, but I will let Mr. Douglas get to that.

12:29:10 1 Project, which I will get to in a minute, the new
2 turbine was eligible for the Bioenergy Call on
3 May 2nd, 2008, and it rejected the Arbitrage Project.
4 Mr. Merwin explained to his CEO that the Claimant
5 wanted to engage in harmful arbitrage: "They do not
6 like the fact that we would be buying the power from
7 Fortis, who is buying the power from them, and then we
8 are turning around and selling them the power."

9 So, let's talk briefly about the Green Energy
10 Project.

11 The Claimant proposed to install a new
12 48 megawatt condensing turbine and sell the new
13 electricity to BC Hydro. And it was accepted as I
14 mentioned on the Call for Power. After that, the
15 Claimant had difficulty receiving finance, and there
16 was a downturn in the economy in early 2009. But the
17 Government of Canada came to the rescue with a
18 \$57.7 million contribution to the Claimant, and almost
19 all of that was put towards the new condensing
20 turbine.

21 Their new turbine, that they don't really
22 mention, very much wouldn't have proceeded without

12:30:13 1 this funding, the PPGTP funding, the Federal
2 Government funding. The Claimant receives <<[REDACTED]>> million
3 a year in additional revenue and has an Internal Rate
4 of Return on this project of approximately <<[REDACTED]>> percent.
5 Now, they say this is all about below-load sales, but
6 a lot of pulp mills in British Columbia are capable of
7 getting far above their loads. Celgar is, and it's
8 receiving very good money for all that, and it's
9 something to bear in mind when you're hearing the
10 hardship story that you're hearing here.

11 Let's talk about the Bioenergy Call and the
12 Claimant's GBL.

13 BC Hydro held two Information Sessions for
14 proponents during the Bioenergy Call which discussed
15 the GBL methodology. The Claimant and its counsel
16 participated in both of these Information Sessions.
17 BC Hydro officials actually held seven calls and
18 in-person meetings with Mr. Merwin to discuss the
19 Claimant's GBL, and Mr. Merwin proposed a GBL of
20 33 megawatts on the basis that it would provide a
21 baseline "as low as credible."

22 What was the Claimant saying about its

12:31:27 1 operations at the time? Well, these are all quotes
2 from Mr. Merwin in his letter to May 7, 2008, in the
3 context of the Bioenergy Call, and about the GBL set.
4 Here he says the Arbitrage Project, this is a
5 52-megawatt turbine that's at issue, will only include
6 electricity that Celgar utilizes, at its option, to
7 displace its load at the Celgar Industrial Facility,
8 representing that what normally occurs at that
9 facility is they meet their load.

10 He then goes on to say with respect to the
11 Celgar Green Energy Project. It would allow Celgar to
12 generate up to 35 megawatts of energy in excess of
13 that, referring back to the 52-megawatt turbine, which
14 is currently being supplied to offset Celgar's load.

15 And, finally, he refers to his competitors
16 and says we know that many of their competitor's
17 generating abilities have not yet matched their mill
18 loads.

19 The Claimant asserts that BC Hydro did not
20 take into account Celgar's Blue Goose Project. This
21 is a series of projects that occurred beforehand in
22 2006. This is wrong. Blue Goose was targeted at pulp

12:32:38 1 production. The aim was to increase pulp production
2 from 434,000 air-dried metric tonnes to 475,000
3 air-dried metric tonnes. The Claimant has its own
4 business reasons for undertaking this project and it
5 did not require an incentive. It would have realized
6 increased revenue from pulp production, it would have
7 saved a lot of money in terms of chemicals, and it
8 also saved a lot of money in terms of natural gas
9 savings because its operations became more reliable.
10 These were the driving factors of it. Electricity
11 savings were not material.

12 BC Hydro included exports in the GBL which is
13 its self-generation which is not used for self-supply,
14 and I am going to come back to this one in a minute,
15 and the Claimants touched on it a lot, but this is
16 also wrong.

17 Mr. Merwin repeatedly represented that Celgar
18 mill self-generated electricity to displace its own
19 load. And the Claimant was self-generating to meet
20 its own load. BC Hydro was aware that there would be
21 variability, as my friend Mr. Shor has noted, in the
22 Claimant's imports and exports of electricity when

12:33:46 1 they were attempting to meet that overall objective of
2 meeting their load. BC Hydro looked at the overall
3 picture and gave Celgar a small adjustment for its
4 export sales. And again, I'm going to show you a
5 graph that might help you on that in a second.

6 A few other assertions. The GBL was not
7 based on a multi-year average. Celgar made it clear
8 that--the way that they phrased this, they suggest
9 that it should be based on multi-year average, but BC
10 Hydro made it clear in the context of the Bioenergy
11 Call that it should be based on a 365-day period. And
12 indeed, Mr. Merwin's proposal for a GBL was also based
13 on a 365-day period, not a multi-year average.

14 Mr. Merwin did not have sufficient
15 information on whether Celgar's operations were normal
16 in 2007, he says. Wrong. BC Hydro would have
17 underestimated the Claimant's GBL in 2007 if it did
18 not represent normal operating conditions. If the
19 pulp mill was less reliable, this pulp mill is--almost
20 all of its electricity generation comes from black
21 liquor. Black liquor is dependent completely on pulp
22 production. If its operations aren't reliable, it

12:34:59 1 has--it's producing less pulp and it's producing less
2 black liquor, which means it's producing less
3 electricity. To the extent its operations weren't
4 reliable, BC Hydro set the GBL too low.

5 Celgar would have shut down its hog boiler
6 and not burned discretionary natural gas, according to
7 Mr. Merwin. That's not true. No kraft pulp mill
8 operates without a hog boiler or a power boiler. That
9 would leave it vulnerable to process upsets. If you
10 have a problem with one of your machines on the pulp
11 line, that can mean you're not producing as much pulp
12 and that means you're not producing as much black
13 liquor. But you want to keep your steam up. You have
14 to keep your steam up. So, what the hog boiler does
15 is it allows you to throw a bunch of wood into that
16 boiler and increase the steam.

17 Okay. Pöyry has also demonstrated in its
18 Second Expert Report that Celgar did not burn any
19 discretionary natural gas in 2007.

20 Celgar would have operated in thermal
21 balance. Well, that's wrong, too. Celgar would have
22 to increase its purchase of electricity from FortisBC

12:36:04 1 to operate in thermal balance.

2 Now, what do I mean by thermal balance? It's
3 a technical term. The way Celgar was operating in
4 2007 was to meet its electrical load, to meet all of
5 its load at the facility. What it was doing--what it
6 would be doing if it was operating in thermal balance
7 is it would only be producing enough steam to meet its
8 pulping needs, and that would mean you would be
9 producing a lower amount of electricity. All of the
10 difference between that lower amount of electricity
11 and the Mill's electrical load would have had to have
12 been purchased from their utility FortisBC.

13 And they have also mean--they would have had
14 to have reduced their pulp production. Okay?
15 Remember, their energy production is tied to their
16 black liquor and their pulp production. So, this
17 doesn't make any sense either.

18 PRESIDENT VEEDER: Just to back to the
19 previous point. Is there something grammatically
20 awkward about the blue box? You read it differently.
21 No NBSK pulp mill operates without a hog boiler
22 shutdown.

12:37:14 1 MR. OWEN: Yes. I think so. No NBSK mill
2 operates without a hog boiler. Mr. Merwin's
3 contention is that he would have shut down the hog
4 boiler without incentives from his brokerage
5 contracts, but NBSK mills just do not--

6 PRESIDENT VEEDER: I've understood that, but
7 in the blue box--

8 MR. OWEN: I may--I'm sorry--

9 PRESIDENT VEEDER: I think this "without"
10 should be "with" or the word "shutdown" should be
11 omitted; is that right?

12 MR. OWEN: "No pulp mill operates without a
13 hog"--yes, you're right. It should be with. I'm
14 sorry, Mr. President.

15 PRESIDENT VEEDER: Thank you very much.

16 ARBITRATOR DOUGLAS: I make the same point
17 about the previous slide, actually. The GBL was not
18 based on a multi-year average. I think your point is
19 that that's true, it wasn't based--

20 MR. OWEN: Yes. It wasn't. That's true.

21 ARBITRATOR DOUGLAS: So, one of them is true,
22 but the rest are wrong.

12:38:02 1 MR. OWEN: I'm sorry.

2 PRESIDENT VEEDER: You said it right. Please
3 continue.

4 MR. OWEN: So, let's talk--one of the things
5 here--and this is critical to the like-circumstances
6 determination--is to discuss the Mill architecture,
7 because the way that the mills are configured is
8 different between the different comparators.

9 So, this is a Celgar pulp mill, and here we
10 have a very large recovery boiler, a very small hog
11 boiler, the wood waste boiler, and a small amount of
12 hog fuel going into it. Now, the hog boiler actually
13 doesn't contribute any steam directly to the turbine.
14 Instead, it contributes a small amount of steam to the
15 recovery boiler for what's called soot blowing. And
16 this steam also goes a bit to the pulp and
17 manufacturing process.

18 Now, here you can see all the black liquor
19 flowing from their pulp manufacturing process to the
20 recovery boiler and steam going to the turbo generator
21 one and then back to the pulp manufacturing process.
22 Now, this is Celgar's mill in 2007. Now they've got

12:39:21 1 another turbine. And their load at that time normally
2 was 43 megawatts.

3 Okay. This is a very complicated slide. So,
4 what does this show? I'm hoping this will help
5 understand things. The top green line is the amount
6 of steam in 2007 that the Celgar Mill produced. It's
7 the recovery boiler steam and a little bit of natural
8 gas. The bottom blue line right down at the bottom is
9 the hog boiler, and you can see it's much, much
10 smaller, and I will get to that in a second. And the
11 middle blue line is the pulp production. Now, look at
12 that pulp production and look at the recovery boiler
13 steam. You can see when pulp production falls, there
14 is a fall in that recovery boiler steam. They're
15 completely tied together.

16 Everyone with me? Okay.

17 So, let's look at this just in terms of steam
18 production. The recovery boiler steam for Celgar in
19 2007 produced 96 percent of steam production. The hog
20 boiler was only producing < [REDACTED] percent of steam

21 production. And, indeed, < [REDACTED]

22 [REDACTED]

12:40:40 1 This is--the red section here is the hog
2 boiler on hot idle. What that means is they're just
3 keeping it warm enough to deal with process upsets.
4 So, they're putting a little bit of natural gas in
5 there, they're keeping it warm, sort of on stand-by,
6 ready to go, and if they have a problem with recovery
7 boiler steam, then they can fire it up for a little
8 bit. And you can see that occasionally it blips up.

9 Now, the key point here--I'm sorry--the key
10 point here is that the recovery boiler steam is from
11 black liquor that Celgar has to burn. No matter what,
12 it's generating 96 percent of its steam. It's
13 generating 96 percent of its energy. It has no other
14 place to go. The total amount of storage that they
15 have for black liquor is about one to two hours at
16 this time.

17 Power boiler steam, Claimant asserts, says,
18 oh, it's discretionary. But power boiler steam is
19 used for multiple purposes. In particular, it's used
20 during the winter months with NBSK pulp mills, and
21 that's because everything becomes colder. You need
22 more steam to heat your buildings. You need more

12:41:55 1 steam to heat up different parts of the process. So,
2 you fire your hog boiler, and here you can see that
3 it's firing back up in November of 2007 as
4 temperatures are starting to drop off.

5 It's also used for the incineration of
6 certain gases that you have to incinerate for
7 environmental reasons, and it's used to get rid of
8 sludge in hog that the mill had to get rid of.

9 Okay. The Claimants talked about how
10 self-generation has to be used to meet loads. So,
11 this is this idea that they looked at the--Hydro
12 looked at the 2007 data; and, when it looked at the
13 2007 data it didn't subtract exports.

14 So, I'd like to look at what was happening on
15 an hour-by-hour basis, and I want to emphasize the
16 variability here. Running one of these mills is not
17 like you turn the dial and you set your recovery
18 boiler, or you set your energy generation to
19 40 megawatts. It just doesn't happen. It swings up
20 and down, it's dependent, very dependent as we've just
21 seen, on the production process.

22 And here you can see in the green the plant's

12:43:05 1 load, okay? You can see the big dip there in April.
2 That's their annual shut. They've got a little bit of
3 electricity they're using there to keep the lights on
4 and things like that. But can you see it's quite
5 variable.

6 This is their TG output from the 52-megawatt
7 turbine. And you can see it jumps up and down, up and
8 down, up and down.

9 Now, what Hydro knew was that they were
10 attempting to meet their load and maybe if they could,
11 every once in a while, generate a bit of surplus
12 electricity. It also knew that this would be the type
13 of generation pattern that they would have. And they
14 looked at overall picture, and they said, you know
15 what? If they're trying to meet their load, this is
16 the type of generation picture they're going to have.

17 But you can't arbitrage above your load, so
18 they looked at their total generation, which was
19 350,000-megawatt hours, and they realized that their
20 load was 349,000-megawatt hours, or 40 megawatts. And
21 they gave them a small adjustment downward from 350 to
22 349.

12:45:26 1 [REDACTED].>>

2 And they could do that because the price of
3 natural gas was pretty cheap in the Nineties. It was
4 around, you know, \$1 or \$2, you know, but definitely
5 below \$2 at all times.

6 When 2001 came along, and my friend,
7 Ms. Flores, referred to this, there was a California
8 energy crisis, and the California energy crisis caused
9 a spike in all sorts of energy-related products. And
10 Howe Sound << [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And that was what led to
15 the whole G-38-01 proceeding and led to a decision

16 that that was--<< [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12:46:37 1 [REDACTED]>> BC Hydro's electricity rates are pretty
2 reasonable, you know, depending on whether their--you
3 know, at the time, the blended rate was probably under
4 \$30 a megawatt hour.

5 Now, it's a different decision point,
6 however, if you can sell that to market, and the
7 market price is higher. It might make sense some
8 months to fire some of your natural gas. If the
9 natural gas prices are low, you could fire some
10 natural gas in that hog boiler, and you could sell
11 that electricity to market, and that would be a
12 different--maybe it would be \$60 a megawatt hour,
13 maybe \$80 a megawatt hour--and you could basically
14 justify that economic decision. But you weren't doing
15 it all the time.

16 And indeed, when you're looking at their
17 generation pattern, << [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]>> It had nothing to do with the

12:47:39 1 actual operations of the kraft pulp mill.

2 Any questions on that?

3 No. Okay.

4 All right. So, my friends brought up a
5 slide, and they sort of--it ended at 2007. I thought
6 that was great. It ended at 2007, and look, you know,
7 this is the highest year that we ever had. But it
8 doesn't tell the story after that. And this is what
9 actually happened at the Celgar Mill after the
10 baseline was set.

11 So, the baseline was set at 349,000-megawatt
12 hours. And you can see here in 2008, 2009, and 2010,
13 their load is always higher and their self-generation
14 is always higher. Now, 2010, I want to make the point
15 that the condensing turbine comes on for the last
16 quarter. I don't want to be unfair to my friends, so,
17 yes, their generation skyrockets a little bit.

18 But you can see here that 2007 was not their
19 highest year ever. It might have been when they
20 were--the GBL was set, but BC Hydro knew from
21 Mr. Merwin's representations that the pulp mill load
22 and pulp mill production were going to grow. They

12:48:56 1 were planning to get this thing all the way up to half
2 a million tonnes a year, which they actually produced
3 in 2010.

4 These are some of the Claimant's positions
5 concerning GBLs in different regulatory proceedings.
6 Starting first with their position with BC Hydro
7 initially was that they should have a 0 megawatt
8 project the Arbitrage Project should in. Then they
9 proposed a GBL for the EPA of 33 megawatts. But after
10 that, in September of 2009, they're lobbying the
11 Government and they're asking for a 3.5-megawatt
12 Generator Baseline.

13 October 2009, their position changes, between
14 3 and 20 megawatts. April 2010, in the context of
15 G-156-10, they're down to requesting a Generator
16 Baseline of 1.5 megawatts. But then in July 2010,
17 they say it could either be 0 megawatts or
18 1.5 megawatts.

19 In March 2011, they say that their GBL is
20 anywhere from 1.5 megawatts or 11.5 megawatts.
21 16 megawatts later on in 2011. Between August--in
22 August 2011, it's between 1.5 and 16 megawatts now.

12:50:20 1 And in November 2013, it should be set back down to
2 1.5 megawatts.

3 Now, I want to tell you what that
4 1.5 megawatts is based off of because it's sorts of
5 funny. It's based off of their generation before they
6 installed the 52-megawatt turbine from 1990 through to
7 1992. So, they had 3.5-megawatt turbine back then.
8 And when I say "they," I mean the Celgar Pulp Company,
9 the company that actually owned it at the time. And
10 what the Claimant wants to do is go all the way back
11 to 1990 and 1992 and basically say, you know, look,
12 let's look at that and base the GBL on that.

13 Now, in this arbitration, they have a myriad
14 of positions. It's either 0 or 16 or 18 or 21 or 25
15 or 28 or 30 or 31 or 37. There is no consistency
16 there, either.

17 Just in conclusion on the Bioenergy Call, the
18 Arbitrage Project was rejected under the Call because
19 it was not new or incremental energy. And the
20 Claimant's energy project was allowed to go forward,
21 the Green Energy Project. They set the Claimant's GBL
22 at 40 megawatts; that reflected the Claimant's

12:51:40 1 generation in 2007, adjusted slightly downwards to its
2 load. And BC Hydro needed to acquire renewable energy
3 and had no incentive to treat the Claimant
4 differently.

5 What the Claimant wants is preferential GBLs
6 that are inconsistent with the GBL methodology and are
7 not comparable to the GBLs that Tembec or Howe Sound
8 received, and that would allow the Claimant to engage
9 in harmful arbitrage.

10 My colleague is urging me to break for lunch.
11 I don't know if that would suit the Tribunal.

12 PRESIDENT VEEDER: The answer is it would.

13 So, thank you very much. We will break now
14 until 5 to 2:00. We will come back then.

15 (Whereupon, at 12:52 p.m., the hearing was
16 adjourned until 1:55 p.m., the same day.)

17

18

19

20

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22

02:01:21 1 occurring at the same time. There was a transaction
2 with the City of Nelson, which was a B.C. community
3 close to Celgar, and it has a hydroelectric dam. And
4 that agreement was filed on June 24, 2008, and the
5 attention that that drew led BC Hydro to the discovery
6 that not only was there an arbitrage proposal for the
7 City of Nelson, there was also an arbitrage proposal
8 for Celgar.

9 So, they didn't know about this arrangement
10 until about a month later. And then, finally, the
11 Application that they talk about is BCUC--the BCUC
12 G-48-09 proceeding. That Application was filed in
13 September 16, 2008. So, just be careful with the
14 timelines here because the Claimant likes to play with
15 them. How could the GBL set at the end of May
16 possibly be predicated on an Application that wouldn't
17 be filed in September concerning subject matter that
18 BC Hydro didn't know about until a month later?

19 So, you can ask Mr. Dyck about this when he's
20 here. He had no knowledge of this when he established
21 their GBL.

22 Okay. I'd like to turn now to Tembec. I'm

02:02:35 1 going to try to move through this crisply.

2 Okay. Tembec/Skookumchuck--Skookumchuck
3 means "strong water," which is another way of saying
4 "rapids"--had a preexisting 1997 EPA with BC Hydro,
5 and I'll just address that very quickly. So, they've
6 talked about, you know, 2001, that EPA was signed in
7 1997. Before 2001, in 1999 and 2000, Tembec assumes
8 control of that EPA. It buys that pulp mill, and it
9 invests all of its infrastructure. It's built the
10 turbine. It's built the new hog boiler. Everything
11 is ready to go, and they've had discussions about how
12 they're going to manage that EPA with BC Hydro, and,
13 in fact, they're moving towards commercial operation,
14 and commercial operation occurs in September 2001.
15 That's Point 1.

16 So, that's the context. Hydro signed this
17 Contract in 1997, and then it moved forward to there.
18 The second thing you need to remember is G-38-01
19 didn't apply to procurement. It applied to
20 self-generators that wanted to export through an
21 energy broker to the United States because that's what
22 they were interested in doing at the time because of

02:05:15 1 under the preexisting EPA, and it too high of a price.

2 The way some of these generators work, the
3 closer you get to their nameplate capacity--that's a
4 theoretical maximum that they can produce--the more
5 expensive the generation becomes. So, Tembec had a
6 43 1/2 megawatt turbine. The closer you creep up to
7 43 1/2 megawatts, the more expensive it gets.

8 Now, importantly, the 1997 EPA could be
9 terminated in << [REDACTED] >> BC Hydro determined
10 that it would lose [REDACTED] >> on an annual basis if
11 there was early termination of the 1997 EPA. There
12 would be a significant loss of power that it would
13 then have to supply back to Tembec, and it would have
14 to do so from high cost marginal sources.

15 Hydro and Tembec thus entered into bilateral
16 negotiations to transition the 1997 EPA into a modern
17 EPA, and BC Hydro set a GBL based on its GBL
18 methodology. And what they were looking at was
19 essentially what Tembec would generate in normal
20 operations in the absence of the contracted, or
21 without the 1997 EPA. What you have to remember about
22 the 1997 EPA is essentially caused very different

02:06:34 1 generation decisions in the mill. They had to use the
2 hog boiler, and the hog boiler, when it was running,
3 generated--it had to << [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

7 And then they also had their recovery boiler
8 running and their black liquor running, and that would
9 cause them to generate even more electricity.

10 Remember, they have to burn that black liquor. If you
11 take away the 1997 EPA, and if you understand that << [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED] >>

17 So, let's just take a look at the mill
18 architecture here. Again, this is significant. The
19 hog boiler--remember the one at--if you remember back
20 to the mill architecture with Celgar, the hog boiler
21 was very small. Here you can see the hog boiler is a
22 very large, << [REDACTED]

02:07:49 1 [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].>>

3 Okay. So, Tembec initially took the position
4 that << [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

13 Hydro didn't accept that. Hydro said, no,
14 << [REDACTED]. [REDACTED]

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

21 As a result, they did their own engineering
22 analysis, and this is referred to in contemporaneous

02:10:27 1 Now, the Claimant makes a lot of noise about,
2 oh, look at how much the energy changed. They talk
3 about doubling of electricity, of electricity
4 purchases. But, again, what BC Hydro was doing is
5 looking at what would happen after the Contract was
6 gone. This was a commercial decision to
7 basically--they knew that they were looking to the
8 terminate the Contract. We have got Mr. Lague, who is
9 the energy manager of the Tembec pulp mill. He'll be
10 here to answer your questions. He's very
11 knowledgeable, and you can ask him all about what was
12 going on at the Skookumchuck pulp mill, and we're
13 happy to have you ask those questions.

14 ARBITRATOR ORREGO VICUÑA: I have one
15 question. If you go back, please, to the chart at
16 Slide 43, at the bottom you show there how Tembec sold
17 part of the electricity to BC Hydro, and then part of
18 the electricity sales to the market through Powerex.
19 But my question concerns Powerex.

20 One of the arguments that one finds all along
21 the Memorials and probably will come up again, it's
22 that Powerex, it's a subsidiary of some sort of

02:11:55 1 BC Hydro, or they have some participation of
2 importance. Now, how does that play from the point of
3 view of being, say, BC Hydro interest purchasing, as a
4 whole, a larger amount of electricity or not, or are
5 they entirely unrelated?

6 MR. OWEN: So, I'm happy you asked that
7 question. And you could get lost in detail on
8 Tembec's--and I didn't get to the Powerex sales
9 because it can be a little bit complex.

10 When the--

11 ARBITRATOR ORREGO VICUÑA: In short, can they
12 be added up or not? I mean, that's the thing that
13 came out to my mind.

14 MR. OWEN: Well, the market--the sales
15 through Powerex, Powerex is essentially acting as a
16 broker, so my understanding is that that energy was
17 sold into the U.S. market, probably to the
18 Mid-Colombia market.

19 Now, << [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

02:13:07 1 [REDACTED]
2 [REDACTED]
3 If you look to Mr. Lague's Witness Statement,
4 << [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] [REDACTED] [REDACTED] [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
13 [REDACTED] [REDACTED]
14 [REDACTED] [REDACTED]
15 [REDACTED] [REDACTED].>>

16 A lot of what happened with this mill--and
17 I'll try and keep this simple. Originally, this
18 configuration wasn't like this. Originally, the way
19 this was set up was to operate actually with two
20 turbines, and the hog boiler was going to operate off
21 of another turbine, and it was designed to be an
22 independent power producer. Okay. And that's why it

02:14:23 1 was signed with Purcell Power.

2 Tembec acquired the mill in 1998 or 1999--I
3 forget which--and when it bought it, it said, Why are
4 we going keep two turbines running, one to supply the
5 mill?--the 15-megawatt turbine here and another
6 14-megawatt turbine over here. And it combined the
7 two together into a large 43 1/2 megawatt turbine.

8 << [REDACTED]
9 [REDACTED] .>> And I

10 don't know that that answers anything, but it might
11 explain some of the complexity.

12 ARBITRATOR ORREGO VICUÑA: Okay. Thanks very
13 much.

14 MR. OWEN: Just briefly, so differences
15 between Celgar and Tembec: Celgar had no preexisting
16 energy purchase agreement that incentivized it to
17 produce electricity and, thus, historical generation
18 levels that could be--change its GBL.

19 Tembec, on the other hand, had a preexisting
20 EPA incentivizing it to produce electricity and
21 requiring it to use its large hog boiler. Historical
22 generation was not going to be a reliable data set

02:15:32 1 going forward.

2 Celgar generates its electricity from a large
3 recovery boiler with a small hog boiler. There's a
4 typo there. I apologize. And the recovery boiler to
5 steam was dependent on pulp production. Tembec, on
6 the other hand, had both a large recovery boiler and a
7 large hog boiler. So, it was dependent both on pulp
8 production and on supplies of hog fuel and their
9 prices. Celgar generated only a small amount of
10 electricity using hog fuel that it produced
11 internally; whereas, Tembec, especially in 2008 and
12 2009, was buying it externally.

13 Okay. Howe Sound's EPA: And this will be
14 Howe Sound's EPA in 2010. I'm not going to go back to
15 the 2001 agreement, which is quite a different
16 agreement, and that's an export agreement, not a
17 procurement agreement. Howe Sound participated in
18 BC Hydro's integrated power offer in 2010. That's
19 another call for power. And BC Hydro and Howe Sound
20 negotiated GBL pursuant to the same GBL methodology.

21 Now, again, mill architecture--and I know
22 these are complex, but the main thing that I want to

02:18:59 1 purchased out of bankruptcy in 2005 and had new
2 management. In 2006, its turbo generator was down
3 twice. It wasn't able to do its annual shut in 2005
4 because of a labor strike. So, it had to shut its TG
5 down twice; and it also installed four new pieces of
6 capital equipment, causing changes and disruptions to
7 the plant. These were all part of the Blue Goose
8 project.

9 So, Celgar operated primarily off its
10 recovery boiler and a small hog boiler, but Howe
11 Sound, on the other hand, was relying a large hog
12 boiler. Celgar represented that it had completed
13 major plan changes in 2006 and indicated that it
14 normally met its load. Howe Sound, << [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]>> Celgar's operations were
18 reliable in 2007, << [REDACTED]>>

19 The Ministers' Order: There's been a lot
20 said about the Ministers' Order, particularly by the
21 Claimant, but I just wanted to go to the actual
22 document, and I'll take you through this very quickly.

02:20:17 1 Celgar, at the time, under Part 2 of--and
2 this is a Celgar pulp company, not the Claimant--was
3 required to submit an Energy Project Certificate
4 Application under the utilities commission at that
5 time. And it was sort of an economic and
6 environmental review. It looked at environmental
7 issues, it looked at economic issues, it looked at
8 social issues, and it looked at energy policy.

9 Celgar emphasized that it would use its
10 electricity for self-supply in both its project
11 description and its project justification. And here
12 we have two excerpts from the Project description.
13 These are bold, as they were in the original
14 Application. They were the only bolded statements,
15 aside from one other line that is quite close to one
16 of these, in the entire Energy Project Certificate
17 Application made by Celgar. And they emphasize that
18 the heat generated by burning the black liquor will be
19 used to produce steam. And this steam, when passed
20 through the turbo generator, will, under normal
21 conditions, supply 100 percent of the modernized
22 mill's electrical power requirements.

02:21:18 1 There is nothing vague in that. It says the
2 black liquor will be used to supply, in normal
3 conditions, 100 percent of the modernized mill
4 requirements. They note there a tie line will be
5 retained at the bottom one--a tie line will be
6 retained to the local utility. Of course, if you have
7 a big problem at your pulp mill, you're going to want
8 your local utility to supply some power. If you're in
9 your annual shut, as you are once a year, you want to
10 make sure that you have some power to keep the lights
11 on.

12 Mr. Ostergaard, this is the Deputy Minister
13 responsible for that at this time, who has direct
14 knowledge of this, recommended to the Minister of
15 Energy that an exemption be granted from the Utilities
16 Commission Act from them having to do a full Energy
17 Project Certificate process conditional on Celgar
18 building and operating the Project in accordance with
19 the detailed description in the Application.

20 Now, this required the approval of both the
21 Minister of Energy and the Minister of Environment, so
22 Dr. O'Riordan--another witness who has direct

02:22:15 1 knowledge of this and who talked to his colleague
2 Mr. Doug Dryden, who was also directly involved, made
3 the same recommendation to the Minister of
4 Environment, and, in fact, their recommendation is
5 actually contained in a briefing note that we found
6 from 1991 that essentially says that it will provide
7 the pulp mill with near energy self-sufficiency,
8 obviously, a relevant consideration.

9 And the Ministers' Order is simple. It says,
10 Celgar shall, subject to this Order, cause the Project
11 to be designed, located, constructed, and operated in
12 accordance with the Application. The Claimant
13 requested the transfer of the Ministers' Order, which
14 the Environmental Assessment Office assigned to it in
15 2005. The Ministers' Order required Celgar to use its
16 electricity from this turbine to serve the pulp mill.

17 And with that, I'd like to turn to my
18 colleague, Mr. Douglas.

19 ARBITRATOR DOUGLAS: May I just ask, how much
20 can we really put on that statement in the context in
21 which it was given? Subsequently to this, there's a
22 program to expand the resources of the--the energy

02:23:25 1 resources of BC Hydro that is the Californian crisis.
2 The circumstances do change quite dramatically. So,
3 to what extent can we really single out that statement
4 in 1991 and extrapolate?

5 MR. OWEN: Well, I mean, I could spend a lot
6 of time on this, and I'm cognizant that we only have a
7 limited amount of time. I would observe that,
8 actually, in 1991, there was a possibility of doing
9 energy exports. The Claimant is somewhat wrong on
10 that. They are quite right that the open access
11 transmission tariff did not exist at that time, but we
12 submitted evidence on the fact that it was possible to
13 wheel power through bilateral negotiations with the
14 utility, there was a statement on energy exports in
15 1989, and so that's one consideration.

16 And so the policy context wasn't completely
17 different. I think, you know, one of the important
18 things to realize was Mr. Ostergaard, and he testifies
19 to this in his Witness Statement, was looking at this
20 in the context of the energy--the load resource
21 balance in the West Kootenay Power region, so the
22 predecessor of FortisBC. And they've always had a bit

02:24:34 1 of a problem insofar--except now, they're getting a
2 new dam and expansion on line, and they've got a
3 little bit more energy. But they had a historical
4 problem that they don't have enough energy generation
5 assets to meet their own load, so they have to rely on
6 long term power purchase agreements. So, they have
7 one with Brilliant Power down in the United States,
8 and they also have the one with BC Hydro that we've
9 heard about.

10 So, when he was looking at this, the Celgar
11 Pulp Mill is like the largest customer in FortisBC's
12 service area, and at the time in the 1990s when they
13 were doing this major rebuild, it drew roughly
14 22 megawatts of power off its local small utility, and
15 it was only generating, as Mr.--as GBL proposal, as
16 the Claimant has made, has shown, about 1.5 megawatts
17 off of its existing 3.5 megawatt turbine.

18 So, it was quite--you know, there was a lot
19 of energy draw off that. And what Mr. Ostergaard was
20 looking at was, well, they wanted to double the
21 production capacity of this pulp mill. They were
22 rebuilding the entire thing. It wasn't \$800 million

02:25:36 1 to rebuild the turbine. That would be crazy. They
2 wanted to increase the production and also bring it
3 into environmental compliance.

4 I guess where I'm going with this is, it
5 really has to do with that regional load resource
6 balance, and if you look at the Utilities Commission
7 Act, and if you look at--and if you look at the
8 regulation, and particularly the information guide,
9 they talk about the importance of looking at supply
10 and demand and looking at whether that is a relevant
11 consideration. There was additional policy context in
12 that the Ministry wanted to encourage cogeneration at
13 that time.

14 And I think it actually became more relevant,
15 from my perspective, as the decade progressed, and you
16 get through to the mid-1990s and into 2000, and the
17 load resource balance for Hydro just gradually shrank.
18 The amount of energy that they were--the surplus that
19 they always had from these large dams shrunk as the
20 population grew and there were--the economy grew
21 until, in 2000, they became an energy importer.

22 And, yes, the energy crisis certainly had a

02:26:39 1 role in that, but that energy deficit continued beyond
2 2001. I mean, the energy crisis happened in 2000, in
3 2001, but the problem of being a net energy importer
4 continued, and that's why the policy was adopted in
5 2007 towards energy self-sufficiency.

6 ARBITRATOR DOUGLAS: Can I just clarify what
7 the precise legal import that you put on this
8 document? You say that that created a legal
9 obligation.

10 MR. OWEN: So, if they had not received this
11 Exemption Order--they are called different things.
12 They're sometimes called Ministers' Orders, Exemption
13 Orders, Disposition Orders--they would have had to go
14 through a more lengthy process in front of British
15 Columbia Utilities Commission, either a CPCN process
16 or a full BCUC review. So, what they got out of it
17 is, it's a little bit of a shortcut because if you
18 looked at the actual statutory scheme, it required you
19 to get both an Energy Project Certificate, which is
20 sort of like a bit of a build permit, and also
21 required an Energy Operation Certificate.

22 But if the Project were simpler and the

02:27:43 1 Ministries, both Environment and Energy, were content
2 to--you know, thought that it was a good project, it
3 didn't require a lot of further review. These
4 Ministers' Orders were a way of saying, "Okay, you
5 know what? You provided good information on the
6 construction and the operation of this. We'll exempt
7 from you further review. To the extent you do not
8 comply with those obligations and you do not comply
9 with your Application, then you have to go back to the
10 BCUC.

11 (Comments off microphone.)

12 MR. DOUGLAS: It's fine by me so long as
13 David can hear me and you all can hear me, then that
14 is--

15 (Comments off microphone.)

16 MR. DOUGLAS: Yeah. No. I do just prefer,
17 especially after lunch, to be on my feet.

18 I will be addressing Canada's arguments for
19 the remainder of the presentation. We're skipping in
20 the facts, and after we'll finish off some factual
21 issues and some BCUC proceedings, then we'll discuss
22 the law for a period of time. My presentation should

02:30:14 1 run about 45 minutes or so, if I'm lucky.

2 The second critical measure that the Claimant
3 alleges breaches the NAFTA in this arbitration is
4 called the Exclusivity Clause, which is a provision in
5 the Claimant's EPA. The Exclusivity Clause provides
6 that a seller can only sell its electricity to
7 BC Hydro and not to another party. When signing the
8 EPA, it means that you are committing to sell all of
9 your electricity--all of your electricity to BC Hydro,
10 all of your above-GBL electricity and that you cannot
11 sell your below-GBL electricity to a third party.

12 Now, the Claimant alleges that the
13 Exclusivity Clause violates NAFTA Articles 1102, 1103,
14 and 1105 because it unlawfully prevents them from
15 selling their below-GBL electricity to third parties.
16 They also argue that the Exclusivity Provision has
17 nothing to do with procurement and is, therefore, not
18 caught by the NAFTA's procurement exception, which
19 we'll discuss later.

20 The Claimant is wrong. First, every single
21 EPA that BC Hydro has signed has included an
22 Exclusivity Clause. The Claimant has been treated no

02:31:32 1 differently than Tembec, than Howe Sound, or any other
2 mill. All of those mills have Exclusivity Provisions.
3 In this context, there can be no less favorable
4 treatment.

5 Second, the primary purpose of the
6 Exclusivity Provision is to protect BC Hydro's
7 procurement of electricity, which is what Mr. Scouras
8 testifies in his Second Witness Statement at
9 Paragraph 8.

10 Now, let me give you an example. You can see
11 on the slide that with an Exclusivity Provision--this
12 is Slide 62--the mill cannot sell its below-GBL
13 electricity to a third party. As a condition of the
14 procurement contract, it has committed to maintain its
15 historical level of self-supply. And BC Hydro
16 procures the incremental generation.

17 Turning to Slide 63, without an Exclusivity
18 Provision, however, the mill would be free to sell its
19 electricity to third parties, and this creates
20 problems for BC Hydro's procurement. While BC Hydro
21 procures above-GBL electricity, it must now supply the
22 mill with electricity to support its sales to third

02:32:47 1 parties. This utterly negates BC Hydro's procurement.
2 It completely undermines the very purpose of the EPA,
3 which is to procure more electricity. Thus, the
4 Claimant is wrong when it argues that the Exclusivity
5 Clause has nothing to do with procurement.

6 Now, during the negotiation of the EPA, the
7 Claimant argued that its EPA should not have an
8 Exclusivity Clause because it is not a direct customer
9 of BC Hydro. The Claimant argued that, as a FortisBC
10 customer, it was allowed, as a matter of law, to buy
11 and sell BC Hydro's PPA power.

12 The Claimant's request to remove the
13 Exclusivity Clause raised serious concerns for
14 BC Hydro. First, BC Hydro still provides the Claimant
15 with electricity through the PPA, thus, there were
16 still concerns about security of procurement. You can
17 see on the slide if BC Hydro's procuring incremental
18 generation, it is losing some of that by supplying PPA
19 power through FortisBC and through to the Claimant to
20 replace its sales to third parties. It is losing its
21 procurement.

22 The second concern for BC Hydro was that the

02:34:06 1 Claimant's request to remove the Exclusivity Provision
2 was more favorable treatment than any other mill:
3 than Tembec, than Howe Sound.

4 Now, the Claimant's able to arbitrage
5 BC Hydro's PPA power was the subject matter of ongoing
6 proceedings at the time of the negotiation of the EPA.
7 These were the G-48-09 proceedings, which I'll discuss
8 later. Thus, to get around the impasse between the
9 dispute between the Parties and the negotiation of the
10 Contract, the Claimant and BC Hydro negotiated a side
11 letter agreement.

12 Now, there is quite a lot of words here on
13 the slide, and I will leave it to you to review the
14 terms, but in summary, the side letter agreement
15 states that if the BCUC agrees in any future
16 proceeding that the Claimant can sell its below-GBL
17 electricity, then the Exclusivity Provision will be
18 amended out of the EPA. This is a remarkable deal for
19 the Claimant as it is a right that no other mill in
20 the Province holds. No other mill can sell its
21 below-GBL electricity, not Tembec, not Howe Sound.

22 Now, the Claimant argues in this arbitration

02:35:24 1 that it has been forced to displace its load. It has
2 put forward this morning as its primary argument. In
3 light of this side letter agreement, that cannot
4 possibly be true. And we'll see later that the BCUC
5 has, in fact, allowed the Claimant to exercise its
6 right under the side letter agreement. It is,
7 perhaps, this reason that the Claimant mentions this
8 agreement only once in a footnote in its Reply
9 Memorial and failed to mention it this morning in its
10 entire Opening Statement. They would rather minimize
11 the Agreement because it completely undercuts their
12 position in this arbitration. It shows they were
13 given better treatment.

14 In summary, the Claimant makes three
15 arguments against the Exclusivity Provision in this
16 arbitration, and all are false. First, the Claimant
17 argues that BC Hydro has prohibited the Claimant from
18 selling its below-GBL electricity. This is false in
19 light of the side letter agreement.

20 Second, the Claimant--

21 ARBITRATOR DOUGLAS: Before you move on, they
22 say that it hasn't been implemented. I mean, what is

02:36:36 1 your position on that?

2 MR. DOUGLAS: And we'll get to this in more
3 detail a little later on, Professor Douglas. But
4 after G-188-11--and I know you asked a question about
5 this, this morning. The Commission, in that order,
6 essentially said that the Claimant can sell its
7 below-GBL electricity to third parties. After that
8 order was issued, Mr. Merwin wrote to BC Hydro to
9 exercise the Claimant's right under the side letter
10 agreement. One month later the Claimant filed its
11 NAFTA arbitration and did not follow up with the side
12 letter agreement.

13 Now, its right to sell its below-GBL
14 electricity continues. You asked a question this
15 morning about whether the NAFTA claim suspended the
16 NECP proceedings. That was almost it. The NECP
17 proceedings proceeded in tandem with the NAFTA. They
18 became suspended with the Claimant's consent, and I
19 will discuss those details a little bit later in my
20 presentation. But it's important to note it is a
21 right they still hold. They still have the NECP in
22 their back pocket. They still have a right to sell

02:37:40 1 their below-GBL electricity. The fact that they argue
2 they have not exercised that right is because they
3 agreed to suspend those proceedings. So, this NAFTA
4 arbitration is pursuing in tandem with that right. It
5 has not been denied to them. It is a right that they
6 hold.

7 Second, the Claimant argues that the
8 Exclusivity Provision has nothing to do with
9 procurement. And they have to make this argument to
10 get around the procurement exception. However, as I
11 have explained, the Exclusivity Clause has everything
12 to do with procurement.

13 Third, the Claimant alleges that the
14 Exclusivity Clause violates Article 1102, 1103, and
15 1105. But how can this possibly be when every other
16 mill has an Exclusivity Clause, and no other mill has
17 a side letter agreement?

18 I'd like to turn now to the final measure at
19 issue in this arbitration, and that is BCUC G-48-09
20 and the subsequent proceedings before the BCUC--or the
21 proceedings, sorry. Order G-48-09 was a regulatory
22 decision made by the BCUC that prevented the harmful

02:39:00 1 arbitrage of BC Hydro's electricity by customers in
2 FortisBC's service territory. The Claimant alleges
3 that BCUC Order G-48-09 violates NAFTA Articles 1102,
4 1103, and 1105 because it restricted their access to
5 electricity that would replace their below-GBL sales.

6 In other words, the Claimant argues that they
7 have a right under the NAFTA to sell their below-GBL
8 electricity, and here they argue that Order G-48-09
9 has impeded that right because it denied them access
10 to replacement electricity. The Claimant is wrong.

11 First and foremost, no mill has a right to
12 sell its below-GBL electricity, not Tembec, not Howe
13 Sound, not Canfor, not Tolko. Only the Claimant has
14 this ability through its Side Letter Agreement.

15 Second, in order to make this allegation, the Claimant
16 is forced to mischaracterize G-48-09.

17 So, let me first touch on the origins of
18 G-48-09, put it in context, and then I will discuss
19 how the Claimant's characterization of that order is
20 wrong.

21 G-48-09 emanated from an agreement that
22 FortisBC signed with the City of Nelson, whereby the

02:40:24 1 City of Nelson wanted to buy PPA power through
2 FortisBC and sell it at a higher price into the
3 market.

4 Now, for those of you who are not familiar
5 with Canada, the City of Nelson is in British
6 Columbia. It is also within FortisBC's service area,
7 not far from the Claimant's mill.

8 The case, G-48-09, did not emanate from the
9 Claimant. The Claimant was not directly involved in
10 the proceedings but participated as an intervenor.
11 The dispute centered on the power purchase agreements
12 signed by BC Hydro and FortisBC in 1993.

13 Now, the 1993 PPA prohibited FortisBC from
14 arbitraging BC Hydro power. It had no provision that
15 would prohibit the arbitrage of PPA power by customers
16 in FortisBC territory. Therefore, BC Hydro brought an
17 Application to prevent the harmful arbitrage of PPA
18 power by customers in FortisBC territory. BC Hydro
19 did not advocate a net-of-load methodology during the
20 G-48-09 proceeding. That is a myth that the Claimant
21 perpetuates in this arbitration. Consistent with
22 G-38-01, BC Hydro sought to prevent increased

02:41:43 1 purchases of PPA power to facilitate sale or arbitrage
2 of that power by FortisBC customers.

3 In its decision, the BCUC agreed with
4 BC Hydro that FortisBC customers should not be allowed
5 to arbitrage PPA power in a way that is harmful to
6 BC Hydro ratepayers. In a section called "winners and
7 losers" the BCUC identifies the winners of harmful
8 arbitrage as being FortisBC's customers, like the
9 Claimant, and the losers, being BC Hydro and its
10 ratepayers.

11 In order to prevent harmful arbitrage, the
12 BCUC stated that, as a general rule, customers who
13 purchase PPA power through FortisBC must be
14 net-of-load before selling their electricity to third
15 parties.

16 Now, the Claimant argues that G-48-09 imposed
17 on them an absolute prohibition on their access to
18 electricity while selling. They argue that they must
19 always be net-of-load before selling any of their
20 electricity. This is wrong. The BCUC, in G-48-09,
21 did not foreclose the possibility of below-load sales
22 so long as a GBL could be set between the customer--in

02:43:12 1 this case, the Claimant, and FortisBC--nor did the
2 Order say anything about the access to FortisBC's
3 non-PPA power resources for the purpose of arbitrage.
4 And I will discuss each these points, in turn.

5 First, G-48-09 left open the door to the
6 Claimant receiving a GBL with FortisBC. At Page 30 of
7 the decision, the BCUC questions whether the
8 Claimant's 52-megawatt turbine installed in 1994 is
9 incremental or existing electricity. You can see the
10 quotes at Slide 74. It says that such determinations
11 could be made on a case-by-case basis.

12 If G-48-09 imposed a net-of-load standard, as
13 the Claimant alleges, these BCUC statements make no
14 sense. On a net-of-load standard, you are either
15 above your mill load or you are not. There would be
16 no need to determine whether turbines are adding
17 incremental generation available for export, which is
18 what the BCUC is talking about here. The Claimant
19 made an identical interpretation of Order G-48-09
20 after it was issued.

21 On the slide--this is Slide 75--this is a
22 memorandum from Mr. Merwin to FortisBC. He cites

02:44:42 1 G-48-09 as authority for establishing a GBL and
2 requests that FortisBC set one at 3.5 megawatts. He
3 argues that a 3.5-megawatt GBL is justified because
4 that is what the Celgar Mill was generating before it
5 installed its 1994 turbine.

6 Now, it is very important here to distinguish
7 between what the Claimant is asking for as a GBL
8 versus GBL in the context of procurement. This is not
9 a GBL in the context of procurement. It's a different
10 kind. This is not a utility setting a GBL to demark
11 incremental from existing electricity. The GBL the
12 Claimant is seeking here is a threshold above which
13 they can either choose to sell it to market, if prices
14 are good, or self-supply, if prices are bad. It is a
15 different character than the GBL in the context of
16 procurement.

17 And it is important to emphasize, again, that
18 mills who already have a GBL with BC Hydro in an EPA,
19 they have no right to another different GBL, like the
20 one the Claimant is seeking here. The Claimant only
21 has this right because of the side letter agreement.
22 And it is clear that the Claimant interpreted G-48-09

02:46:10 1 to mean that such a GBL could be set, as shown in this
2 memorandum.

3 And here on the next slide, you can see that
4 this is what Mr. Merwin was asking FortisBC to do; to
5 have a low 3.5-megawatt GBL between it and FortisBC
6 that it could sell above to third parties and above
7 the 40-megawatt GBL in its procurement contract, well,
8 above that is it what BC Hydro would buy. And to make
9 up the loss, BC Hydro would supply power through the
10 PPA to FortisBC, who would supply it to the Claimant.

11 Now, naturally, FortisBC, in the negotiations
12 with the Claimant, had serious concerns with this.
13 They did not think that the BCUC would agree to such a
14 low 3.5-megawatt GBL because it would involve an
15 increased purchase of PPA power for the purposes of
16 arbitrage. It would affect BC Hydro ratepayers.
17 FortisBC had numerous discussions with the Claimant
18 trying to set a more appropriate GBL. The Claimant,
19 however, refused to move from its position.

20 Now, because the Claimant and FortisBC could
21 not agree on a GBL, the Claimant brought its complaint
22 to the BCUC, where it changed its requested GBL from

02:47:30 1 3.5 megawatts to an even lower 1.5-megawatt GBL. And
2 you can see from this quote that the Claimant does not
3 ask for a reconsideration of G-48-09 but asks that a
4 GBL be set pursuant to G-48-09. And this is an
5 important point, especially for NAFTA Article 1105,
6 which the Claimant alleges was breached by G-48-09.
7 Not only did the Claimant not appeal G-48-09, it
8 specifically asked that the BCUC not reconsider it.
9 This is a very different approach to the order than
10 the one the Claimant takes in this arbitration.

11 So, the Claimant is before the BCUC. It is
12 asking the BCUC to set a GBL between it and FortisBC.
13 And in those proceedings, it sings the praises of
14 BC Hydro's GBL methodology. These statements are
15 quotes from the Claimant's submissions to the BCUC,
16 and these statements are diametrically opposed to what
17 the Claimant alleges in this arbitration and what you
18 heard this morning.

19 The Claimant argues that GBL--Claimant argues
20 now that GBLs require there to be a defined set of
21 strict rules. However, the Claimant made these
22 statements to the BCUC, and they say otherwise. They

02:49:02 1 say that GBLs must account for the unique
2 circumstances of each mill, and they cite to the BCUC
3 two of the comparators--three, actually: Canfor,
4 Tembec, and Howe Sound. They state that extensive,
5 uncontested evidence has been placed before the
6 Commission relating to GBLs, and methods utilized for
7 establishing GBLs in BC Hydro's service area. They
8 state that these should be sufficient to circumscribe
9 a process for establishing a GBL for the Claimant.
10 And, finally, they state that GBLs are not to be
11 determined by any set formula.

12 Perhaps more interestingly than this, the
13 Claimant asks the BCUC to set a 1.5-megawatt GBL based
14 on broader set of considerations than those given by
15 BC Hydro when it sets GBLs. Looking at Slide 79, this
16 is an information request that the BCUC sent to the
17 Claimant during the course of these proceedings, and
18 it asked it, Are FortisBC GBLs the same as BC Hydro
19 GBLs? And the Claimant unequivocally at the end says
20 for the purposes of FortisBC GBL, the Claimant is
21 requesting that consideration be given to broader
22 circumstances than those relevant to the determination

02:50:31 1 of a BC Hydro GBL.

2 Thus, what the Claimant is asking BCUC to set
3 is a special GBL, based on factors different than for
4 those for other mills in the Province. FortisBC, of
5 course, opposed the Claimant's request for a special
6 GBL of 1.5 megawatts. As the proceedings progressed,
7 applying the BCUC methodology, FortisBC determined
8 that the Claimant's GBL should be 41 megawatts, which
9 is even higher than the GBL set by BC Hydro for the
10 EPA.

11 In light of the significant disagreement
12 between the Claimant and FortisBC, the BCUC did not
13 believe that it could impose a GBL, either a high GBL
14 on the Claimant or a low GBL on FortisBC. It
15 encouraged the Parties to reach an agreement, but
16 neither were able to do so.

17 Now, recall what the Claimant alleges in this
18 arbitration. It alleges the G-48-09 imposed an
19 absolute restriction on their access to electricity
20 while it is selling. It states that no GBL is
21 possible under G-48-09. Based on the above, that
22 clearly is not the case.

02:51:55 1 Now, Dennis Swanson, who is the chief
2 regulatory officer of FortisBC at the time, he has
3 filed two witness statements in this arbitration, and
4 on this very GBL issue, he testifies as follows:
5 that the Claimant's failure to establish a GBL with
6 FortisBC is not, in his view, the fault of the BCUC
7 but of the Claimant's own aggressive negotiation
8 tactics.

9 The Claimant's characterization of G-48-09 is
10 not correct. They had the opportunity to set a GBL
11 and rather than reach an agreements with their
12 utility, FortisBC, they pursued aggressive positions
13 that no one could accept.

14 I'd like to turn to a second characterization
15 or mischaracterization of G-48-09, but I'm wondering
16 whether any member of the Tribunal has any questions
17 on these issues.

18 PRESIDENT VEEDER: Documentary question.
19 R-32 is what you cited as the relevant Order. It's
20 the decision of the 6th of May, 2009.

21 MR. DOUGLAS: Yes, 2009, yes, BCUC
22 Order G-48-09.

02:53:19 1 PRESIDENT VEEDER: Did I determine in the
2 index--I've also got in our--C-7, sorry. Just give me
3 the reference again, sorry.

4 MR. DOUGLAS: It's R-32. My colleagues have
5 confirmed that it is Order G-48-09.

6 PRESIDENT VEEDER: I've got G-48-09 is also
7 Claimant's Exhibit 7. But they are different
8 documents.

9 MR. SHOR: They're the same document,
10 Mr. Veeder. We submitted it in our First Memorial.
11 We submitted a lot of documents. Canada submitted the
12 same documents and assigned them different numbers.
13 So we just have.

14 PRESIDENT VEEDER: I may be blind, but it's
15 not the same document.

16 MR. SHOR: It should be.

17 MR. DOUGLAS: Actually, just to clarify.
18 I've been told that C-7 is just the Order and not the
19 decision.

20 PRESIDENT VEEDER: So you should read them
21 together? Because you've got the decision without the
22 Order. You've got the Order without the decision.

02:54:25 1 MR. DOUGLAS: I think the Order comes at the
2 end of the decision in R-32. No? Okay.

3 PRESIDENT VEEDER: Well, if it's not an issue
4 I'm not going to invent an issue. If you're happy I'm
5 happy. I think you read them together. The result is
6 the same, but the documentation is different.

7 MR. SHOR: The way it usually works is the
8 Commission issues an Order, and then it gives reasons
9 accompanying the decision. And sometimes it's in
10 front.

11 MS. GEHRING FLORES: Mr. President, the
12 Claimant submitted Order G-48-09 as C-7, and the
13 decision for C-48-09 as C-8.

14 PRESIDENT VEEDER: Okay.

15 MR. DOUGLAS: So I'd like to turn to a second
16 reason why the Claimants mischaracterize Order G-48-09
17 is that G-48-09 says nothing about the Claimant's
18 ability to access other FortisBC sources of
19 electricity that are not PPA Power.

20 Now, this slide, 84, is a quote from the
21 Claimant to the BCUC stating precisely what I just
22 said, that Order G-48-09 does not prohibit FortisBC

02:55:44 1 from selling other electricity to Celgar while Celgar
2 sells such self-generation. And in G-188-11, the BCUC
3 agreed with the Claimant. The Claimant is free to buy
4 all of its power from FortisBC and sell all of its
5 self-generation. This is remarkable. No mill in
6 BC Hydro territory has this right, not Tembec, not
7 Howe Sound, only the Claimant and other mills in
8 FortisBC territory have the right to sell electricity
9 below a GBL.

10 Mr. Merwin regarded this decision as a major
11 victory. This is a memorandum from Mr. Merwin to the
12 Mercer Board of Directors, R-531, and he states
13 explicitly that Celgar is able to buy all of its power
14 requirements from FortisBC and free to sell the output
15 of all of its generation to third parties. What the
16 BCUC said was that FortisBC was to design a rate to
17 facilitate those sales. This rate became known as the
18 non-PPA embedded-cost power rate, or NECP.

19 I was going to address your question this
20 morning here, Professor Douglas, at this moment, and
21 I'm wondering if I missed anything, but I think my
22 explanation this morning was sufficient.

02:57:18 1 After this Order was issued, Mr. Merwin wrote
2 to BC Hydro to exercise the side letter agreement but
3 then opted instead to file a NAFTA claim. But that
4 did not stop the NECP proceedings, they proceeded in
5 tandem and are currently suspended and I'll explain
6 the details of that in just a moment. You also asked
7 my colleague a question about whether FortisBC can
8 separate electrons. Unfortunately, electrons through
9 a transmission line don't get ear-marked as PPA or
10 not. They all sort of get blended together. What
11 FortisBC can do is it can match the purchase of sales
12 or the take of electricity from other resources for
13 sales to the Claimant. So it can prove that there is
14 no increased take of PPA Power to facilitate. So
15 while you cannot pull away electrons, there are ways
16 of matching and that's really what the NECP is all
17 about. It's about finding the way to supply the
18 Claimant with electricity that does not include PPA
19 Power so that it can arbitrage.

20 And just so we're all on the same page, this
21 on Slide 87 are a couple of definitions. This is from
22 a submission from FortisBC to the BCUC just providing

02:58:29 1 definitions of embedded-cost power and non-PPA
2 embedded-cost power.

3 ARBITRATOR DOUGLAS: Just an obvious point,
4 presumably the differential for arbitrage would be
5 less favorable. It stands to reason?

6 MR. DOUGLAS: And why less favorable?
7 Because the cost of the NECP is higher?

8 ARBITRATOR DOUGLAS: Yeah.

9 MR. DOUGLAS: If you allow me to explain why
10 that is not the case. Thank you. I will get to that
11 in just one moment.

12 Mr. Swanson in his Second Witness Statement
13 explains how the NECP works. It is the delta of the
14 cost between supplying electricity with PPA Power and
15 the cost of supplying electricity without PPA Power.
16 In other words, if there--in other words, is there an
17 additional cost to supplying electricity if you remove
18 PPA Power. If there is no additional cost, then your
19 rate stays the same. And this slide here, Slide 88,
20 is based on 2007 power supply mix of FortisBC. You
21 can see that PPA Power comprises 15 percent of Fortis
22 BC's energy resources. So the question is removing

02:59:46 1 that piece, what effect does it have for the
2 Claimant's ability to access electricity. And
3 Mr. Swanson explains in his Second Witness Statement
4 that since 2009--and this addresses your question,
5 Professor Douglas--that since 2009, there has never
6 been an additional NECP cost and nor does he foresee
7 any cost into the future.

8 ARBITRATOR DOUGLAS: You have a reference to
9 that, I just don't recall it.

10 MR. DOUGLAS: I can pull up the precise
11 reference for you in just one moment.

12 ARBITRATOR DOUGLAS: Thank you.

13 PRESIDENT VEEDER: We'll come back to it
14 later because we're interrupting you. Take your own
15 course.

16 MR. DOUGLAS: Fair enough. Will do.

17 Now, I'd like to pause here on this slide for
18 one second because regardless of PPA Power, the
19 Claimant's electricity rates stay the same. The
20 Claimant makes an incredible amount of noise about
21 BC Hydro's heritage assets and low-cost electricity.
22 Excluding that power has no impact on the Claimant's

03:00:51 1 electricity rates. Their rate stays the exact same
2 and they can arbitrage all of the power they want.
3 This is an incredible right for them, a right that
4 only customers in FortisBC territory have and not
5 customers in BC Hydro territory like Tembec, like Howe
6 Sound, or Canfor.

7 Now, let's take a look at this graph. You
8 will see that the red is Rate Schedule 31. This is
9 the Claimant's normal industrial rate, what it pays,
10 that includes PPA Power. The blue is the NECP, and as
11 you can see Mr. Swanson testifies that the two are the
12 same. The Claimant argues that the NECP is not
13 reflective of traditional rates. It not clear to
14 Canada where the Claimant gets this, but it is simply
15 not true. And I think more importantly, why would it
16 matter? The Claimant argues in this arbitration that
17 it could have sold its below-GBL electricity at green
18 energy market prices, either to BC Hydro or to the
19 United States.

20 If that were true, those prices are about 2.5
21 times bigger than the NECP. What are they complaining
22 about? They have the right to buy and sell all of

03:02:15 1 their below-GBL electricity, a right that no mill in
2 BC Hydro territory possesses, and at profits that
3 could be staggering. The real truth is, the real
4 truth is, is that they could not sell at green energy
5 market prices.

6 The only market available to them was Mid-C,
7 and you can see on the graph that Mid-C has
8 consistently been lower than both Rate Schedule 31 and
9 the NECP.

10 It is for this reason that the Claimant has
11 not persisted with the NECP in front of the BCUC. In
12 fact, as I have mentioned, the Claimant agreed to have
13 the NECP proceedings be suspended pending the outcome
14 of other rate issues in front of the BCUC.

15 You can pull that up now, Chris.

16 We asked a question this morning of Mr. Shor
17 about where the NECP stands in front of the BCUC, and
18 his answer was that the BCUC has suspended the
19 proceedings, which is in part true. If you look
20 at--this is a submission on your screen from the
21 Claimant to the BCUC. It states that accordingly,
22 Celgar supports the FortisBC recommendation that the

03:03:34 1 review of the NECP Rate Rider be suspended. That
2 exhibit is R-574. And it suspended pending the
3 outcome of the other rate issues in front of the BCUC.
4 And the proceedings are still suspended. The
5 Claimants still have the NECP in their back pocket.

6 So in conclusion to G-48-09, there are three
7 take-away points that I would like for you to
8 consider. First, what the Claimant has successfully
9 sought before the BCUC is a right that no other mill
10 in the Province holds, which is the right to arbitrage
11 existing self-generation historically used for
12 self-supply. Second, the Claimant's argument that
13 Order G-48-09 restricts their access to embedded-cost
14 utility electricity is false. And finally, the
15 Claimant argues that the NECP does not reflect what
16 they call traditional embedded-cost rates is also not
17 true.

18 I would now like to turn to the law. Canada
19 has canvassed the law in detail in its pleadings, so I
20 will only touch on the more salient points here. I'll
21 first discuss jurisdiction and admissibility, national
22 treatment, Most-Favored-Nation treatment,

03:05:27 1 Article 1105, the Minimum Standard of Treatment and
2 then a bit on damages. As I do, I will apply the law
3 where applicable to the three measures at issue in
4 this arbitration: The Claimant's GBL, the Exclusivity
5 Provision, and G-48-09.

6 Let's look at the procurement exception. It
7 states that Articles 1102 and 1103 do not apply to
8 procurement by a party or State enterprise. Both
9 Canada and the Claimant agree that BC Hydro is a State
10 enterprise. There is no disagreement there. The
11 issue is whether the GBL and Exclusivity Clause in the
12 Claimant's EPA fall into the procurement exception.
13 The Claimant confirms in its Reply Memorial that, if a
14 GBL--and I quote from their own pleadings--"if a GBL
15 defines BC Hydro's purchase obligation, then it falls
16 within the exception." Now, in its opening this
17 morning, the Claimant said in its Slide 114 that the
18 GBL only indirectly establishes the amount of energy
19 BC Hydro will purchase. Now, let's compare that
20 statement to what the Claimant has said before the
21 BCUC about the purpose of the BC Hydro GBL. They
22 confirm precisely what the GBL does, that it is a

03:07:04 1 line, a demarcation that divides existing from
2 incremental generation. It defines the line above
3 which BC Hydro will procure electricity from the
4 Claimant. Now, in this arbitration, the Claimant
5 tries to color the GBL as a restriction on their
6 ability to sell electricity to third parties. Not
7 only is this inconsistent with what the Claimant has
8 said before the BCUC, it is also not true.

9 The Claimant conflates the GBL with the
10 Exclusivity Clause. The Exclusivity Clause restricts
11 below-GBL sales to third parties, not the GBL.

12 In any event, even if the Claimant were
13 somehow correct that the GBL and Exclusivity Provision
14 could be conflated, the Exclusivity Provision itself
15 is also caught by the procurement exception. As I
16 explained earlier, the very purpose of the Exclusivity
17 Provision is to secure procurement, as Jim Scouras
18 testifies at Paragraph 8 in his Second Witness
19 Statement, and which is indicated here on Slide 95.

20 The next bar to the Claimant's claim is under
21 Article 1503 of the NAFTA. Under this provision,
22 Canada is only liable for the measures of its State

03:08:28 1 enterprises when they exercise delegated governmental
2 authority. Now, thus, to be liable under the NAFTA,
3 the Claimant's GBL and Exclusivity Clause must be
4 exercises of delegated governmental authority. As
5 we've already seen, though, they are not exercises of
6 delegated governmental authority but are contractual
7 provisions negotiated as part of a procurement
8 contract. BC Hydro's procurement of electricity was
9 not delegated governmental authority.

10 Now, the Claimant confuses this issue when it
11 argues that the BCUC directed BC Hydro to set GBLs in
12 Order G-38-01. This is a mischaracterization of that
13 Order. G-38-01 does not even use the word "GBL." The
14 GBL concept of was created by BC Hydro after G-38-01
15 and for the purpose of procuring electricity. G-38-01
16 does not deal with the procurement of electricity.
17 And in any event, as you will here, the BCUC has no
18 Legal Authority to direct BC Hydro in its procurement
19 activities. For these reasons, the Claimant is wrong
20 when it states that BCUC G-38-01 directed BC Hydro to
21 set GBLs. That is not true.

22 For these reasons, the Claimants' EPA with

03:09:57 1 BC Hydro, including the GBL and Exclusivity Provision
2 found in its EPA, were not exercises of delegated
3 governmental authority and are inadmissible under the
4 NAFTA.

5 The final jurisdictional bar to the
6 Claimant's claim is time bar. Now, the Claimant
7 suggested this morning in its opening that Canada only
8 briefly argues about time bar as if it is an
9 insignificant issue. Time bar is a condition
10 precedent to arbitration under the NAFTA. If you do
11 not fall within the time bar, Canada does not consent
12 to arbitrate, and this Tribunal has no jurisdiction.
13 It is a serious claim and one that should be taken
14 seriously.

15 Pursuant to Article 1116(2), the Claimant
16 must file a claim within three years of first
17 acquiring knowledge of breach and loss. The Claimant
18 filed its claim on April 30, 2012. The time bar date
19 for this is thus, April 30, 2009. In other words, the
20 Claimant must have first acquired knowledge of breach
21 and loss sometime after the time bar date. The
22 Claimant, however, signed its EPA containing the GBL

03:11:15 1 and Exclusivity Provision on January 27, 2009. This
2 is before the time bar date. How could the Claimant
3 have possibly first acquired knowledge of breach and
4 loss after the date on which it willingly signed its
5 EPA?

6 The Claimant argues that could not have--that
7 it could not have first acquired knowledge of breach
8 and loss until the EPA--and these are its words--"took
9 effected" which they allege occurred when the BCUC
10 examined the EPA pursuant to the Utilities Commission
11 Act on July 31, 2009. The Claimant, however, did not
12 protest the EPA in front of the BCUC. It's not as if
13 they were fighting against the EPA and the BCUC forced
14 them to take it. The Claimant willfully signed the
15 EPA before the cutoff date and wanted it to proceed.
16 It is simply not credible that they could have
17 acquired knowledge after this date.

18 Moreover, the Claimant is wrong when it
19 states that the EPA only took effect when the BCUC
20 examined it in July. The EPA itself states that its
21 effective date is January 27, 2009, and not the date
22 the BCUC reviewed it.

03:12:42 1 The Claimant also argued this morning that it
2 could not have first acquired knowledge of breach and
3 loss until BC Hydro entered into the 2009 EPA with
4 Tembec or the 2010 EPA with Howe Sound, those later
5 agreements that it compares itself to. But the
6 Claimant also compares itself to the '97 EPA with
7 Tembec and the 2001 agreement with Howe Sound. It is
8 thus, not credible to argue that the Claimant first
9 acquired knowledge of breach and loss only when the
10 later agreements were signed. They knew of the
11 earlier agreements, and they must have first acquired
12 knowledge on the date they signed their Contract.

13 For these reasons, the Claimant's EPA with
14 BC Hydro, including its GBL and Exclusivity Clause,
15 are time barred under the NAFTA, and this Tribunal has
16 no jurisdiction to hear claims relating to those two
17 measures.

18 ARBITRATOR ORREGO VICUÑA: Please make one
19 question of clarification. If you go back to the
20 actual text at Page 100, at Slide 100, with the
21 provision as cited there, there's two things: One, of
22 course, is the knowledge of the alleged breach, and

03:14:13 1 the other one is the knowledge that the investor has
2 incurred loss or damage. I understand, or one could
3 understand because of the end of their community.

4 Now, the question that I would put for you as
5 a matter of clarification, could anyone--not thinking
6 of the Claimant here--but could anyone signing an EPA
7 say on January 27, 2009, be aware upon that signature
8 that it has incurred in damage or losses because one
9 would assume that the EPA is exactly for the contrary.

10 We were doing great business here. How could
11 you say at the same time, look, I'm losing my shirt in
12 this business?

13 This is a question of clarification I would
14 like to put to you be clear on how do you see that.

15 MR. DOUGLAS: Okay. So, the GBL in the EPA
16 was set a year earlier, on May 30, 2008, and the
17 Claimant had negotiated that GBL with BC Hydro. The
18 Claimant's position in this arbitration is that it
19 protests that GBL. It doesn't agree with it. It
20 argues that that GBL should have been lower, and
21 because it should have been lower, BC Hydro should
22 have bought more electricity. So the claim is that

03:15:51 1 BC Hydro was required to procure more under the EPA,
2 and those are the damages that they have suffered.
3 Had BC Hydro set the GBL lower, they would have gotten
4 more money.

5 So on the date that they signed, they had
6 that knowledge because they had been disagreeing with
7 the GBL. They signed it knowing that that was the
8 deal that BC Hydro was willing to go along with, but
9 they didn't agree with the GBL, believing that it
10 should be lower compared to other mills.

11 Did I lose you?

12 ARBITRATOR ORREGO VICUÑA: Okay.

13 MR. DOUGLAS: So, they had that knowledge all
14 along. I mean, I use January 27 as the date they
15 signed the EPA. The GBL was set even a year earlier,
16 so an argument could be made that they had knowledge
17 even a year beforehand because the GBL establishes the
18 amount that BC Hydro is going to buy. So, if the
19 claim is that it should have been lower, then that's
20 the Claim for damages, and they would have had that
21 knowledge.

22 ARBITRATOR ORREGO VICUÑA: Okay. Thank you.

03:16:50 1 MR. DOUGLAS: You're welcome.

2 PRESIDENT VEEDER: But how does the side
3 letter fit into this?

4 MR. DOUGLAS: Into the knowledge?

5 PRESIDENT VEEDER: Yes. It may help you, it
6 may hurt you.

7 MR. DOUGLAS: Well, I guess it is kind of an
8 interesting question because the side letter
9 agreement, from our standpoint is in effect, and they
10 have the right. They just haven't pursued it. BCUC
11 has allowed them to do everything, so, at least from
12 our standpoint, it is hard to see how--what rights
13 have been violated at all.

14 So, I think the question is hypothetically at
15 what point in time would they have been denied that
16 right. I don't know. I'll have to dwell on that, I
17 guess. I just don't think that that's ever
18 transpired.

19 PRESIDENT VEEDER: A different question: In
20 your written pleadings you talk of all these
21 objections as jurisdictional objections, but this
22 afternoon you've referred to it as jurisdictional and

03:17:55 1 admissibility bars.

2 Now, what is the significance of this
3 additional phrase "and admissibility"?

4 MR. DOUGLAS: Oh, you would like for me to
5 write a paper. I could quote you on Paulsson's paper
6 on the topic.

7 PRESIDENT VEEDER: Well, it is highly
8 debatable.

9 MR. DOUGLAS: It is.

10 PRESIDENT VEEDER: And I was hoping you'd say
11 that it adds nothing to your case.

12 MR. DOUGLAS: It is--

13 If you give me one moment please.

14 (Pause.)

15 MR. DOUGLAS: So, our position on this is
16 time bar is jurisdictional, so is delegated
17 governmental authority. Canada is only liable for the
18 actions of delegated governmental authority, and if
19 there are no such actions, then there is no
20 jurisdiction to hear those claims.

21 With a procurement though, that is an
22 exception, and it's an exception only to Articles 1102

03:18:55 1 and 1103, not 1105. Therefore, that is an
2 admissibility issue and not a jurisdictional issue.

3 PRESIDENT VEEDER: Thank you.

4 MR. DOUGLAS: You're welcome.

5 So, assuming the Tribunal does have
6 jurisdiction or that these claims are admissible, I
7 would now like to discuss national treatment and Most
8 Favored Nation treatment.

9 In order to find a breach of NAFTA
10 Articles 1102 or 1103, the Claimant must show three
11 elements: That it has been accorded treatment, that
12 the treatment is less favorable, that the treatment
13 was accorded in like circumstances to domestic or a
14 third-party investor.

15 Now, the Claimant has identified two primary
16 comparators in this case, Tembec and Howe Sound, as
17 well as Canfor. It should be noted, however, that
18 there are several other pulp mills in British Columbia
19 who each have an EPA with BC Hydro and who have GBLs.
20 Canada has produced thousands of documents relating to
21 the settings of these GBLs. The Claimant however has
22 decided to focus on just two.

03:20:00 1 With respect to its GBL, the Claimant has
2 received no less favorable treatment than Tembec or
3 Howe Sound. When BC Hydro sets a GBL, its objective
4 is always the same. It is to demark existing from
5 incremental generation. BC Hydro could only procure
6 incremental generation because only incremental
7 generation would add to its energy resources.
8 Procuring existing generation would add nothing to its
9 energy resources, and it would run against the policy
10 objective of being self-sufficient.

11 Now, the Claimant alleges that BC Hydro had
12 complete discretion when setting GBLs. It argues that
13 there were no written standards and that BC Hydro
14 arbitrarily set the Claimant's GBL in a less favorable
15 way than Tembec or Howe Sound.

16 But this argument makes no sense when you
17 consider the facts. In the Bioenergy Call for power,
18 Phase I, BC Hydro had a goal of procuring 1,000
19 gigawatt hours of incremental generation per year.
20 The Call received 20 bids, but there were only four
21 successful Contracts, one of which was awarded to the
22 Claimant. The four Contracts totaled 579

03:21:14 1 gigawatt hours of incremental electricity.

2 BC Hydro did not meet its target. In fact,
3 it met only 58 percent of its procurement goal. In
4 this context, why would BC Hydro arbitrarily choose to
5 procure less electricity from the Claimant? If the
6 Claimant actually had more incremental energy to sell,
7 what possible reason could BC Hydro have not to
8 procure it?

9 Now, the Claimant argues that BC Hydro should
10 have used 2006 as the year to set their GBL. It also
11 argues that BC Hydro used "load" versus generation to
12 load. You will hear over the coming nine days why
13 these arguments are misguided. But as you listen to
14 these arguments, please, keep them in the following
15 context: BC Hydro not only wants to procure
16 electricity, it needs to procure electricity. It
17 needs to add to its energy resources. Why? So that
18 it can meet the policy objective of becoming
19 self-sufficient.

20 BC Hydro had no incentive to give the
21 Claimant a raw deal. To the contrary, it had every
22 incentive to procure as much incremental generation

03:22:38 1 from the Claimant as it could. What this NAFTA claim
2 is about is the fact that BC Hydro did not procure the
3 Claimant's existing generation. The Claimant's
4 existing generation would not, however, have added
5 anything to BC Hydro's resource portfolio and it would
6 run counter to the policy objective of becoming
7 self-sufficient.

8 Members of the Tribunal, the Claimant has put
9 a magnifying glass over Tembec and Howe Sound and the
10 way the GBLs were set for those mills, but let us not
11 lose sight of the forest from the trees. Where are we
12 in the context of NAFTA Articles 1102 and 1103? Did
13 the NAFTA Parties really draft these provisions with a
14 view to having NAFTA Tribunals scrutinize specific and
15 technical terms of large procurement contracts?
16 Moreover, what role does nationality play in the
17 analysis?

18 The Claimant argues that nationality plays no
19 role. It argues that NAFTA Tribunals should have the
20 power to scrutinize and compare the technical terms of
21 negotiated contracts to find differences, and if it
22 finds any differences, that is sufficient to find a

03:24:02 1 breach of national or Most-Favored-Nation treatment.

2 In Canada's view, that is too far down in the
3 weeds. And, to keep the forest and tree analogy, it
4 is neither the forest nor the trees. It is the detail
5 of the granular moss on the forest floor. To the
6 extent that Tembec's GBL or Howe Sound's GBL appear
7 different than the Claimant's GBL, that does not have
8 anything to do with national treatment or
9 Most-Favored-Nation treatment. It has to do with the
10 unique circumstances of each mill.

11 BC Hydro's goal when procuring electricity
12 has always been the same: To demark incremental from
13 existing electricity so that it can procure
14 electricity that will increase its energy resources.
15 And in this context, it has treated everyone the same:
16 The Claimant, Tembec, and Howe Sound.

17 Mr. President, you asked the Claimant this
18 morning a question about their below-load access
19 percentage calculations, and I would like to just
20 touch quickly on the BLAP metric for a moment.

21 I didn't mean to interrupt, sorry.

22 The Claimant argues that in order to treat

03:25:22 1 all mills fairly, BC Hydro should procure electricity
2 from all mills at the same BLAP level. You'll have to
3 forgive BLAP--it's a short form for Below-Load Access
4 Percentage. However, this would result in the
5 procurement of existing electricity, and procuring
6 existing electricity would add nothing to BC Hydro's
7 energy resources and run counter to the policy
8 objective of becoming self-sufficient.

9 In other words, the BLAP is completely
10 contrary to provincial policy. And I'd like to refer
11 to you, for our discussion of the BLAP, Mr. MacLaren
12 discusses it in his Second Witness Statement at
13 Paragraphs 10-13. It is in our Counter-Memorial at
14 Paragraphs 362-366, the Rejoinder at 280-285, and in
15 the First Expert Report filed by Mr. Rosenzweig at
16 Paragraphs 59-69.

17 To the extent that the Claimant--oh, pardon
18 me.

19 I guess that concludes my portion on GBLs and
20 national treatment. Turning now to the Exclusivity
21 Clause, I won't spend much time here as I've already
22 addressed it earlier in my presentation. Every mill

03:26:43 1 that has an EPA with BC Hydro has an Exclusivity
2 Clause. The Claimant has been treated no different.
3 The Claimant has, in fact, received more favorable
4 treatment than any other mill through its side letter
5 agreement.

6 Finally, at G-48-09, as I've mentioned, the
7 Claimant mischaracterized that Order. The Claimants
8 have the ability and the right to sell their below-GBL
9 electricity, a right that no other mill possesses.

10 I would like to touch on Article 1105, which
11 protects against violations of customary international
12 law minimum standard of treatment. Now, the Parties
13 agree that the FTC Note is binding on this Tribunal
14 and that it is the customary international law minimum
15 standard of treatment that must be applied.

16 And I know the Tribunal understands these
17 issues well, so I will only touch on a few brief
18 points. First, the Claimant alleges that it has no
19 burden to prove a customary norm. It states that this
20 is this Tribunal's job. For example, the Claimant
21 says that it is this Tribunal's responsibility to
22 determine whether economic discrimination is a

03:27:51 1 customary norm. But based on what evidence?

2 The Claimant has proffered no evidence of
3 State practice or opinio juris and in Canada's view
4 that is the Claimant's responsibility. It is not the
5 Tribunal's to figure it out on its own. Instead of
6 providing the Tribunal with evidence, the Claimant
7 merely cites arbitral awards. It takes out isolated
8 words from the decisions like Waste Management. It
9 did this morning, words like "discrimination." Words
10 like "transparency." But it has not proven that those
11 are or form a customary international law standard.

12 The final point about the law on 1105 is that
13 the threshold is high. I'm not sure whether the
14 Claimant disagrees with that point, but that has been
15 consistent through the jurisprudence.

16 Turning to the three measures at issue, in
17 the manner in which BC Hydro set the Claimant's GBL
18 did not violate the customary international law
19 minimum standard of treatment. As my colleague and I
20 have explained above, BC Hydro set out to procure
21 incremental generation, and its treatment of the
22 Claimant in this regard is hardly manifestly

03:28:59 1 arbitrary.

2 Nor does the Claimant's Exclusivity Clause
3 violate the standard. As I mentioned, the Claimant
4 has a side letter agreement.

5 And, finally, the Claimant's argument that
6 the BCUC violated the minimum standard of treatment in
7 G-48-09 must be dismissed. As I've mentioned, only a
8 claim for denial of justice can be made against the
9 BCUC under Article 1105. And the Claimant did not
10 appeal that decision, nor did it even ask the BCUC to
11 reconsider the decision. In fact, it expressly told
12 the BCUC not to reconsider the decision. The Claimant
13 thus did not exhaust its local remedies, and a denial
14 of justice claim in that context is simply not
15 credible.

16 Now, I'd like to briefly turn to damages.
17 Even if the Claimant has proven a breach of the NAFTA,
18 which Canada denies, then we must turn to the issue of
19 damages. The Claimant's damages assessment can be
20 divided into two categories: Its above-GBL damages
21 and its below-GBL damages. In the first category, the
22 Claimant alleges that the GBL was set too high and

03:30:10 1 that a GBL that complies with the NAFTA should be
2 lower. The Claimant thus argues that BC Hydro was
3 required in law to have procured more electricity from
4 the Claimant in the Bioenergy Call for power.

5 This claim, however, falls squarely within
6 the procurement exception. The Claimant alleged this
7 morning that different--its different GBLs claim do
8 not form the basis of its claim for liability, only
9 damages. Admittedly I'm a bit confused by this
10 response. The Claimant's primary claim in this
11 arbitration is that its GBL was set too high.

12 Mr. President--

13 Can you go back one slide?

14 If you look to Number 9 on the slide,
15 Slide 113, you will see the BLAP you inquired about,
16 the below-load access percentage you inquired about.
17 You will see on the right-hand side it states
18 "additional Celgar self-generated electricity
19 available for sale."

20 And this is one of their damages scenarios.
21 As I mentioned, this is existing electricity that the
22 Claimant was arguing BC Hydro was required to have

03:31:27 1 procured. This is not incremental generation.

2 Moreover, it is a claim that BC Hydro should procure
3 more electricity from the Claimant, and it falls
4 squarely within the procurement exception.

5 The second category of damages is the
6 below-GBL electricity, which the Claimant alleges it
7 has been unlawfully prevented from selling. Assuming
8 this is the case, the Claimant must prove that there
9 was a third party willing to buy its below-GBL
10 electricity, otherwise it has suffered no loss. The
11 Claimant has not however proffered any evidence of any
12 third party that was willing to buy its below-GBL
13 electricity.

14 The Claimant simply asserts that it could
15 have sold its electricity at green energy market
16 prices into the United States. This, however, is not
17 true. In order for the Claimant to put such sales
18 into effect, it would have had to have long-term, firm
19 transmission access into the United States as well as
20 a buyer willing to buy electricity at green energy
21 prices.

22 You'll recall the Claimant in its Memorial

03:32:42 1 and Reply Memorial, as an example, put forward < [REDACTED]
2 [REDACTED] as a potential willing buy for its electricity.
3 Canada followed the Witness Statement of Roger Garratt
4 of Puget Sound who testifies that he does not even
5 remember < [REDACTED] >
6 The Claimant has elected not to cross-examine
7 < [REDACTED] .

8 And as you will hear from Canada's Witness,
9 Mr. MacDougall, as he testifies there is no way the
10 Claimant could secure long-term firm transmission
11 access it needed for sales into the United States.

12 Moreover the Claimant has no eligibility in
13 the United States to sell its electricity at green
14 energy market prices. Every state has its own set of
15 laws that regulates those purchases, and the Claimant
16 is not eligible. The Claimant knows this, which is
17 why they allege in this arbitration that BC Hydro
18 would buy all of their below-GBL electricity at green
19 energy prices. But again, this is an argument that
20 BC Hydro is required in law to procure more
21 electricity from the Claimant, which falls within the
22 procurement exception. It is also simply not true.

03:33:56 1 It is false to assert that BC Hydro would buy the
2 Claimant's below-GBL electricity at green energy
3 prices, as this would violate the provincial policy of
4 becoming self-sufficient. The Second Witness
5 Statements of both Les MacLaren and Jim Scouras
6 explain these very points.

7 For these reasons even if Canada has been
8 found to violate the NAFTA, the Claimant has failed to
9 prove its damages case.

10 Unless there are any last questions from the
11 Tribunal, that will conclude Canada's opening remarks.

12 PRESIDENT VEEDER: Again, as with the
13 Claimant, I'm sure we'll have questions for you later,
14 but not for now.

15 MR. DOUGLAS: Okay. Thank you very much,
16 Mr. President.

17 PRESIDENT VEEDER: Thank you very much.

18 Let's take a short break now. Let's take a
19 10-minute break.

20 And then we've got, I think, to address
21 certain procedural matters before we can move to the
22 first witness, Mr. Merwin. But he's available here to

03:34:54 1 give evidence.

2 MR. SHOR: Yes, sir.

3 PRESIDENT VEEDER: Thank you. Well, 10
4 minutes.

5 (Brief recess.)

6 (End of confidential session.)

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03:42:42 1

OPEN SESSION

2 PRESIDENT VEEDER: Let's resume.

3 Before we get to Mr. Merwin, we must sort out
4 one of the procedural issues at least; namely, the
5 Claimant's application by letter of the 16th of July
6 in respect of Mr. Merwin and certain others for an
7 extended direct examination.

8 Now, as we understand, Mr. Merwin will be
9 cross-examined by the Respondent; that's correct,
10 isn't it? So, if the Claimant wants to add anything
11 to its application of the 16th of July, they may, of
12 course, do so briefly.

13 MR. SHOR: We understand the application is
14 not opposed by Canada, so unless we're wrong on that--

15 PRESIDENT VEEDER: It's conditionally not
16 opposed by Canada. As we understand their response,
17 which is the Respondent's letter of the 17th of July,
18 depending upon what happens with your extended direct
19 examination of your witnesses, they may wish to have
20 extended direct examinations of seven of their
21 witnesses.

22 Now, is that opposed by the Claimant?

03:55:27 1 MR. SHOR: That's not opposed if they make a
2 proper application and notify us of the issues that
3 will be addressed. That's how we understand the--

4 PRESIDENT VEEDER: In principle, you don't
5 oppose it?

6 MR. SHOR: No.

7 PRESIDENT VEEDER: Well, they've got to sort
8 of explain a little bit further.

9 MR. SHOR: They've got to jump through the
10 same hoops we jump through.

11 PRESIDENT VEEDER: Okay. Do you want say
12 anything about that on the Respondent's side?

13 MR. DOUGLAS: I think when it comes to
14 jumping through the same hoops, the Claimant has
15 submitted an application to conduct directs. It has,
16 however, listed a rather exhaustive list of topics to
17 conduct our direct examination, and Canada questions
18 whether the Claimant will be able to sufficiently
19 address those topics within the ten-minute direct
20 period.

21 I think my point is Canada finds it difficult
22 to know ahead of time what precisely the Claimants

03:56:16 1 intend to ask their Witnesses on direct and would
2 either, I think, appreciate some further clarification
3 or at least when it comes to Canada making its
4 application, it can be as equally broad without
5 objection from the Claimant.

6 PRESIDENT VEEDER: Well, let's get to
7 Mr. Merwin. You've got a witness who's coming soon.
8 You'll have an extended examination-in-chief or direct
9 examination, which I'm just looking to the Tribunal's
10 Order Number 9, which will be ten minutes. You do
11 seem to have an ambitious list of topics to cover in
12 ten minutes.

13 MR. SHOR: We will make our best effort to do
14 it in ten minutes.

15 PRESIDENT VEEDER: I think that's a better
16 way of putting it. Thank you.

17 ARBITRATOR DOUGLAS: Especially if you have
18 to repeat everything twice.

19 PRESIDENT VEEDER: So, just let's see where
20 we've got to. We've got the Claimant's application
21 covers not only Mr. Merwin, and forgive me, I won't be
22 able to pronounce Mr. Switlishoff's name correctly.

03:57:26 1 MR. SHOR: You pronounced it perfectly.

2 PRESIDENT VEEDER: Mr. Austin and
3 Mr. Friesen. And that's conditionally not opposed by
4 the Respondent. There will be extended direct
5 examinations of those witnesses, except that
6 Mr. Friesen is covered by Paragraph 6 of our Order
7 Number 9, and his direct examination cannot exceed 15
8 minutes.

9 And then the Respondent has this conditional
10 application, which would have put on ice for the
11 moment, in regard from Mr. Bursey, is it Mr. Dyck,
12 Mr. Krauss, and then this I really can't pronounce.
13 Mr. Lague?

14 MR. DOUGLAS: Correct.

15 PRESIDENT VEEDER: Okay. And this is a tough
16 one, MacDougall, Mr. Stockard, and Mr. Swanson.
17 Mr. MacDougall, again, I think is a 15-minute extended
18 direct examination, and subject to going through the
19 hoops, that's not opposed by the Claimant?

20 MR. SHOR: We understand Canada's
21 application; with respect to MacDougall, we do have an
22 objection. We thought the Procedural Order was clear.

03:58:51 1 It said that the rules of the original Procedural
2 Order apply. That means direct examination is limited
3 to new arguments and events. They have asked for a
4 clarification that would suggest that Mr. MacDougall
5 can reiterate his direct testimony, and we do object
6 to that.

7 PRESIDENT VEEDER: Actually that was the next
8 topic. I've jumped ahead.

9 Mr. MacDougall seems to be wearing two hats
10 now. He's a witness with an extended direct
11 examination, but also a witness with new material to
12 cover in his direct examination, and we weren't quite
13 clear what the Respondent was now suggesting. Perhaps
14 that could be explained to us.

15 MR. DOUGLAS: The Respondent's position on
16 this is--and the same would apply to Mr. Friesen, to
17 Mr. MacDougall--that the directs are 15 minutes and
18 can cover the evidence in their Witness Statement as
19 well as any new evidence or arguments that are
20 presented over the course of the proceedings.

21 PRESIDENT VEEDER: Well, maybe they can, but
22 will they? That's what I'm asking.

03:59:52 1 MR. DOUGLAS: At least at this stage, that is
2 Canada's intention.

3 PRESIDENT VEEDER: Well, they will. Okay.
4 Well, that's your answer.

5 MR. SHOR: That is an issue we object to
6 because that's inconsistent with the Procedural Order
7 that does not allow a witness on direct testimony to
8 reiterate its original testimony. That's what Canada
9 has asked for, and we oppose that request. We do not
10 intend Mr. Friesen, for example, to reiterate his
11 direct testimony. He will only respond to new
12 arguments and new issues.

13 PRESIDENT VEEDER: Well, we'll make a
14 decision about that, okay.

15 The other matter which we left over from this
16 morning was the remainder of Exhibit R-531 and
17 Paragraph 9 of the Tribunal's Procedural Order
18 Number 8. We're going to come back to that.

19 What is the Claimant's position on that?

20 MR. SHOR: We have no objection to the
21 admissibility of that exhibit. Portions of it are
22 restricted; portions of it are confidential. I think

04:01:04 1 it's not an issue for the Hearing.

2 MR. OWEN: I think, if I may, the only issue
3 in disagreement was at one point you designated--there
4 is agreement that certain portions are restricted, I
5 think, and there's agreement that certain portions are
6 now public, but I think you redesignated large
7 sections of the document restricted access
8 information, and maybe the best way to proceed is, to
9 be honest, I can't remember what words are restricted
10 and what words are confidential, and even what our
11 position was. I think we thought a little bit more of
12 it could maybe go out, and at one point that was your
13 position. Anyways, I'm not getting really bust about
14 it, but why don't we go and we look at what it is, and
15 maybe we can have a discussion with Mr. Shor.

16 PRESIDENT VEEDER: So, it looks as if
17 principally, it can come in subject to certain parts
18 of it being restricted?

19 MR. OWEN: Yes, I think so.

20 PRESIDENT VEEDER: And we'll leave that to
21 the Parties to sort out.

22 MR. SHOR: I don't think the Parties objected

04:02:02 1 to it coming into evidence.

2 PRESIDENT VEEDER: Okay. Well, let's have it
3 into evidence. We'll confirm that position now, and
4 then we'll leave it to you to sort out the restricted
5 passages.

6 Anything else we need to address at this
7 stage?

8 We ask the Claimants first.

9 MS. GEHRING FLORES: Just one point. During
10 Mr. Merwin's direct, we're going to refer to one
11 exhibit--well, it's actually a chart in the second
12 Pöyry Expert Report that has both confidential and
13 restricted information in it, so I think as long as we
14 get to that question, and it is to clarify a point
15 that's come up that came up during the Rejoinder, but
16 if we get to that question, then we would need people
17 without access to confidential or restricted
18 information to leave the room.

19 PRESIDENT VEEDER: We're going to leave that
20 to the Parties to signal when that should happen, so
21 whenever there is a moving Party that wants that to be
22 closed and the room emptied, please, that Party should

04:03:14 1 make an application. We'll mark it on the Transcript,
2 and then that Party should also indicate when that
3 moment has passed, and we go back into open session.

4 But if we start with Mr. Merwin, do we start
5 in open session?

6 MS. GEHRING FLORES: Yes, yes. There is--it
7 is my understanding that Mr. Merwin's testimony should
8 be in open session, and it's really only an issue, at
9 least for us, of this one chart that has both
10 confidential and restricted information in it.

11 PRESIDENT VEEDER: But when you come to that,
12 if we get to it today, signal the moment, and we'll
13 then take steps.

14 And again, in cross-examination, in any
15 questions, if a question comes to that point where
16 there is a restricted document or a restricted
17 question, please signal it, and we'll take the next
18 step, but we can't do that as a tribunal of our own
19 initiative obviously. You know more about the case
20 than we do.

21 Now, we'll withdraw and make a decision about
22 Mr. MacDougall and Mr. Friesen, but before we do that,

04:04:16 1 could we just have a look briefly at the proposed
2 Joint Hearing Schedule. So, we hear Mr. Merwin today.
3 We won't finish with him today, but we will finish,
4 it's still thought, tomorrow morning.

5 It's quite a tight schedule. So far so good,
6 but at any point where anybody thinks it's getting too
7 tight, we'd rather adjust the hours if we need to
8 earlier rather than leave it to the last day and
9 finish at quarter past midnight. If you could bear
10 that in mind as we go through this, that will be
11 helpful.

12 Well, give us five minutes and we'll come
13 back with our ruling about Mr. MacDougall and
14 Mr. Friesen.

15 (Tribunal confers outside the hearing room.)

16 PRESIDENT VEEDER: Let's resume.

17 We've decided the issue relating to
18 Mr. MacDougall and Mr. Friesen and their extended
19 direct examination. We had decided in Paragraph 6 of
20 Procedural Order Number 9 that Mr. MacDougall could be
21 called by the Respondent as the Respondent's witness,
22 and that Mr. Friesen could be called by the Claimant

04:08:19 1 as a Claimant's witness for an extended direct
2 examination not to exceed 15 minutes. But that was on
3 the assumption that neither will be cross-examined at
4 the Hearing. If there were to be any
5 cross-examination intended for either witness, the
6 Tribunal should be notified as soon as practicable.
7 That's what we decided on the 13th of July 2015.

8 It's our understanding that both these
9 witnesses will be called by the Claimant and the
10 Respondent, respectively. And it's also our
11 understanding, but we'd like that to be confirmed,
12 that they will both be cross-examined.

13 We ask the Claimant first.

14 MR. SHOR: That is correct, Mr. President.

15 PRESIDENT VEEDER: And the Respondent?

16 MR. DOUGLAS: That is correct, Mr. President.

17 PRESIDENT VEEDER: It's also our
18 understanding that as regards Mr. MacDougall at
19 least--and it may be true of Mr. Friesen--that
20 Mr. MacDougall will not only testify as regards
21 certain new matters that have arisen since he signed
22 his last Witness Statement, but also he will expand

04:09:26 1 upon what is already in his Witness Statement. We're
2 not sure whether that would apply to Mr. Friesen. We
3 understand it probably would not.

4 MR. SHOR: That is correct, Mr. President.

5 It would not.

6 PRESIDENT VEEDER: Nonetheless, our decision
7 is that it's very difficult for the Tribunal to make a
8 distinction between the two, and so we're going to not
9 make a restriction formally as regards to
10 Mr. MacDougall nor as regards Mr. Friesen as regards
11 existing written testimony and new material.

12 But we do caution the parties, particularly
13 here obviously the Respondent, that everything that is
14 done counts against their time, so the 15 minutes will
15 count against their time, and it must not be exceeded.

16 But secondly, we remain concerned that there
17 should be no unnatural surprises, no white rabbits
18 which upsets the orderly progression of this Hearing,
19 so we want no surprises during the direct examination
20 of either Mr. MacDougall and Mr. Friesen.

21 So, we'll leave it there for the time being.

22 It doesn't arise with the next witness, we hope, but

04:10:38 1 we shall proceed step by step, so let's have the next
2 witness, Mr. Merwin.

3 BRIAN MERWIN, CLAIMANT'S WITNESS, CALLED

4 PRESIDENT VEEDER: Good afternoon, sir.

5 You'll have to learn how to operate the
6 microphone, and the best way is to leave it on and
7 don't touch it ever again.

8 THE WITNESS: I'll take your advice on that.

9 PRESIDENT VEEDER: Now, we ask you to state
10 your full name, and then if you will, to read the
11 words of the Witness Declaration on the piece of paper
12 before you.

13 THE WITNESS: My full name is Brian James
14 Merwin, and I solemnly declare upon my honor and
15 conscience that I shall speak the truth, the whole
16 truth, and nothing but the truth.

17 PRESIDENT VEEDER: Thank you very much.
18 There will first be questions from the Claimant.

19 MS. GEHRING FLORES: Thank you,
20 Mr. President.

21 DIRECT EXAMINATION

22 BY MS. GEHRING FLORES:

04:11:45 1 Q. Mr. Brian Merwin, Vice President of Strategic
2 Initiatives of Mercer International submitted two
3 written Witness Statements in this arbitration. The
4 first one is dated March 28th, 2014, and the second is
5 dated December 15, 2014.

6 Mr. Merwin, do you confirm those written
7 statements?

8 A. Yes, I do.

9 Q. Do you have any changes or revisions to those
10 statements?

11 A. No, I do not.

12 Q. Thank you, Mr. Merwin.

13 Mr. MacDougall's testimony suggests that
14 Celgar did not have the ability to sell its
15 self-generated electricity in the U.S. Pacific
16 Northwest due to lack of transmission access. Could
17 you please explain your understanding of Celgar's
18 opportunity to sell its electricity into the Pacific
19 Northwest in 2008?

20 A. Okay. Canada and Mr. MacDougall assert that
21 Celgar had, because we didn't have long-term firm
22 transmission access, it would be uneconomical due to

04:12:44 1 the penalties we would face by selling our power into
2 the Pacific Northwest.

3 I strongly disagree with this. The first
4 reason is, we were looking to engage with
5 counter-parties that had firm transmission access;
6 and, second of all, even if our end buyer did not have
7 transmission access, we would have secured short-term
8 firm or non-firm transmission to move our power into
9 the U.S. And, yes, that would have exposed us to
10 potential penalties when that transmission was not
11 available, but the penalties would be quite small, and
12 they're something Celgar is very familiar with. In
13 our current contract with BC Hydro, we currently incur
14 penalties for not delivering power.

15 And just to give an order of magnitude,
16 Celgar last year and pretty much the year before that
17 and the year before that incurred penalties of about
18 << [REDACTED] >> And, you know, to give
19 a quantum in terms of the penalties we would face in
20 terms of lack of transmission, they would be
21 negligible.

22 Q. Mr. Merwin, could you explain what you did in

04:14:01 1 2008 to evaluate transmission access as one of the
2 business components of selling your self-generated
3 electricity?

4 A. Yes, we did exactly what I just described in
5 looking at the short-term transmission access and
6 potential counter-parties that had access, and the
7 basis of this analysis was also the basis of the
8 analysis when we looked at investing in our 2010
9 turbine, and we made our--our board made an investment
10 decision based on we could sell that generation output
11 because you can't invest in a project without having
12 an end buyer.

13 Q. Mr. MacDougall has also claimed that Celgar
14 could not sell its electricity outside of British
15 Columbia at green energy prices. Can you please
16 explain the market you had contemplated for sales of
17 Celgar's electricity outside of British Columbia in
18 2008.

19 A. Yes. Again, Mr. MacDougall asserts that our
20 power was non-renewable and, therefore, uneconomic for
21 sale into the Pacific Northwest.

22 Again, I disagree with this. And the first

04:15:11 1 reason is, he says our power is non-renewable when, in
2 actual fact, a very significant portion of it is
3 renewable.

4 And even if that power was not deemed
5 renewable for sale in the Pacific Northwest, the
6 difference between long-term power contracts for
7 generic power or green power are not different, and
8 I'd like to point to Exhibit C-98, Page 47. And in
9 this exhibit--this is a document prepared by BC Hydro,
10 and you can see that in 2006 the prices for long-term
11 contracts for natural gas was 70 to 129, and coal it
12 was 70 to 125, and hydro and wind, which are green,
13 were actually a little bit lower.

14 Q. Mr. Merwin, I'm going to refer to Exhibit--

15 PRESIDENT VEEDER: Before you do that, this
16 is Exhibit C-98 in the bundle. Page 47?

17 MS. GEHRING FLORES: Page 47 of the document,
18 and it would be Page 52 of the PDF.

19 PRESIDENT VEEDER: Mine is headed Appendix 2,
20 energy profile?

21 MS. GEHRING FLORES: Yes, I believe so.

22 PRESIDENT VEEDER: I hope not because it's a

04:16:46 1 blank sheet of paper.

2 Have a look.

3 MS. GEHRING FLORES: Okay. We'll try to
4 resolve that, but Exhibit C-98 at Page 52 of the PDF
5 or Page 47 of the document.

6 MR. SHOR: If I may.

7 (Document handed to the Tribunal.)

8 PRESIDENT VEEDER: Absolutely.

9 MS. GEHRING FLORES: And the chart is up on
10 the screen.

11 PRESIDENT VEEDER: Got it. Thank you very
12 much.

13 BY MS. GEHRING FLORES:

14 Q. Mr. Merwin on December 7, 2011, you wrote a
15 memorandum to your Board of Directors. It is Exhibit
16 R-531, where you described BCUC Decision 188-11 as a
17 "major victory."

18 Can you please tell us why you called the
19 decision a "major victory."

20 A. Yes, I can. G-188-11 was the determination
21 from the Utilities Commission stating that we had
22 entitlement to sell our below-load power, and

04:18:02 1 essentially they were lifting the prohibition that
2 they had placed upon us with the G-48-09 Decision.

3 And I'd like to say that right after that
4 announcement I contacted BC Hydro, and we requested
5 that they lift the restriction as per the Side Letter
6 and lift the restriction in our exclusivity agreement
7 with BC Hydro to sell our below-load power. And to
8 this date, we have not heard back from BC Hydro.

9 And I'd like to point out that on
10 January 23rd, about two months after we had first
11 requested this from BC Hydro, we sent another e-mail
12 or letter to them and requested that they make this
13 modification. And I'd just like to note that
14 Mr. Scouras omitted that in his Second Witness
15 Statement.

16 Q. And can you tell us what happened since that
17 supposed major victory.

18 A. Yes. We had--essentially the Utilities
19 Commission, there had to be a number of steps that had
20 to happen after this first decision, and it was
21 determining the rate that we would pay for
22 embedded-cost power. That proceeding has been

04:19:24 1 suspended; and essentially, because it's been
2 suspended, we don't have access to embedded-cost
3 power, and I don't think--it's been a number of years
4 it's been suspended. I don't think we'll ever see it
5 be reignited again, this process. It's dead.

6 And I think I'd like to make a comment about
7 Mr. Swanson's comments that embedded-cost power from
8 FortisBC is available to Celgar while we're selling
9 our generation. This simply is not true. We're on a
10 net-of-load criterion.

11 Q. Mr. Merwin, in Paragraph 119 or
12 Paragraphs 119 through 131 of the Rejoinder, Canada
13 claims that you knew the methodology that BC Hydro
14 used to set Celgar's GBL. Can you please explain what
15 your understanding of BC Hydro's GBL methodology was
16 in 2008.

17 A. Well, I think my understanding was pretty
18 clear in what I said in my First and Second Witness
19 Statement, but I would like to say that the guidelines
20 that BC Hydro finally wrote down in 2012 were
21 submitted to the Utilities Commission for review, and
22 the Utilities Commission determined those guidelines

04:20:41 1 as being not being transparent, fairly general, and
2 open to considerable interpretation.

3 And, you know, going back to 2008 with me not
4 having these fairly general and open to considerable
5 interpretation guidelines, I don't understand how
6 BC Hydro could expect I would have a better
7 understanding of the GBLs than what I did.

8 MS. GEHRING FLORES: And, Mr. Chairman, at
9 this point I'd like to refer to the exhibit that has
10 confidential and restricted access information. This
11 is our last question.

12 PRESIDENT VEEDER: At this point we must
13 close the feed.

14 (End of open session. Confidential business
15 information redacted.)

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CONFIDENTIAL SESSION

2 PRESIDENT VEEDER: We understand it's been
3 done. So please proceed.

4 MS. GEHRING FLORES: Thank you.

5 BY MS. GEHRING FLORES:

6 Q. Mr. Merwin, in the Expert Report of
7 Mr. Stockard in Paragraph 31 there's a table showing a
8 summary of Celgar's total generation and pointing to a
9 discrepancy for 2007. We've highlighted the 2007 row
10 there of data. Can you please explain the reasons for
11 this discrepancy between what is in Reply Annex A, the
12 monthly statistics and the daily reports.

13 A. Yes, I can.

14 When Mercer purchased the Mill in 2005, the
15 existing meter that was on the generator was not of
16 the highest quality; and, in 2007, our Accounting
17 Department noticed a discrepancy between the data that
18 FortisBC was providing us off of their meters and the
19 data off of our generator's meter. It was determined
20 that the meter, our meter, was defective and our
21 Accounting Department made adjustments with the
22 FortisBC numbers to get to the correct numbers, and

04:22:43 1 the numbers that are in Annex A of my Witness
2 Statement are the correct numbers adjusted using the
3 FortisBC information. The numbers that Mr. Stockard
4 has in his that I'm looking at right now, those are
5 the numbers that were generated from the defective
6 meter. We replaced the meter in 2008, and we haven't
7 had any problems with it since.

8 Q. Thank you, Mr. Merwin.

9 MS. GEHRING FLORES: That concludes my
10 direct.

11 PRESIDENT VEEDER: Let's go back on to the
12 feed.

13 (End of confidential session.)

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OPEN SESSION

2 PRESIDENT VEEDER: We're now in open session.

3 There will be now questions from the Respondent.

4 MR. OWEN: Just give me one minute to get

5 binders out.

6 PRESIDENT VEEDER: You could have more than

7 one minute, if you want.

8 Do you want five minutes? You're not tied to

9 one minute. Let's take five minutes.

10 Whenever we break, we'd ask you not to

11 discuss the case or your testimony until you come back

12 before the Tribunal.

13 THE WITNESS: Okay.

14 PRESIDENT VEEDER: We're going to break for

15 five minutes now.

16 THE WITNESS: Am I allowed to stand up?

17 PRESIDENT VEEDER: Of course you are. You

18 can even have coffee or biscuits or cookies or

19 whatever you want.

20 THE WITNESS: Thank you.

21 (Pause.)

22 PRESIDENT VEEDER: Just tell us when you're

04:27:46 1 ready.

2 Let's resume.

3 MR. OWEN: Thank you.

4 CROSS-EXAMINATION

5 BY MR. OWEN:

6 Q. Mr. Merwin, good afternoon. How are you?

7 A. I'm fine, thank you.

8 Q. My name is Mike Owen. I'll be asking you a
9 few questions on behalf of the Government of Canada.

10 Probably more than a few, but some questions.

11 A. There's a lot of binders.

12 Q. I apologize for that.

13 Just on top, just to orient you here, on top
14 on your right there are your Witness Statements.

15 You'll also find in the first binder, if I
16 can just direct you to that, inside jacket, and this
17 is the same for the Tribunal, there's a letter of
18 yours, it's your letter of May 7, and we're going to
19 be referring to that letter a lot, so I thought we
20 would give the Tribunal and yourself that letter in
21 loose copy, and if you could keep that and your
22 Witness Statements just handy, sir, that will help us

04:28:44 1 move along in an efficient manner.

2 A. Okay.

3 Q. Are you ready?

4 A. Yes, I am.

5 Q. Okay, thank you.

6 Mr. Merwin, you're Vice President of
7 Strategic Initiatives with Mercer?

8 A. Yes, I am.

9 Q. And you have your MBA from the University of
10 Western Ontario?

11 A. Yes, I do.

12 Q. And you joined the Claimant as a business
13 analyst in May 2005, a few months after the
14 acquisition of the Mill?

15 A. Correct.

16 Q. Okay. I'd like to begin with some of your
17 testimony concerning the production at the Celgar pulp
18 mill?

19 A. Okay.

20 Q. You've testified it's one of the largest and
21 most modern kraft mills in North America; is that
22 right?

04:29:23 1 A. Yes.

2 Q. And is failing to meet pulp production
3 targets costly for a pulp mill like Celgar?

4 A. It is.

5 Q. Okay. I'd like to turn as to the pulp
6 production process. And, Mr. Merwin, you've provided
7 us a schematic in your First Witness Statement. It's
8 Figure 1, and that's at Paragraph 11.

9 A. Which tab?

10 Q. First Witness Statement is loose. Just
11 underneath the flap of your--there you go.

12 A. Sorry.

13 Q. Not at all.

14 A. And where would you like me to go?

15 Q. Paragraph 11, Figure 1, please.

16 Okay. So, Mr. Merwin, I just want to walk
17 you through a few basic concepts here. We're looking
18 at a schematic of the pulp production process, and I
19 understand that wood chips that are up on the top
20 left-hand corner are essentially placed into chip
21 silos, which are right below there, and then from
22 there they're fed into a piece of equipment known as a

04:30:22 1 digester; is that correct?

2 A. Correct.

3 Q. Okay. And the wood chips are essentially, I
4 think the terminology here is cooked with chemicals in
5 the digester to break down the cellulose from the
6 lignins; is that correct?

7 A. Correct.

8 Q. And then the cellulose is separated from the
9 lignins of the spent cooking chemicals in the washer.
10 Have I got that right?

11 A. You've got it right, yes.

12 Q. And the cellulose is manufactured in the
13 pulp?

14 A. Yes, the cellulose is essentially the pulp
15 once it's been bleached, yes.

16 Q. And the leftover cooking chemicals and the
17 lignins are essentially black liquor or weak black
18 liquor at this point?

19 A. Weak black liquor, correct.

20 Q. And black liquor is a byproduct of that
21 process, is it not?

22 A. Correct.

04:31:04 1 Q. And black liquor is burned in the kraft
2 mill's recovery boiler to create high-pressure steam?

3 A. Correct.

4 Q. Can you turn to Paragraph 14 of your Witness
5 Statement.

6 A. Okay.

7 Q. Here you testify at Paragraph 14 that the
8 high-pressure steam is, in turn, used to power turbine
9 generated electricity; is that right?

10 A. Yes.

11 Q. And that the remaining low-pressure steam,
12 after being passed through the turbine is used for
13 heat in the pulp production process; is that correct?

14 A. Correct.

15 Q. And you also note in Paragraph 14 just
16 towards the end, I believe, that cooking chemicals are
17 recycled; is that right?

18 A. Yes, they are.

19 Q. And if Celgar was unable to recover chemicals
20 in its recovery boiler, it would have to purchase
21 additional chemicals in its digester, for its
22 digester; is that right?

04:31:59 1 A. Yes, and you don't operate a kraft pulp mill
2 without recycling the chemicals because it's bad for
3 the environment.

4 Q. Probably pretty expensive, too?

5 A. And expensive, yeah.

6 Q. Okay. In your First Witness Statement, let's
7 just flip back to that schematic for a minute--now,
8 you have the turbo generator sort of at the top
9 middle, and you have three arrows coming out of that,
10 and that's steam used for the process, I understand,
11 the pulp production process?

12 A. Correct.

13 Q. And that goes to the washing and bleaching
14 processes?

15 A. It goes to the digester. It goes to the
16 washing--a little bit goes to the washing and
17 bleaching process, and a whole lot goes to the
18 evaporators, which is used to--because weak black
19 liquor is essentially diluted in water, so you have to
20 evaporate all the water off until it starts looking
21 like crude oil.

22 Q. Gets to a higher concentration essentially is

04:33:03 1 what I understand?

2 A. A high concentration so you can burn it, yes.

3 Q. And some goes to the pulp driers, too? Am I
4 right on that?

5 A. Some steam goes to the pulp driers, too,
6 correct.

7 Q. So the burning of black liquor essentially
8 plays an indispensable role in the pulp production
9 process?

10 A. Yes, it does.

11 And I just want to say with regards to the
12 Celgar Mill, there is many other mills in B.C. that
13 not only need that, but they also need to use their
14 power boiler to supply the fuel to do that, and that's
15 one of the things about being modern. We're much more
16 efficient in terms of how we can burn the black liquor
17 and how we can extract the energy from it.

18 Q. So a lot--a high percentage of your energy
19 comes from black liquor?

20 A. Correct.

21 Q. Okay. I would like to turn now to Project
22 Blue Goose. Can you turn to Paragraph 57 of your

04:33:57 1 Witness Statement, please.

2 A. Okay.

3 My First Witness Statement?

4 Q. Yes, I'm sorry.

5 A. Okay.

6 Fifty-seven.

7 Q. Fifty-seven.

8 So, here you've got a number of subparagraphs
9 and my understanding is they list sort of the major
10 capital projects that were part of Blue Goose.

11 A. Yes.

12 Q. So, we have Number 3, 4 chip silo
13 dischargers?

14 A. Yes.

15 Q. A pre-bleach and EOP washers; is that right?

16 A. Yes.

17 Q. Filtering heat exchanger and a pulp drier
18 expansion; is that right?

19 A. Correct.

20 Q. Now, you emphasize that these were related to
21 electricity production in your Witness Statement.

22 A. Yes, they are, but they're related to pulp

04:34:41 1 production, too.

2 Q. Okay. And you made that same point to
3 BC Hydro; right? I direct you maybe to refresh your
4 memory, it's been a long time.

5 A. It's been a long time.

6 Q. Take a look at the May 7th letter that I've
7 got loose there for you because we're going to be
8 going to it a lot.

9 If you could just turn to Page 5 and take a
10 look at the bottom paragraph, and maybe I will get
11 there, too.

12 PRESIDENT VEEDER: Just for the sake of the
13 Transcript, if you could just refer to the exhibit
14 number.

15 MR. OWEN: I'm sorry, Exhibit R-127.

16 THE WITNESS: Which sentence do you want me
17 to look at?

18 BY MR. OWEN:

19 Q. Just one second. I've got to sort myself
20 out, too.

21 And here in Page 5, take a look at the bottom
22 paragraph, and here you refer to these as phased

04:35:40 1 energy optimization investments; is that right?

2 A. Yes.

3 Q. So, I would like to back up and discuss this
4 project from the beginning.

5 Mr. Merwin, Celgar pulp mill was acquired by
6 Mercer in February 2005; is that right?

7 A. Yes.

8 Q. And prior to the acquisition of the Celgar
9 Mill, Mercer made plans to increase pulp production
10 capacity from 434,000 air-dried tonnes to 475,000
11 air-dried tonnes; is that right?

12 A. Yes.

13 Q. And Mercer retained Pöyry to conduct
14 technical due diligence?

15 A. Yes, we did.

16 Q. And Pöyry recommended a series of the
17 projects that would resolve many of the major
18 deficiencies.

19 A. Yes.

20 Q. And that was essentially what was holding it
21 up from getting the 475,000 air-dried tonnes; right?

22 A. That was holding it up from getting to

04:36:37 1 475,000 air-dried tonnes.

2 Q. Okay. Let's see how others have
3 characterized Pöyry's due diligence. Can you turn to
4 Mr. Gandossi's Witness Statement, and that would be in
5 those white binders right there. Go to paragraph--

6 A. Oh, it says witnesses on it?

7 Q. Expert Reports, and I would like you to go to
8 Paragraph 30, please, sir.

9 A. Sorry, I was shuffling with the binders.

10 Q. No, not at all. So, Mr. Gandossi's Witness
11 Statement, I take it that there is an index there?

12 A. I'm sorry. The Witness Statements I
13 have--it's not here.

14 Should I shuffle the indexes right now?

15 Q. I'm sorry, Mr. Merwin.

16 A. No problem.

17 (Pause.)

18 A. Okay. First tab, and what?

19 Q. Would you take a look at Paragraph 30 of his
20 First Witness Statement.

21 A. Paragraph 30.

22 Q. Could you read the first two sentences of

04:38:27 1 that paragraph, please.

2 A. Sure.

3 "Our evaluation of the Mill focused
4 principally on the Mill's pulp production capabilities
5 as we wanted to determine whether an investment in the
6 Mill's pulp production alone would make good sense."

7 Do you want me to do the next sentence?

8 Q. Yes, please.

9 A. "We did not separately evaluate the Mill's
10 potential to generate revenue from electricity sales
11 principally because we did not think that selling the
12 Mill's self-generated electricity would be necessary
13 to earn reasonable rate of return on our investment."

14 Q. Okay.

15 Now, Mr. Merwin, Mr. Gandossi testifies that
16 Pöyry's due diligence, which identified the Blue Goose
17 Projects, wasn't focused on energy sales; is that
18 right?

19 A. Yes.

20 Q. And he was there, was he not?

21 A. Yes, he was there, and that's what it says,
22 yes.

04:39:22 1 But I think he's referring to--we're looking
2 at getting a return on that investment of I believe it
3 was \$28 million we invested, and to get the payback it
4 was sufficient on pulp production alone.

5 But if you go back--

6 Q. Actually, if I may, so there was the benefit
7 from pulp production--

8 MR. SHOR: Objection. If we can let the
9 Witness finish the answer, please.

10 PRESIDENT VEEDER: For the sake of the
11 shorthand writer we have got to let the Witness finish
12 the question before we have the next question.

13 MR. OWEN: Certainly.

14 PRESIDENT VEEDER: So, please conclude your
15 answer.

16 THE WITNESS: I think if we go back to my
17 Witness Statement where I talk about the Blue Goose
18 investments, if you look at those various components
19 of the Mill, essentially chip silo dischargers,
20 essentially we're talking about fuel preparation
21 system to make more power. We make pulp, and we make
22 power. So, to separate the two...

04:40:25 1 BY MR. OWEN:

2 Q. My understanding is, just in terms of the
3 rationale for Blue Goose that there was, of course,
4 the increased revenue you get from the pulp
5 production.

6 A. Yes.

7 Q. Was there a chemical savings?

8 A. Yes, there was a chemical savings.

9 Q. And that was a very large portion of Blue
10 Goose, was it not?

11 A. That had to do with the investment in the
12 washers, yes.

13 Q. And then when you increased reliability, you
14 also reduce your consumption of natural gas. Is that
15 not correct, sir?

16 A. Yes, but we also, when you increase your
17 reliability, you also increase your ability to sell
18 power reliably because, before, the Celgar Mill
19 essentially ran like a yo-yo. It's still--we still
20 have a lot of ups and down, but the idea you might see
21 in some of the documents where they talk about
22 reliability, and reliability is for pulp production,

04:41:13 1 but it's also for power production because you can't
2 enter into a power agreement if you don't have
3 reliable power production.

4 Q. Now, I quite understand that, but I'm looking
5 at the components of Blue Goose, and I think in terms
6 of reliability, you know, yes, there was components of
7 electricity there but you also had many other business
8 reasons for undertaking these projects, didn't you?

9 A. Yes, absolutely.

10 Q. Okay.

11 A. It's a really big mill and there's lots of
12 different things that can always be improved.

13 Q. All right. And you know, my next question is
14 whether or not you sought to improve operational
15 reliability, and I think we've covered that off, and
16 it had a number of positive impacts, and I think we've
17 talked here about higher returns and chemical savings
18 and reduced natural gas consumption and reduced
19 electricity costs.

20 So, can we turn to Tab 6, please.

21 A. Of which?

22 Q. Your first binder.

04:42:14 1 A. The big one?

2 Q. Yes, the big one. The giant one.

3 A. Tab 6.

4 Q. So, this is a Project Performance Analysis
5 that Pöyry 25--

6 PRESIDENT VEEDER: Let's get the reference
7 for the Transcript.

8 MR. OWEN: Yes, Pöyry 25, sir.

9 PRESIDENT VEEDER: Thank you.

10 BY MR. OWEN:

11 Q. And could we turn--and this is a performance
12 analysis of various projects that were carried out
13 that you did in 2012, I think it covers Blue Goose and
14 your woodroom upgrade; is that correct?

15 A. Maybe I'm looking at the wrong--I'm sorry,
16 you're looking to paragraph or Page 6?

17 Q. Tab 6.

18 A. Tab 6. I had switched, and I was on Tab 5.
19 My apologies. So, yes, I'm looking at this Project
20 Performance Analysis.

21 Q. Could you turn to Page 31, please.

22 And here again, we've got total production

04:43:33 1 being the first item in the table, and this notes--one
2 minute. Pardon me.

3 (Pause.)

4 Q. So, here we have the total production year in
5 air-dried metric tonnes, and here before we had the
6 Project basis 445,000. I think these are the
7 assumptions that went in, and afterwards it was
8 475,000 was the target; is that correct?

9 A. Yes.

10 Q. Okay. And I think you ended up producing
11 476,000 air-dried tonnes that year. Does that ring a
12 bell?

13 A. I would have to check, but after the Blue
14 Goose, we sequentially year after year increased our
15 production, and in 2010 we peaked out at
16 500,000 tonnes.

17 Q. Okay.

18 A. Just a comment on this, the purpose of this
19 benefit summary was to sort of match up to what the
20 Pöyry Report, so essentially we were going back and
21 saying, okay, well, based on the Pöyry, just looking
22 at the variables on the Pöyry Report, how does this,

04:44:59 1 how did we stack up and how did we do? And that's
2 what this says.

3 Q. Okay. Now, Mr. Merwin, we've already
4 discussed that Celgar burned black liquor to generate
5 steam and the steam was used for pulp production to
6 generate electricity. Could you turn to Tab 7,
7 please.

8 A. Sure.

9 What page would you like me to go to?

10 Q. Just a second. This is a copy of Pöyry 109.
11 This is a presentation to BC Hydro. I think you'll
12 note at the bottom it's dated April 2007. You have
13 seen this before, sir?

14 A. Yes.

15 Q. And this is the RFEOI presentation, so the
16 request for expressions of interests?

17 A. Yes.

18 Q. Okay.

19 A. I remember working on it, but I have to see
20 what's in it.

21 Q. Okay. Can you turn to--and I'm going to give
22 you a Bates number. It's 27705.

04:46:07 1 A. What was the number?

2 Q. 277705.

3 A. Okay. Yes.

4 Q. And here in the first bullet you indicate
5 that you invested an additional 30 million to increase
6 capacity efficiencies and productivity, and it also
7 says excess steam is a spin-off benefit of Mercer's
8 investment; is that right?

9 A. Correct. Based on our analysis, that's how
10 we were framing it, yeah.

11 Q. Okay.

12 A. It was a benefit that belonged to us.

13 Q. A spin-off benefit though, not a benefit that
14 you originally were after.

15 A. Well, it's a benefit that everyone knows when
16 you run a pulp mill, that's a benefit that comes with
17 making pulp; and, in Germany, that was one of our big
18 focuses, making power, and we have always been as a
19 company focused in making the maximum power potential
20 that a mill can produce. You make the most pulp, and
21 you also make the most power, and yes, it was a
22 spin-off benefit, but it's a benefit nonetheless that

04:47:16 1 belonged to us.

2 Q. Mr. Merwin, can you tell us when the Blue
3 Goose Projects were fully operational?

4 A. The Blue Goose Projects, some of them started
5 up in I think October 2006, and they were fully
6 operational in 2007. They were being put through
7 their paces in 2007 for sure.

8 Q. So, I think most of the Projects went in in
9 your October 2006 shot as you indicated. Everything
10 except the pulp drier expansion that went in in
11 May 2007. Does that sound right to you?

12 A. Correct.

13 And the pulp drier was sort of the key to
14 really crank up the production. Everything else was
15 really just related to the energy savings and
16 different things that we discussed earlier.

17 Q. Okay. Could you turn to your loose document
18 R-127, please. Take a look at that again.

19 A. Okay.

20 Q. And can you go to Page 5.

21 A. Page 5.

22 Am I allowed to move this big binder out of

04:48:33 1 the way again?

2 Q. Yes, absolutely.

3 A. Thank you.

4 Okay. I'm on Page 5.

5 Q. Okay. Could you read the first sentence
6 under the first table.

7 A. "It should be noted that the \$30 million
8 worth were upgrades we only"--I guess that's a
9 typo--I'm assuming it's "were only operational for
10 part of 2006 but all of 2007."

11 Q. Okay. And then could you just look at the
12 first sentence of the paragraph right underneath the
13 second table. You indicate that the 2007 generation
14 figure reflects the full investment Celgar made into
15 generating incremental biomass steam output; is that
16 right?

17 A. Just let me read this. 2007 reflects full
18 investments into generating incremental biomass steam
19 output. That's what I said.

20 Q. And BC Hydro ultimately set Celgar's GBL
21 using data you provided concerning 2007?

22 A. They based their GBL, yes, on our 2007

04:49:48 1 numbers.

2 Q. Okay. But the drier project wasn't
3 operational until May 2007?

4 A. That's correct.

5 Q. And as you just testified, you really needed
6 that to crank everything up; right?

7 A. Yes.

8 Q. So, for the first quarter of 2007, you
9 weren't operating with the benefits of Blue Goose.

10 A. We were operating with most of the benefits
11 of Blue Goose.

12 Q. Okay. Just one minute.

13 (Pause.)

14 Q. Can you go back to Tab 6, please.

15 A. Tab 6.

16 Q. And turn to, it's just before the benefits
17 summary, it's Page 28--

18 MR. OWEN: And Tab 6, I'm sorry, Mr. Chair, I
19 will get this right--this is Pöyry 26, I believe.
20 Just let me just check. Pöyry 25.

21 BY MR. OWEN:

22 Q. So, if you could turn to Page 28 of Pöyry 25.

04:51:08 1 So, this is the PM2 upgrade that refers to
2 the drier upgrade, does it not?

3 A. Just to make sure I'm on the--it's 29 of the
4 MER-00148445.

5 Q. A page before that, if you don't mind.

6 A. Okay, yes.

7 Q. So, this is a discussion under Section 2.3.3,
8 and this is about the drier upgrade; correct?

9 A. Yes.

10 Q. Can you read the first sentence, please.

11 A. "Drier capacity increase was required to
12 increase annual production capacity from 445,000 to
13 475,000 tonnes per year, an increase of 30,000
14 air-dried metric tonnes per year."

15 Q. So, you weren't--until this dryer went in in
16 May 2007, you weren't getting those benefits?

17 A. Well, what we would have to do to confirm
18 whether or not that is the case if there weren't any
19 reliability benefits to get up to the 475 number, we
20 would have to look at the monthly reports from
21 January, February, March and April to see what rates
22 the Mill was running at during those months, and it

04:52:17 1 could be quite possible that it was running at higher
2 than the 475 rate.

3 I don't quite know what it was running at in
4 the first two or three months of the year, based on it
5 was so long ago, but we could look, I'm sure you guys
6 have those as well.

7 Q. Well, I've only got a limited amount of time.
8 We're on the chess clock here, so let's move on.

9 A. Sorry.

10 Q. No problem.

11 Okay. So, you represented to BC Hydro that
12 Project Blue Goose was operational for part of 2006
13 but all of 2007; is that right?

14 A. Yes.

15 Q. So, that's not technically correct?

16 A. I guess you're right, yes.

17 Q. Okay. So, the GBL BC Hydro set on the basis
18 of your representations was probably less than it
19 should have been?

20 A. I don't just--I disagree with you on that.

21 And seeing as we're talking about this letter
22 so much, if we go to the 2007 charts at the back, it

04:53:20 1 shows--and it's Page 7 of that same letter.

2 Q. Yes.

3 A. And it shows what the Mill was targeted to
4 run at in 2007, and I just want to point out that
5 BC Hydro based their numbers on these. And if you go
6 back, it shows I have 5 megawatts of export in 2007 as
7 being the targeted rate. And if you look at our
8 long-term tables, we've never produced five times
9 8,700 hours of power generation.

10 So, 2007, we provided the numbers--we
11 provided the numbers that the Mill would ran at on a
12 targeted rate, but it doesn't always run at those
13 rates.

14 Q. Okay. I'm not entirely sure that I
15 understood that, but let's keep going.

16 Could you turn now to events leading up to--I
17 would just like to turn now to events leading up to
18 BC Hydro's Bioenergy Call in 2007 and 2008. Just to
19 get a sense of what went on.

20 A. Okay.

21 Q. The Ministry of Energy released its 2007
22 Energy Plan in February 2007; right?

04:54:43 1 A. I was just looking, waiting for you to tell
2 me which binder to look at.

3 Q. I'm asking for your recollection now.

4 A. Okay.

5 Q. Early 2007--

6 A. Can you ask me the question again? I
7 apologize.

8 (Overlapping speakers.)

9 Q. In 2007, February 2007, the Ministry of
10 Energy released the 2007 Energy Plan?

11 A. Correct.

12 Q. Okay.

13 A. As far as I can remember, yes.

14 Q. And the 2007 energy policy required the
15 Province to become energy self-sufficient?

16 A. Correct, yes.

17 Q. And pursuant to the 2007 Energy Plan,
18 BC Hydro held a request for expressions of interest in
19 biomass Call for Power as I think we just saw?

20 A. Yeah, and we submitted an RFEOI form and all
21 of that and met with BC Hydro.

22 Q. April 2007, I think; right?

04:55:38 1 A. Around there, yes, it's probably around that
2 time, yeah.

3 Q. Okay. Can you turn to Tab 14, please. And
4 this will be R-353.

5 A. Which R was it again?

6 Q. Well, don't worry about the R-numbers, I'm
7 just reading them in for the Transcript so we got
8 them, but it's R-353, and it's Tab 14 of your binder.

9 A. Yes.

10 Q. You will not find a Tab 353, unfortunately.

11 A. Tab 14?

12 Q. Tab 14. If I could have you turn to Page 7,
13 please. And this is--actually, just before I get
14 there, there is your preliminary analysis for the
15 Celgar Energy Project, and my understanding is that
16 what you call the Celgar Energy Project at this point,
17 it would later become what you term the Green Energy
18 Project; is that right?

19 A. That's correct, yes.

20 Q. It's the condensing turbine?

21 A. That's the condensing turbine, yeah.

22 Q. Okay. Could you turn to Page 7, please.

04:56:49 1 A. And this was--just, let me double-check, this
2 was in?

3 Q. This is a preliminary draft, I think, so this
4 is dated April 13, 2007.

5 A. Yes.

6 Q. Okay. Could I take you to the bottom of the
7 page under the subtitle "marketing opportunities," and
8 the second opportunity is BC Hydro; is that right?

9 A. Yes.

10 Q. Okay. And this indicates you were aware that
11 the Province wanted to become self-sufficient by 2016.
12 That's the first sentence; right?

13 A. Yes.

14 Q. Okay. Now, Mr. Merwin, you decide to
15 approach FortisBC and [REDACTED]>> to see if either of
16 these utilities were interested in purchasing your
17 electricity; correct?

18 A. Yes.

19 And the logical approach is you go to your
20 utility that's closest first because you don't have to
21 worry about transmission, and then you go to the next
22 one, which would be BC Hydro, and the next one down

04:57:46 1 the road is <<[REDACTED],>> so yeah.

2 Q. Okay. Sounds right.

3 Could you turn to Tab 15, please.

4 A. Tab 15. Okay.

5 Q. This is a series of e-mail exchanges between
6 yourself and Mr. Debieenne of FortisBC from June 2007?

7 A. I see the one from September--

8 Q. There is one later on in September?

9 A. Okay. The first one or--

10 Q. The second and third one.

11 A. Okay.

12 Q. So, I would like to take you to the one that
13 is dated June 15, and that actually straddles the
14 page.

15 MS. GEHRING FLORES: Just one moment. Could
16 we get an exhibit number?

17 MR. OWEN: Yes, certainly. R-241.

18 BY MR. OWEN:

19 Q. Go to the second page, please, and that's the
20 text of the e-mail at the top.

21 A. Okay.

22 Q. Now, Mr. Merwin, this e-mail indicates, if

04:58:56 1 you actually could go--this indicates that you were
2 going to propose a concept. Can you read from the
3 middle of the paragraph, the sentence starting "my
4 concept."

5 A. "My concept is quite an aggressive approach
6 and, as I do not know your electricity costs even if
7 there is a business case for what I've proposed."

8 Q. Is that aggressive approach that you're
9 referring to here, that's the Arbitrage Project, isn't
10 it?

11 A. Yes.

12 Q. Okay. And the Arbitrage Project was your
13 plan to have FortisBC supply additional electricity to
14 Celgar to meet its load essentially, and then you
15 could sell electricity using your existing 52-megawatt
16 turbine?

17 A. Correct.

18 And essentially that's exactly what we were
19 going to do. We were just going to simply become a
20 customer just like any other customer of FortisBC's,
21 whether it's the sawmill or the grocery store, that
22 has a load, and we would dispatch our generation to

05:00:01 1 the marketplace, correct.

2 Q. Okay. Okay. And let's just move an e-mail
3 up, so I'm now in the e-mail on the first page, and
4 it's dated June 19, and it's sent at 10:41 a.m. And
5 this is Mr. Debiegne's response to you. And he
6 indicates there that he doesn't see a problem with it
7 as long as no 3808 power is exported.

8 What is 3808 power?

9 A. 3808 power is the part of FortisBC's embedded
10 resource stack that they purchased from BC Hydro.
11 It's 200 megawatts, and FortisBC uses it, like, they
12 have a series of generators and other contracts that
13 form their embedded--their embedded-cost power that
14 they supply to their customers.

15 Q. So, that's the 1993 PPA power?

16 A. Yes.

17 Q. Okay. And he explained to you that it was
18 FortisBC was prohibited from arbitraging BC Hydro's
19 electricity under the terms of the 1993 PPA?

20 A. It said--it said--I'm just reading it. I
21 don't think it says--oh, but it does say there "prove
22 no arbitraging of 3808 on the market." And yes, as

05:01:20 1 long as FortisBC was not selling its 3808 power to the
2 U.S. or some other party, that--that was okay. The
3 power is for its customers, its FortisBC customers.

4 Q. Okay. Now, you also discussed with Fortis,
5 just to back up a minute, you discussed the Green
6 Energy Project with the additional condensing turbine
7 with them.

8 A. Yes.

9 Q. But they weren't--

10 (Overlapping speakers.)

11 Q. So, just to back up for a minute, there was
12 also the Green Energy Project, and you did take the
13 idea of selling the condensing turbine to them, but my
14 understanding is Fortis was not interested because it
15 had sort of these long-term Power Purchase Agreements
16 with Hydro and Brilliant; is that right?

17 A. Well, we actually, in 2006, spoke to FortisBC
18 about the energy from our existing what you referred
19 to as the Blue Goose Project. We had a meeting with
20 them seeking load--potentially seeing if there were
21 Load Displacement Agreements available, and at that
22 time they explained to us that the Load Displacement

05:02:40 1 Agreements aren't available like in the BC Hydro
2 service area and your power, but there were a couple
3 incentives available for some motor upgrades.

4 So, we got those from Fortis, but they left
5 us with the impression, "Well, it's your power, you do
6 what you want with it." So, there was no reason to
7 talk to them really about our Green Energy Project
8 because they already told us in 2006 when we talked
9 about making more power under Blue Goose that they
10 weren't really interested in that.

11 Q. Okay. I thought you did actually bring it to
12 Fortis, but it's not a very material point, so--in
13 2007--but let's move on.

14 A. We probably discussed it when we had our
15 meeting.

16 Q. Yeah.

17 A. I'm sure we did, because it was the biggest
18 thing our company was working on.

19 Q. Okay. Okay. So, you continued your
20 discussions with FortisBC throughout the remainder of
21 2007 and into 2008?

22 A. Correct.

05:03:35 1 Q. Okay. And Mr. Merwin, you were negotiating
2 with FortisBC a term sheet, I understand, initially,
3 and that eventually became a Power Supply Agreement
4 which was signed in August 2008; is that right?

5 A. Yes.

6 Q. Okay. And these negotiations in early 2008
7 were occurring concurrently with the Bioenergy Call?

8 A. They started before--the Bioenergy Call only
9 started in February. So, they--our discussions with
10 Fortis had been occurring a lot longer, before the
11 Bioenergy Call, yes.

12 Q. I was just going to say what I meant was that
13 my understanding was exactly yours, that you started
14 your discussions in 2007, and they continued while you
15 were negotiating the Bioenergy Call, because I think
16 the Bioenergy Call started in February 2008; is that
17 right?

18 A. Correct.

19 Q. Okay.

20 A. It takes a while to work out very--you know,
21 we were working with Fortis to sign a 20-year deal, so
22 it takes a long time to negotiate terms like that.

05:04:42 1 Q. Can you turn to Tab 16, please.

2 A. Okay.

3 Q. And this will be R-354.

4 I just want to touch basically on this. This
5 is your presentation to < [REDACTED] in July 2007; is
6 that right?

7 A. This was our initial meeting with them, yes.

8 Q. Okay. Okay. And you proposed selling < [REDACTED]
9 [REDACTED] electricity from your new condensing turbine in
10 your Arbitrage Project; is that right?

11 A. We proposed selling power to FortisBC. I'm
12 just trying to look at maybe for some guidance on
13 exactly what exactly we proposed to them in--

14 Q. On [REDACTED] >

15 A. With [REDACTED] > yeah.

16 Q. If you go to Page 16, please.

17 So, here on Page 16, it's got potential
18 energy profile condensing turbine project. That would
19 probably be the Green Energy Project or what became
20 the Green Energy Project?

21 A. Yes.

22 Q. And then there is another larger energy

05:05:47 1 opportunity on the next page; is that right?

2 A. Yes.

3 Q. Okay.

4 A. Correct.

5 Q. Okay.

6 A. So, yes, we did.

7 Q. All right. And did you, Mr. Merwin, did you
8 have any further meetings with [REDACTED] in 2007?

9 A. No, I did not.

10 And I would like to explain why. The reason
11 we didn't meet any more with [REDACTED] was we were
12 focused on, you know, we knew there was a BC Hydro
13 Call coming, and as logic goes, you sell into your
14 backyard, your closest backyard first. And, you know,
15 it's very difficult to go beyond having more than an
16 introductory meeting to introduce ourselves to a
17 prospective customer if you don't know exactly how
18 much power you actually have to sell them and what
19 your terms are going to be, and our preference
20 was--and I think we've advised that to BC Hydro
21 numerous times--our preference was to sell our power
22 to them first and others second.

05:06:46 1 Q. So, you weren't planning on doing more with
2 < [REDACTED] at that time?

3 A. In--well, we were--

4 Q. Until you finished with BC Hydro; is that
5 right?

6 A. Well, we needed to do two things. We needed
7 to finish with FortisBC to ensure that we had power,
8 embedded-cost power, to feed our pulp mill, and we
9 needed to find out what was happening with the BC
10 Hydro Call process. Those were two unknowns.

11 Q. Okay.

12 Can you turn to Tab 17, please. And this is
13 Exhibit R-357.

14 And I'd just like to direct you to--this is
15 an e-mail from Mr. MacLaren, who worked with you. I
16 think he worked on energy issues, and to yourself,
17 from October 30, 2007.

18 Can you just take a look at--there is a
19 number of summer and winter numbers here across the
20 middle--can you look at the paragraph just underneath
21 that and read the first sentence, please.

22 A. "Your idea of selling 28 megawatts from STG-2

05:07:55 1 to [REDACTED] starting as soon as possible as soon as
2 a suitable contract can be negotiated is very
3 appealing."

4 Just the first sentence or keep going?

5 Q. And--I'm sorry?

6 A. How many sentences? I didn't know how many
7 you asked me to read.

8 Q. No, that's just the first sentence, and
9 actually I would like you to go to the last sentence
10 of that same paragraph, if you wouldn't mind.

11 A. Okay.

12 Can I first see what the whole paragraph
13 says?

14 Q. You certainly may.

15 (Witness reviews document.)

16 A. Okay: "Creating a historical practice of
17 selling 28 megawatts of output from SGT-2 into the
18 U.S. before entering the future call with BC Hydro has
19 merit."

20 Q. So, when you're talking about establishing a
21 historical practice there, why were you talking about
22 that?

05:08:51 1 A. I can tell you exactly why we were talking
2 about that.

3 Q. Why?

4 A. Because when we first started to sell our
5 power in 2006, BC Hydro told me that our power, when
6 we approached--we first approached Fortis, we
7 approached BC Hydro, we approached Powerex, and at the
8 end of the day BC Hydro told us our power was
9 stranded. Therefore, it had zero value.

10 And that--you know, if--and this is our
11 surplus power we're talking about, so that was BC
12 Hydro's approach to our power. And if you--you know,
13 if a company thinks they're getting the milk for free,
14 why are they going to pay for the cow? And that is
15 very simple. Based on past experience with BC Hydro,
16 they always buy the power out of B.C. if it's flowing.

17 And, for example, there is lots of companies;
18 the Williams Lake power plant, they didn't have an EPA
19 with BC Hydro for a while. They're a stand-alone
20 bioenergy plant. They exported for several months
21 through Morgan Stanley, and sure enough a few months
22 later BC Hydro gave them a contract.

05:10:08 1 So, what we're talking about there is no
2 different than what any other--any other biomass
3 producer would do.

4 Q. But you were--

5 PRESIDENT VEEDER: Can I intervene?

6 When you say that BC Hydro told that you your
7 power was stranded, what did you understand them to
8 mean by "stranded"?

9 THE WITNESS: Well, "stranded" meant--so, our
10 surplus power which should just flow into the FortisBC
11 system and displace 3808 power that BC Hydro would
12 otherwise supply FortisBC. So, our surplus power--so,
13 FortisBC typically--or back then at least--used to use
14 this supply from BC Hydro. They had a contract up to
15 200 megawatts, and they weren't always using it. So
16 if they needed more, they would buy more. So, BC
17 Hydro's approach was this power is stranded; and if
18 it's stranded, that means it flows into the Fortis
19 system and BC Hydro doesn't have to supply as much to
20 Fortis.

21 PRESIDENT VEEDER: And you would get no
22 compensation from BC Hydro or Fortis?

05:11:28 1 THE WITNESS: We would get--at that point,
2 Fortis was paying us \$27 per megawatt, and what we
3 were looking to do at that time, because we'd bought
4 the Mill, we were moving into making the Mill have
5 power sales, we wanted to either sell our surplus
6 power to Alberta or the U.S., and, you know,
7 that's--we ended up first selling it with a firm
8 called NorthPoint, and I think it was our first
9 or--four months we were--instead of getting \$27 a
10 megawatt, we were averaging three or \$400 a megawatt.

11 So, and then, what that meant, as soon as we
12 were selling that power into Alberta or the U.S., BC
13 Hydro had to supply more power to FortisBC under the
14 3808 Agreement.

15 PRESIDENT VEEDER: Okay. Thank you.

16 THE WITNESS: You're welcome.

17 BY MR. OWEN:

18 Q. Just to follow up on your \$300 a megawatt
19 hour, you weren't always getting those prices--

20 A. No, that's correct. October was, it was a
21 very high-priced market in Alberta. So, we--I think
22 we started in June or July, and in October we were

05:12:46 1 enjoying those really high numbers.

2 Q. October of 2006?

3 A. Correct, yes.

4 Q. Okay.

5 Now, Mr. Merwin, just, again, sort of set the
6 stage a little bit. In 2007, I think, you know, the
7 Energy Plan and the RFEOI led to some of this. There
8 was also the formation of the B.C. pulp and paper task
9 force; is that right?

10 A. Correct. Actually, the B.C. pulp and paper
11 task force had been around longer than that, I
12 believe, because not just on energy-related matters.
13 It was addressing other matters in B.C. regarding our
14 pulp and paper sector.

15 Q. Okay. But it did issue a paper to the B.C.
16 Government, and the suggestion was that all of the
17 energy of all pulp mills should be purchased; is that
18 right?

19 A. Yes, it did. And I'd just like to take a
20 step back. The primary focus of the pulp and paper
21 task force at the beginning on the energy file was
22 there was a big concern that if there was a Bioenergy

05:13:45 1 Call and all these high-priced--because there is
2 essentially two uses you can use wood chips for. You
3 can burn them and make power or you can take some of
4 the cellulose out and make pulp and power. And our
5 concern was if BC Hydro procured power at these
6 bioenergy rates, we wouldn't be able to compete to buy
7 the chips anymore, throwing the entire industry out of
8 balance.

9 Q. No, I certainly understand that. But if you
10 could just keep your responses, please, if possible, a
11 bit confined because we do have a timetable to sort of
12 keep to.

13 A. Okay.

14 Q. And the B.C. Government, in response to the
15 task force paper that included things like
16 recommendations on electricity sales, they formed
17 something called the pulp and paper working group in
18 early 2008; is that right?

19 A. Correct, yes.

20 Q. And that was joint industry and Government;
21 is that right?

22 A. That was joint industry and Government, and I

05:14:49 1 guess BC Hydro as well, yeah.

2 But just I would like to point out, FortisBC
3 was not part of that group.

4 Q. Okay.

5 Mr. Merwin, I would like to turn now to the
6 Bioenergy Call for power Phase I. BC Hydro released
7 its RFP for the Bioenergy Call on February 6, 2008; is
8 that right?

9 A. Sounds about right, yes.

10 Q. Again--

11 A. Is there a place you wanted me to turn to?

12 Q. Sure. You can turn to Tab 25, quickly, or
13 sorry, Tab 18. And you can see there the--this is
14 Exhibit R-25, and the issue date at the top is
15 February 6.

16 A. Um-hmm.

17 Q. Now, Mr. Merwin, when you were preparing your
18 proposal as part of the Bioenergy Call, did you review
19 the relevant RFP documents?

20 A. Yes, I did.

21 Q. The EPA Term Sheet?

22 A. Yes, I did.

05:15:48 1 Q. The addenda to the RFP?

2 A. All of them, yes.

3 Q. Okay. And the specimen EPA I think you
4 testified that you did look at that?

5 A. Yes, I did.

6 Q. Okay. Can you turn to Tab 19, please. These
7 are two Registration Forms for the Bioenergy Call that
8 you submitted on March 6, 2008.

9 MS. GEHRING FLORES: Excuse me. Could we get
10 an exhibit number? Sorry.

11 MR. OWEN: Exhibit R-123.

12 THE WITNESS: I'm just going to drink a glass
13 of water.

14 MR. OWEN: Absolutely.

15 THE WITNESS: Just give me one second.
16 Sorry.

17 PRESIDENT VEEDER: Are you okay handling
18 these bundles?

19 THE WITNESS: They're heavy.

20 PRESIDENT VEEDER: Because you're entitled to
21 a helper. If somebody wants to sit next to you to
22 help you find the documents.

05:16:34 1 THE WITNESS: No, I'm finding it all right,
2 thank you.

3 PRESIDENT VEEDER: Okay. Well, they're
4 pretty heavy.

5 THE WITNESS: Okay. I'm on Tab 19.

6 BY MR. OWEN:

7 Q. Okay. So, this would be a letter, and behind
8 the letter are two Registration Forms for the
9 Bioenergy Call. One, if you just turn to the second
10 page, and this is Bates Number 278896, and if I just
11 direct you to the bottom of the page under preliminary
12 project information, there is a project name, there is
13 the Celgar Green Energy Project; is that right?

14 A. Yes, that's right.

15 Q. Okay. So, that's your condensing turbine;
16 right?

17 A. Yes.

18 Q. And if I could just get you to turn to the
19 next Registration Form, and it's at Bates 278903.

20 A. Yes, I'm there.

21 Q. Just look at the same spot. This is the
22 Biomass Realization Project; is that right?

05:17:33 1 A. Correct, yes.

2 Q. Now, Mr. Merwin, Canada has reviewed all of
3 your internal planning documents, your decision
4 documents, and none of them refer to a Biomass
5 Realization Project unless they're sent to BC Hydro.

6 A. Correct.

7 Q. Okay. This was really your Arbitrage
8 Project?

9 A. Correct, yes.

10 Q. Okay. Can we back up for a second? I think
11 we touched on the pulp and paper working group a
12 minute ago.

13 A. Okay.

14 Q. Can you turn to Tab 22, please. And this is
15 Exhibit R-385. Okay?

16 And these are minutes from the first
17 conference call of the pulp and paper working group,
18 and they're dated--there's two dates here, but I think
19 the conference call, if you look on the left, it was
20 January 25, 2008; is that right?

21 A. Okay. I see January 28 on the top of it.

22 Q. January 28. I think that's when the minutes

05:18:32 1 were prepared. It says over on the left January 25th
2 conference call?

3 A. Oh, yes. Yes. Absolutely.

4 Q. Okay. And we've got attendees, we've got the
5 Ministry of Forest, Energy, Shelly Murphy is there,
6 and then some representatives of BC Hydro, as you
7 pointed out. In industry, we've got Bill Adams, Vince
8 Fitzgerald and--can you--representatives of BC Hydro,
9 and then we have industry representatives. And there
10 is someone from Mercer there, and I think this is
11 probably just a typo--can you confirm that "Bill
12 Erwin" is probably Brian Merwin?

13 A. I would say probably Brian Merwin because I
14 don't know any Bill Erwins from Mercer.

15 Q. That would be engaged on energy projects?

16 Now, Mr. Merwin, the Ministry of Energy and
17 Mines was represented by Shelly Murphy. Could you
18 just read the first bullet under key points of
19 discussion, please.

20 A. "Shelly Murphy started the discussion of
21 self-generation by saying that they had received
22 direction on the issue of self-generation that there

05:19:39 1 was an agreement in the Government in BC Hydro on
2 paying market rates for incremental power, but that
3 for existing generation the idea that BC Hydro should
4 pay at market for ongoing self-generation was not
5 going to be on."

6 Q. Okay. So, the Ministry indicated that it was
7 not going to purchase existing self-generation; is
8 that right?

9 A. For BC Hydro customers, yeah.

10 Q. Does it say that?

11 A. Well, all of the pulp and paper working group
12 meetings had to do with BC Hydro and what they were
13 doing with their customers. We were there, but
14 FortisBC wasn't there, and, you know, all of what
15 happens with FortisBC and ourselves, at this time we
16 were in discussions with FortisBC to negotiate our
17 Power Purchase Agreement that we finalized six months
18 or seven months sooner.

19 Q. Okay. So--but you understood with respect to
20 what BC Hydro would do that this is the direction that
21 the Government was giving?

22 A. Yes, I understood that, but I later learned

05:20:52 1 that's not what BC Hydro and the Government actually
2 did.

3 Q. Okay. Well, let's--

4 A. Because there is a big difference there from
5 what they actually did.

6 Q. I understand that's your contention, but
7 that's not my question.

8 Can you turn to Tab 23, please.

9 Now, these are minutes from another meeting
10 of the pulp and paper--it says task force, but I think
11 it's again the working group because we've got both
12 B.C. Government, BC Hydro and industry
13 representatives. There's--Mr. Allan is there.

14 Now, you were not there, but were you at this
15 meeting to the best of your recollection, sir?

16 A. I don't think I was, but I would have gotten
17 the minutes of the meeting.

18 Q. Okay. So, the meeting was chaired by Les
19 MacLaren, who you know, and introductions were made,
20 and then what does it say under the--MEMPR is Ministry
21 of Energy and Mines and Petroleum Resources; right?

22 A. Yes.

05:21:59 1 Q. Okay. So, can you read what the direction
2 from the Ministry is?

3 A. "Not looking at repricing of electricity, the
4 treatment of incremental power is already clear. Not
5 looking at a solution that just pays more for what is
6 already being produced."

7 And I just want to point out that that's not
8 what happened. That's not what BC Hydro and the
9 Province did with our competitors.

10 Q. I understand that's your contention, sir, but
11 if you could just respond to my questions.

12 A. Okay. Sorry.

13 Q. And your counsel will make those arguments,
14 and if I ask you a question about that, please feel
15 free to expand on that. We just need to keep on time.

16 MS. GEHRING FLORES: Excuse me, could we get
17 an exhibit number?

18 MR. OWEN: Yes. Absolutely. I'm sorry,
19 Gaela. That would be Exhibit 387. R-387. And I will
20 try to get better at that, Mr. President. I'm a
21 little rusty on my cross-examination.

22 BY MR. OWEN:

05:23:00 1 Q. Okay. All right.

2 So, Mr. Merwin, your Biomass Realization
3 Projection would have sold BC Hydro existing
4 electricity that you were already producing to meet
5 your own load; is that correct?

6 A. That is correct.

7 Q. Okay. So, it wouldn't have been eligible for
8 the Bioenergy Call.

9 A. It was eligible from what we understood
10 because there was a lot of discussion at the time
11 whether we were a customer or not a customer if you
12 read the RFP guidelines, and, you know, so much so
13 that when--if you go back to the RFP guidelines, BC
14 Hydro was supposed to submit our GBL on May 2.

15 And we got a letter saying that it was
16 not--our Biomass Realization Project was not eligible,
17 but they didn't set a GBL for us. And that was the
18 problem. And when we followed up with them, they said
19 we--you need to be net-of-load.

20 And we said, well, net-of-load doesn't work
21 for a GBL, setting a GBL in a contract, and that's
22 what BC Hydro required for the RFP process.

05:24:06 1 Q. Mr. Merwin, I appreciate that. I understand,
2 you know, and the first part of your question I think
3 was responsive. You're skipping ahead a little bit.
4 I'm going to get to May 2008, and you definitely can
5 respond to this.

6 A. Okay.

7 Q. Then.

8 So, I'd just like to understand, though, is
9 your contention that your electricity was not existing
10 self-generation? Because here the Ministry has said
11 quite clearly, I think, that existing self-generation
12 is not to be purchased.

13 A. Some of it was our existing, but I believe it
14 was our above-load power. So, yes, it was all
15 existing but some of it was below-load and some of it
16 was above-load power.

17 Q. Okay. Thank you.

18 I would like to take a look now at how the
19 Bioenergy Call process unfolded. Can you turn to Tab
20 26, please.

21 A. Okay.

22 Q. So, we saw the RFP--and this is Exhibit

05:25:05 1 R-116--and we saw a minute ago the RFP started on
2 February 6, and this is an Information Session held
3 two weeks later on February 20; is that right?

4 Look at the date on the first page.

5 A. Yes.

6 Q. Did you or other representatives of the
7 Claimants attend this meeting?

8 A. I'm pretty sure someone--I don't specifically
9 remember the meeting, but I'm pretty sure myself or
10 someone else from our company attended this meeting,
11 yes.

12 Q. Okay. All right. Can you turn to Page 22 of
13 this presentation.

14 So, this is some bullets about Generator
15 Baselines for the Bioenergy Call, and the first bullet
16 states "the purpose of the GBL is to find incremental
17 generator output that can be considered for
18 prospective energy sale."

19 Is that right?

20 A. Yes, that's right.

21 Q. Okay. Okay. We will come back to this. Can
22 you turn to--again, I just want to get a sense of the

05:26:12 1 process--so, Tab 27.

2 So, this is about a week later, on
3 February 26, 2008, and this is--sorry, Exhibit R-113.
4 This is an addendum to the RFP, and I think this is
5 essentially the Registration Form that we looked at a
6 few minutes ago, the blank Registration Form; is that
7 right?

8 A. I think this must be the one that we filled
9 out after in our submission, yeah.

10 Q. Okay. Can you turn to Page 5 of this
11 document, please.

12 So, here we have a schedule called
13 preliminary GBL data, and just to get a sense of
14 what's here, there is some instructions on filling it
15 out, and Paragraph 2 and 3 provide instructions, and
16 here, too, there's some basic data asked for from
17 proponents that are interested in registering. We
18 have Paragraph A, the generator number; B, the
19 nameplate capacity; net operating output in C; the
20 annual energy output in Paragraph D; and E is the
21 estimated GBL; is that right?

22 A. Yes.

05:27:40 1 Q. And Section B, just again to get a sense, and
2 we will get back to this in a minute, there are
3 commitments. And here we have a column asking for
4 Contracted Parties and then annual energy committed,
5 and then expiry of commitment. So, this would be
6 things like EPAs.

7 A. And it was also our--what we had filled out
8 that we had contractual commitments to FortisBC that
9 would be--because the requirements were those
10 commitments needed to expire prior to signing the EPA
11 or prior to COD. And in each of the forms we put
12 FortisBC, NorthPoint Energy, and FortisBC again on
13 because we were supplying ourselves and we were in the
14 process--it was highlighting that we were in the
15 process of negotiating our deal with Fortis to sell
16 our--to purchase all of our load at embedded-cost
17 rates from Fortis.

18 Q. So, you're talking about the Brokerage
19 Agreements and I think--

20 A. No, no.

21 (Overlapping speakers.)

22 Q. You are--so, the first two items you're

05:28:52 1 referring to were the Brokerage Agreement with
2 FortisBC and then the Brokerage Agreement with
3 NorthPoint? Or the Market Sales Agreement with
4 NorthPoint?

5 A. I'm referring--

6 Q. And then finally you were referring to the
7 Power Supply Agreement that you were negotiating with
8 FortisBC; is that right?

9 A. Yes.

10 PRESIDENT VEEDER: It's 5:30. Would that be
11 a convenient time to stop?

12 MR. OWEN: Sure.

13 PRESIDENT VEEDER: Let's stop here. We will
14 resume at 9:00 tomorrow.

15 We ask you not to discuss the case or your
16 testimony until you come back at 9:00 tomorrow
17 morning.

18 THE WITNESS: Okay. Thank you. Thank you.
19 Thank you.

20 MR. OWEN: Thank you, Mr. Merwin.

21 PRESIDENT VEEDER: Thank you.

22 (Whereupon, at 5:30 p.m., the Hearing was

05:29:30 1 adjourned until 9:00 a.m. the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAWN K. LARSON

