Before the

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

In the Matter of Arbitration between:	
MERCER INTERNATIONAL INC.,	
Claimant,	
and	ICSID Case No. ARB(AF)/12/3
GOVERNMENT OF CANADA,	
Respondent.	
	Volume 8

HEARING ON JURISDICTION AND THE MERITS

MAY CONTAIN RESTRICTED ACCESS AND CONFIDENTIAL INFORMATION

Friday, July 31, 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

Also Present:

MS. ALICIA MARTÍN BLANCO
Secretary to the Tribunal

Court Reporter:

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APPEARANCES: (Continued)

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT VEEDER: Let's start Day 8, the 31st of July. The timing, you'll not be surprised from the Parties, is the same as our Secretary announced on Wednesday evening. The Claimants have 2 hours, 38 minutes left, and the Respondents have 2 hours, 25 minutes left. In the circumstances, these are not material.

We have Closing Oral Submissions, two hours each from each Party, 20 minutes in Reply, and the timing is obviously not affected by questions and interruptions from the Tribunal.

Is there anything else we need to address before we start with the Claimant's Closing Oral Submissions?

MR. SHOR: Nothing on the Claimant's side, Mr. President.

PRESIDENT VEEDER: On Respondent's side?

MR. OWEN: Nothing, Mr. President.

PRESIDENT VEEDER: We give the floor to the Claimant. Both sides have now closed their case as regards evidence. Please, when you want to have a

09:32:40 break, you indicate when the break should take place, but we do need one break within those two hours.

MR. SHOR: Thank you.

PRESIDENT VEEDER: So the Claimant has the floor.

CLOSING STATEMENTS BY COUNSEL FOR CLAIMANT

MR. SHOR: Good morning, Mr. President, Members of the Tribunal.

Mercer has proven everything we told you we would prove in our Opening. Mercer's Witnesses did not evade questions. Unlike Mr. Dyck, if they were asked to review the arithmetic they described in their Witness Statement, such as we have on DX-2, they did not obfuscate. As we will outline, the testimony supports Mercer on every single issue before you.

Whether Canada chooses to characterize our arguments as "residing in the forest, in the trees, or in the granular moss," the Hearing revealed that Canada's arguments reside in no real forest at all.

Canada gave you a mythical forest with two GBL minotaurs, NECP Rate Rider fairies with real embedded-cost rates, Side Letter implementation, and a

09:33:42 fantastical array of supposed options for Celgar that have never been available to Celgar in the real world.

Let's begin by reviewing the key themes we will discuss today.

First, Mercer's investments position Celgar as the most efficient pulp mill self-generator in British Columbia. The Celgar Mill has invested more in self-generation assets than any other pulp mill in B.C., starting with its $850 million rebuild in 1993, followed by Mercer's Project Blue Goose $28.5 million investment in both pulp production and electricity generation and reliability, and followed by the 2010 Green Energy Project where it added the second turbine.

It was undisputed during the Hearing that Celgar is unique because it is the most efficient pulp mill electricity self-generator in British Columbia.

And the final point I want to make, which is a point that Canada seems not to understand, is that the Celgar Mill is a Mercer resource; it is not a BC Hydro resource, and it is not a B.C. resource. We built it. We paid for it. It's ours.

09:34:56 Second point. Immediately after investing in the Mill, Mercer sought to maximize the returns on its generation investments. Concurrent with its efforts to maximize electricity generation were its efforts to maximize electricity revenue.

PRESIDENT VEEDER: May I interrupt you a second? We have a technical problem in that I've been told the feed is not working. If this is still open--which, I take it, it is--we should be providing the feed. Can we just pause for one moment.

MR. SHOR: I'm not sure that this is open.

MR. OWEN: Are you covering restricted access information?

MR. SHOR: In damages, certainly.

MR. OWEN: Well, why don't we close during damages?

MR. SHOR: Okay. Actually, in discrimination. Just remind me if I forget.

PRESIDENT VEEDER: Let's stop a second. I'm told it is working now. But we don't have our screen working, so we can't tell whether it is open or closed from here. But somebody else can tell us.

09:36:19 But is this something you want open or is this something any Party wants closed?

MR. SHOR: We can have this portion open. When we get to the discrimination, we can close it down.

PRESIDENT VEEDER: Okay. Sorry for the interruption. It's now working and it's now open.

MR. SHOR: Point 1, Mercer invested in self-generation.

Second point. Concurrent with those investments, Mercer engaged in activities to maximize its electricity revenue. It entered into a July 2006 Transmission Agreement with FortisBC, a July 2006 Brokerage Agreement with NorthPoint, a 2006 Brokerage Agreement with FortisBC. June 2007, it sought to sell its electricity to Fortis, and in August 2008 it entered a PSA with FortisBC to allow full arbitrage of its self-generated electricity.

Now, Canada makes much of the point that no incentive was necessary, but Canada forgets the point that the market itself provides incentives. It is not necessary for Canada and British Columbia to subsidize

investments. The market provides an incentive, and the market provided the actual and potential sales opportunities that incentivized Celgar's Blue Goose investment.

One thing that I think is worth making clear is that Mercer could never have intended to use the new generation from Project Blue Goose for self-supply because, as Canada's itself argues, the Celgar Mill typically would generate electricity surplus to its load. If it was generating surplus electricity, that was not electricity that was intended to be used for self-supply.

Third point. When it comes to the regulation of self-generators, B.C. has a completely nontransparent regulatory regime. As it began exploring its options for selling its energy beginning in 2006 and 2007, Mercer confronted this nontransparent regulatory regime. There is no statute or regulation or binding rule of law of any kind. There is no Province-wide policy of any kind. G-38-01 directive was out there, but, by its terms, that was directed to BC Hydro. And the 1993 PPA, which was

09:38:35 then in existence, did not restrict FortisBC sales to Celgar in any way, shape, or form. That was Mercer's starting point.

Nevertheless, Mercer looked at this regime and followed the principles of G-38-01, approached its utility in 2007 to establish its access to embedded-cost utility electricity while selling its own electricity, just as G-38-01 teaches it should.

Canada then acted to thwart Celgar. Order G-48-09 issued in 2009 imposed a net-of-load standard--net-of-load access standard on Celgar, alone among pulp mills in British Columbia, and it had a unique and absolute prohibition on access to BC Hydro Heritage Resources while selling power.

Now, that was contrary to the Heritage Contract that B.C. had enacted years earlier that provided that every person in B.C. should have access to the benefits of BC Hydro Heritage Resources. Celgar got none while it was selling electricity.

And I want you to understand that this is the most pernicious aspect of G-48-09 because the requirement to hive off PPA Power created a dilemma

for FortisBC because, as we've discussed, electrons are not color coded, and the restriction on PPA Power effectively became a restriction on FortisBC power as well because it could not hive off the PPA Power.

This was--around the same time, Celgar concluded its 2009 EPA with BC Hydro, in which BC Hydro insisted on a load-based GBL with exclusivity provisions that precluded below-GBL sales, below-load sales to third parties. Separately and collectively, these two Measures, first, cut off Celgar's access to embedded-cost utility power while it was selling power; two, imposed compulsory load displacement obligations on Celgar; three, precluded all arbitrage; and four, precluded Celgar from selling any electricity below its 2007 load. No other pulp mill in British Columbia was subject to these same restrictions.

Our fifth theme. There was no justification for Canada's less favorable treatment of Celgar. Let's start with Order G-48-09. Mr. MacLaren, Mr. Les MacLaren, could not justify the application of a more restrictive standard on Celgar in G-48-09 than other

09:41:19 pulp mills in G-38-01. He admitted that he knew it was a more restrictive standard at the time he advocated it to the BCUC.

In his written statement, he gave two reasons for advocating a more restrictive standard. He said, first, FortisBC would not cooperate; and, second, BC Hydro did not have the data to calculate a GBL for Celgar. Both of those during cross-examination collapsed.

He admitted that, if the Commission had ordered FortisBC to set a GBL, it would. And Mr. Swanson stated that, if he had been ordered to set a GBL for Celgar, he would have. So, the lack of cooperation of FortisBC is a red herring.

Second, he said, Well, BC Hydro didn't have Celgar's generation data, but he admitted they could have asked for it. He also admitted that the BCUC could have compelled Celgar to provide it. That argument, too, collapsed. At the time the BCUC provided no justification for imposing a more restrictive standard on Celgar than on other pulp mills, and Mr. MacLaren's post-hoc justifications

didn't work either.

The testimony revealed with respect to the GBL that BC Hydro has no coherent dividing line between preexisting generation and new generation. And, understand, that the GBL and the preexisting and new existing--"preexisting" and "new and incremental" generation are not different concepts. What is preexisting--the line separating preexisting generation from new and incremental generation is not set by physics and observations or other constructs that Canada's Witnesses tried impose. It is set by the GBL. So if there is no consistent GBL rule, there is no consistent dividing line between new and preexisting.

And, finally, BC Hydro did not even follow its own vague post-hoc GBL principles. You only need to look at two things. Mr. Dyck admitted that he did not follow the Addendum 8 to the Bioenergy Phase I RFP definition of "incremental power" to Celgar. That was the "deer in the headlights" moment when Mr. Dyck was shown Addendum 8, which says "incremental power" is defined to include sales to third parties. He said he

didn't apply that definition to Celgar because Celgar's situation was unique. Everyone was unique in BC Hydro's eyes, so there were no rules.

The second point to prove that BC Hydro didn't follow its own vague post-hoc GBL principles is the Tembec Skookumchuck example. Mr. Dyck stated at the outset of his testimony that you must normally rely on actual self-generation data used for self-supply; but if you abandon that in favor of a hypothetical model because of a claim by the self-generator that they're going to behave differently absent a new contract, then you must validate and substantiate those claims.

What validation or substantiation did BC Hydro perform of Tembec's claim that it would not operate the hog boiler absent a new contract before it was self-generation? It was finger pointing: I thought somebody else would do it. I thought they did it. We didn't have to do it. That was not my responsibility.

The fact remains they didn't do anything. So, you have a methodology that they say requires

09:45:05 substantiation. They didn't do any substantiation. They didn't follow the methodology.

The juxtaposition of the treatment of Celgar and Tembec is striking. Recall for Celgar, Celgar had incremental generation as a result of its Project Blue Goose that installed in 2007, its baseline year. It also had surplus electricity that it was selling on a consistent basis to NorthPoint and FortisBC, 23 megawatts in 2007. Yet, both of those components were labeled and continue to be labeled by Canada as "preexisting generation," historically used for self-supply, even though Blue Goose was new and the surplus generation was never used for self-supply and could never have been used for self-supply. That's how they treated Celgar.

Take a look at Tembec. Tembec had preexisting generation from a hog boiler installed in 2001 that was not idle and which had been used for self-supply for eight years. Yet under BC Hydro's methodology, that was treated as new and incremental. Canada's GBL policy toward Celgar can be summarized as "no good deed goes unpunished."

09:46:36 It is undisputed--well, I don't want to say it was undisputed. It was resisted by Canada's Witnesses that Celgar's historical load displacement benefited other ratepayers. They seemed to have this notion that there could be harm to other ratepayers if Celgar withdraws its load displacement services, but there is no benefit in the first place. I think it became fairly obvious to everyone that those are flip sides of the same coin. There can't be harm from withdrawing the benefit unless there was a benefit in the first place.

Through G-48-09 and the Exclusivity Provisions and the EPA combined with Celgar's GBL, B.C. effectively compelled Celgar to provide full load displacement services without compensation. Why did they do that? Because they could. BC Hydro and B.C. got all the benefit of Celgar's existing generation, all the benefit of its new investment in 2007, and all the benefit of its surplus electricity that it had been selling to FortisBC and NorthPoint without having to pay Celgar at all. This is what Dr. Rosenzweig means by "efficient resource allocation."

09:47:53 The irony is when Celgar seeks to withdraw the benefit it had been providing and goes to FortisBC and asks for a rate for replacement energy, FortisBC says, "You're causing all this harm." They don't give any recognition to the preexisting benefit. They say, "Cost-causality principles require us to charge you the full incremental cost of the replacement energy we have to buy."

And Mr. Douglas, you're forgiven for misunderstanding how that actually worked because Canada misled you in the Opening. There is no blending. There is no embedded-cost rate. As Mr. Swanson told you, Celgar does not get the benefit of any of the historical assets of FortisBC, the low-cost assets, the low-cost hydro resource assets, because as Mr. Swanson says, that's already used up, you don't get any benefit on that. We're not just going to buy a portion of the power that you require. We're going to have to go out and buy the entire amount that you require, and we're going to charge you, you alone, the incremental cost of that.

This is my favorite chart, and we spent a lot

of time on this, and don't expect fancy animation for anything else because this took a lot of time. But I wanted you to understand what happened. G-48-09 and the requirement to hive off PPA Power put Celgar in a box. There is Celgar going into the box. You can also think of the box as Canada's mythical forest. And I want you to understand that Celgar had no way out of the box and still has no way out of the box. Let's look at all of the arguments Canada makes.

First, they say G-188-11 said you can sell all your embedded--you can sell all your power and obtain embedded-cost power. What they left out of that is there is no rate for it yet. It is not available. It is mythical, like their forest.

Second, they suggested we could go to the Ministry of Energy, if we've really been wrong. Well, we tried that route. Remember what Mr. MacLaren said when we told him our GBL had been set unfairly? We asked him, Did you look at how Celgar's GBL had been set? No, he couldn't be bothered with that.

Next, we have the argument that G-48-09 only restricts Fortis. It doesn't restrict Celgar. This

09:50:29 ignores the inability to color-code the electrons. It directly restricted Fortis from transferring PPA Power to Celgar, but it also indirectly restricted FortisBC from transferring its own power to Celgar because it couldn't segregate its electrons. Then there is the argument we heard for the first time with Mr. MacLaren: Celgar could get two GBLs, we're told. Unclear how that works. Mr. MacLaren certainly couldn't explain it. It is unclear where it says we can get two GBLs. They're just making this stuff up as they go along.

Next, they criticize Celgar for not requesting consistent Province-wide regulations. Well, it wasn't Celgar's obligation to provide consistent treatment. That was Canada's obligation. But this was the part of the testimony where Mr. Merwin was shown a BCUC submission and asked, well, your Expert here--I'm sorry, it might not have been Mr. Merwin. It might have been one of the Experts who was shown--well, Mr. Merwin argued in the BCUC that you shouldn't take the time to impose consistent-wide regulations. Isn't that inconsistent

09:51:41 with what you're arguing here? Well, of course, it is inconsistent what we're arguing here because we're arguing from different places and we're arguing with different objectives and we're arguing with different information. Mercer, at the time, was in the box. It was looking to get out of the box. It wasn't asking how it got in the box in the first place.

Next, we're told, well, you could have gotten a FortisBC GBL. Mr. Swanson says, we were open. We proposed 41 megawatts. We're going to give you a higher GBL than you have with BC Hydro. That collapsed under analysis too because he admitted that, well, he really couldn't give Celgar a GBL without consulting with BC Hydro. That was the third party that was in the room with the negotiations. Does anyone here really think that BC Hydro was going to agree with FortisBC that Celgar could have a FortisBC GBL that somehow was lower than the BC Hydro GBL?

Next, we got criticized for not seeking reconsideration of Order G-48-09, even though we showed you in a later proceeding we did ask for reconsideration of the principles of G-48-09. The

09:52:49 Commission gave some reconsideration and rejected that. And I want you to keep in mind the "Celgar-can't-win" mentality that we've heard throughout the Hearing. Celgar gets criticized if it doesn't seek reconsideration of decisions, if it doesn't appeal. But when it does appeal certain other decisions, it gets criticized for delaying the proceedings, suspending the proceedings. We can't win. Whatever route we try and take is the wrong one, according to BC Hydro.

Finally--actually, we have two more. We had the NECP Rate Rider. That's the corollary to G-188-11. It's not available. It hasn't been approved, and it is not an embedded-cost rate. All of these the mechanisms, it's important to point out--even if they existed, which they don't, would give Celgar something dramatically different than all the other pulp mills in B.C. have. None of these mechanisms give them access to a portion of BC Hydro Heritage Resources. None of these mechanisms give them true embedded costs rates for arbitrage.

Finally--and this was the most astounding to

09:54:05 me--we had the argument that, "Well, you just need to activate your Side Letter with us."

Well, the testimony on that came out, and Mr. Merwin testified that he wrote BC Hydro not once, but twice, asking them to implement the Side Letter. And BC Hydro, Mr. Scouras, said here, Well, we didn't get around to it because we were more focused on this proceeding. So BC Hydro fails to comply with its contractual obligations under the Side Letter because Celgar availed itself of its rights under NAFTA.

So the bottom line on all of these supposed ways out for Celgar is that there is no clear path available, and there is no clear path equivalent to G-38-01, the treatment that everybody else in British Columbia got.

Our final theme is that what's really going on here is that British Columbia wants and gets the benefit of Celgar's below-load self-generation for free because BC Hydro doesn't pay Celgar anything for its below-load electricity, and Celgar must pay the cost of production. BC Hydro, through the effect of the PPA, BC Hydro's customers get the benefits of that

09:55:20 self-generation without ever having to pay anything for it.

Mr. Douglas keeps asking, why would BC Hydro arbitrarily choose to procure less electricity from the Claimant? If we actually had more incremental energy to sell, what possible reason could BC Hydro have not to procure it? And the answer is, because they took it for free. It is not hard to figure that out. And, again, as I mentioned, this is what Dr. Rosenzweig refers to as "efficient resource acquisition." Why should--what he means by "efficient resource acquisition" is BC Hydro pays the lowest cost possible for resources, and if it can Celgar's resource without having to pay for it, that's efficient.

We're now going to turn to our overall presentation, and it consists of five parts. We're going demonstrate that the Tribunal has jurisdiction over all claims, that Mercer has proven its claims, that Mercer suffered substantial damages, and then we're going to turn to Canada's half-truths and untruths. This was a rather long session, so we may

09:56:24 not get through all of it.

And, finally, we're going to revisit the questions we posed in our Opening Statement. And I'll turn to Gaela to present on jurisdictional issues.

PRESIDENT VEEDER: Just before you do that, you heard an explanation from the Respondent that some of their objections are admissibility, some are jurisdiction. It may not matter, given that we don't have bifurcation, but do you have a position on that?

MR. SHOR: We don't think it matters whether you call it jurisdiction or admissibility. Just keep in mind that the procurement objection, which they refer to admissibility, doesn't apply to the FET claims.

MS. GEHRING FLORES: Good morning, everyone.

Starting with jurisdictional issues and admissibility, broadly speaking, there are two interrelated Measures at issue in this case. The first is BC Hydro's imposition of an unfair and discriminatory GBL on Celgar and its related Exclusivity Provision, and the second is BCUC Order G-48-09.

09:57:33 Canada has raised jurisdictional and admissibility objections as to this first issue, the GBL Measures, but has not done so with respect to the BCUC Claim G-48-09.

As we discussed in our Opening, Canada presented three jurisdictional objections, the first of these relates to the limitations period under NAFTA. The requirement is that a claim should be brought three years from the date on which Mercer first acquired, or should have first acquired, knowledge of the alleged breach, and knowledge of loss or damage.

As indicated in our Opening, the standard here is met. The Request for Arbitration in this case was filed April 30, 2012. Therefore, the relevant date for the limitations period would be April 30, 2009. Mercer's claims are within this time period. The first claim, based on BCUC Order and Decision G-48-09 was issued on May 6, 2009. There is no objection with respect to this.

The Measure Canada does have an issue with is Celgar's discriminatory and unfair GBL and related

09:58:43 Exclusivity Provision.

Canada has argued that the three-year period ran on the GBL Measures because Celgar's EPA containing its GBL was signed in January 2009. But Canada's argument is misguided for several reasons. First, Canada's argument belies the fact that a GBL is of no force until the BCUC approves Celgar's GBL. Canada admitted as much in its written pleadings, and its Witnesses have confirmed it in this Hearing. And on the screen you'll see some of those quotations.

The key part here--

Yes. Yes, Professor Douglas--

ARBITRATOR DOUGLAS: It's a question of law, isn't it, whether or not the EPA comes into force before or after BCUC approval?

MS. GEHRING FLORES: Sorry, I didn't quite hear.

ARBITRATOR DOUGLAS: Isn't it a question of law when the EPA comes into force?

MS. GEHRING FLORES: Yes. And it is our contention, and we believe we've proved it, that the EPA and its related GBL provision did not come into

force. It couldn't come into force until the BCUC approved it.

ARBITRATOR DOUGLAS: It's just that the EPA says--it appears to say something to the contrary. It says that it comes into force on the effective date, and the effective date is the date of signature.

MR. SHOR: Mr. Douglas, I think the effective date of the EPA, when it came into force or when the GBL provisions and Exclusivity Provisions took effect, which, in fact, didn't happen until the Commercial Operation Date much later, is something of a red herring. Because the issue under NAFTA is, when did he we have knowledge of the breach? And for the discrimination claims, the knowledge of the breach occurs not whether our treatment is afforded, but when our treatment is afforded and we have knowledge that someone else was afforded less favorable treatment. That's the part Canada ignores, and I think if we focus on that, it will be much easier to dispose of this issue.

PRESIDENT VEEDER: And that's your second argument. But the first argument does, indeed, have

10:00:47 to address the fact that Article 21 of the EPA does define the effective date, and, under that definition, the effective date is the 29th of January, 2009. Now, are you saying that the whole EPA was suspended until it was approved on the 31st of July?

MR. SHOR: I'm saying--again, our focus is on the GBL and the Exclusivity Provisions of that EPA. As a legal document, it was signed when it was signed.

PRESIDENT VEEDER: Yeah.

MR. SHOR: But different provisions actually took effect on different dates. Celgar, for example, was under no self-supply obligation. It wasn't restricted from selling to third parties until much later, until the Commercial Operation Date. So, if you're going to look for a contractual date on when the Measure at issue took effect, we think that's the most relevant date because the Contract--and this was kind of Canada's argument too. Even though the Contract came into effect between the Parties on that date, as a legal matter, it was subject to a condition subsequent. And that condition subsequent was it had to be approved by the BCUC. The BCUC had the

10:01:56 authority to approve or disapprove the Contract. So, until that happened, the Parties really couldn't implement the Agreement.

ARBITRATOR DOUGLAS: Which provision is the condition subsequent? It's been a while since I looked at it, but my understanding was that each Party had a right to terminate in the event that the BCUC didn't approve of the EPA.

MR. SHOR: Well, that's a matter of law. Under BCUC law, as I understand it, is the--that since this document has to be approved by the BCUC, it does not really come into effect. It cannot be implemented until after the BCUC approves it.

MS. GEHRING FLORES: And also I think it's important to keep in mind the Side Letter Agreement of Parties, which basically provided that the GBL-related Exclusivity Provision would not--would be changed if the BCUC issued a decision basically allowing Celgar to sell its below-load or below-GBL electricity.

PRESIDENT VEEDER: Just come back to the primary point because there are several points in succession.

10:03:05 MS. GEHRING FLORES: Sure.

PRESIDENT VEEDER: You cited Paragraph 330 of the Respondent's Counter-Memorial, and what they seem to be saying there is that the whole EPA had no force at all, all the terms and conditions of the EPA, until it received the approval of the BCUC.

MR. SHOR: And we agree with that.

PRESIDENT VEEDER: They cite that with some effect. But are you saying that part of it came into effect? That the Exclusivity Provision, for example, did not come into effect until approval?

MR. SHOR: The exclusivity agreement--the Exclusivity Provisions by the terms of the Contract did not take effect until later, until the Commercial Operation Date.

PRESIDENT VEEDER: And what about the other terms? Was there no EPA at all until something was approved on the 31st of July?

MR. SHOR: There was an EPA, just as there was a PSA between Celgar and FortisBC, but until those agreements received approval of the BCUC, they have no implementation. They have no legal effect, as Canada

10:04:06 itself argued.

PRESIDENT VEEDER: Thank you.

ARBITRATOR DOUGLAS: Perhaps, and you don't need to do it now, but it may be relevant for a separate issue, which is there's no--I don't think there is any dispute that the BCUC is exercising sovereign powers. But there is a dispute as to whether or not BC Hydro is. Now, if the whole thing doesn't have any effect until BCUC approves the Contract, then--

MR. SHOR: That's the sovereign power.

ARBITRATOR DOUGLAS: That's the sovereign power. So, for that reason, I think the point may be relevant. So, at some point, if you did want to take us to the EPA and point out the provisions that it relied upon, that might be useful.

MR. SHOR: We will take a look at it when we have a minute.

MR. DOUGLAS: Sure.

MS. GEHRING FLORES: I think we can go to the next slide.

And so we come to a relatively

straightforward inquiry here. How is Mercer supposed to know that it's received unfair or discriminatory treatment if it has no knowledge of its comparators' treatment in this case involving discrimination and unfair treatment?

One of Celgar's comparators came along only on November 13, 2009, when the BCUC approved Tembec's EPA. In the same vein, the Howe Sound EPA, which also contained a significantly more favorable GBL than Celgar's, was signed on September 7, 2010. To be sure, Howe Sound's EPA was exempt from BCUC review, thus, unlike in Celgar's EPA, the GBL was effective without review. These events all occurred within the three-year limitations period. And this really shouldn't be a controversial point.

Despite the fact that Celgar's comparators received treatment on a specific date, Mercer had no knowledge of that treatment or the loss that could be associated with that treatment. Mercer's first knowledge of breach and actual loss was first acquired through its counsel in this arbitration. It didn't know how its comparators were treated. It still

10:06:37 doesn't know. We know. The lawyers know. We found out after Canada's document production in response to our document request.

Canada's Witness, Mr. Dyck, in fact, confirms that Mercer could never have acquired knowledge of the actual treatment of its comparators, ruling out the possibility of knowledge of breach and loss outside the limitations period. Canada's second jurisdictional objection is that--

PRESIDENT VEEDER: Just a question. Not quite so fast.

MS. GEHRING FLORES: Sorry.

PRESIDENT VEEDER: You've given us the dates for two of the comparators, Tembec and Howe Sound. Are there any other dates we should know about? What was the date for Tolko?

MR. SHOR: 2001.

PRESIDENT VEEDER: So what's the position about that one?

MR. SHOR: We're not comparing ourselves to Tolko because Tolko is a sawmill.

PRESIDENT VEEDER: So the only two

10:07:32 comparators you're relying on are Tembec and Howe Sound.

MR. SHOR: Tembec and Howe Sound, and for both--for Tembec, including the 1997 EPA, about which we had no knowledge, and about which, I should add, Mercer still has no knowledge. All of that is restricted access information. That is why Mr. Dyck's testimony is so important. He confirmed that he never told Celgar how others were treated, and Canada has presented no evidence that Mercer knew or should have known of the treatment of these other comparators at any time.

PRESIDENT VEEDER: As regards this first knowledge, could you look at the U.S. submission under Article 1128 NAFTA. Just look at Paragraph 7 at Page 3 if you have that there.

MR. SHOR: I don't know if we have it in front of us, but is that the one where they argue it's when you acquire knowledge of how the first comparator is treated?

PRESIDENT VEEDER: It is. But let me read it out because it's rather important. I'll read the

10:08:38 whole paragraph slowly. "But in the context of national treatment and Most Favored Nation Treatment Claims, if an investor or an investment receives treatment that is less favorable than treatment provided to comparators in like circumstances in accordance with Articles 1102 and 1103, the breach would occur on the later of the date that, one, the first comparator in like circumstances received treatment or, two, the investor or investment received less favorable treatment."

MR. SHOR: Yeah. We do not agree with that because, in the first instance, it talks about when the comparator first received treatment. That's not the language in the NAFTA. The NAFTA language is when the investor first acquired knowledge.

PRESIDENT VEEDER: Let me finish then because I accept what you're saying except for the next sentence. "Accordingly where a comparator in like circumstances received treatment prior to the less favorable treatment accorded to an investor or investment, the limitations period would commence on the date the investor or investment received its

10:09:50 1 treatment to the extent that, on that date, the
2 Claimant knew or should have known of the breach and
3 of the alleged damage or loss."
4 Now, do you agree or disagree with that
5 statement?
6 MR. SHOR: I think we would agree that
7 statement that it's the date on which we first
8 acquired or should have acquired knowledge of how the
9 comparator was treated, which didn't happen on the
10 date we were afforded treatment. It happened later
11 and still has not fully happened because all the
12 information still is treated as restricted.
13 But there's a second premise in the U.S.
14 analysis, which is that what I'll call the first
15 comparator rule. And I think that presupposes that
16 all the comparators are treated the same and we're
17 treated worse. I think if you read our response to
18 that, we tried to argue that can't possibly be the
19 case, and we gave the example of--again, to just look
20 at simplified GBLs, for example, let's say that Canada
21 in Year 1 afforded a comparator, a GBL that allowed it
22 to arbitrage 10 percent of its electricity, and then

10:11:04 five years later it afford treatment to another comparator that allowed it to arbitrage 50 percent of its electricity. We can't be time barred from bringing a claim relating to the 50 percent by virtue of the fact that they gave 10 percent five years earlier. Each instance of more favorable treatment that is different than the earlier provision of more favorable treatment creates a new claim.

PRESIDENT VEEDER: So you would say a new breach, therefore a new Claim.

MR. SHOR: New breach, that's right.

PRESIDENT VEEDER: Okay. Thank you.

MS. GEHRING FLORES: Canada's second jurisdictional objection is that BC Hydro did not have delegated governmental authority in establishing its GBLs. This objection, too, is meritless. The plain text of BCUC Order G-38-01 is inescapable. In that order, the Commission "directs" BC Hydro to establish GBLs for self-generators.

Now, we've heard Canada and Witnesses say that the term or acronym "GBL" is not mentioned in the Order. The Order, I believe, uses the word "baseline"

10:12:26 instead of "generator baseline." But we urge you to review the text of BCUC 38-01 and the subsequent BCUC Decisions that we pointed out to a variety of Canada's Witnesses that clearly say that 38-01 was directing BC Hydro to establish GBLs for its customers. In those later decisions, they use the term, the specific acronym "GBL," and they're talking about 38-01, and they're talking about BC Hydro setting GBLs for its customers in EPAs.

Canada's Witnesses have confirmed that with Order G-38-01, the BCUC expressly "directs" BC Hydro to determine GBL's for its customers. In fact, as you can see from the transcript, Canada's Witnesses, Messieurs MacLaren, Dyck, and Scouras all use variations of the term "directed" to explain the BCUC's mandate to BC Hydro.

During the Hearing you no doubt saw Canada's Witnesses bending over backwards trying divorce BC Hydro's GBLs from BCUC Order G-38-01. We heard about this secret 2002 BC Hydro policy or approach to develop GBLs. I think we can take that for what it is. When these Witnesses were confronted with BCUC

10:14:08 Orders that absolutely rebut what they're saying, they didn't really have much to say.

As I noted in relation to the limitations period claim, both Parties agree that the GBL and related Exclusivity Provision were approved and made effective by the BCUC. This approval independently provides the basis for finding State action as a matter of international law.

ARBITRATOR DOUGLAS: Just on that point, the language of Article 1503, it lists some examples of delegated sovereign authority or Governmental authority, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges. It doesn't appear to be an exhaustive list. But is it your submission that BC Hydro's setting a GBL falls within one of those examples, or it's not covered by those examples?

MR. SHOR: The closest example in which it falls is the setting of quotas. What Order G-38-01 and what a GBL does is limit the obligation to of a utility to serve an eligible customer. It provides a quota on the amount of electricity that Celgar can

10:15:24 obtain from FortisBC. So that is the closest analogy there. It is directly appropriate. We get a quota. We are limited in how much embedded-cost power we can obtain from our utility. And it's also a regulatory Measure.

PRESIDENT VEEDER: Now, the U.S. submission under Article 1128 referred to NAFTA Note 45 to which the Claimant responded in writing. Do you want to say anything about that because that helps us a little bit on the meaning of "delegation" in Article 1503(2)?

MR. SHOR: I apologize that we didn't bring the submissions, and I don't remember what NAFTA Note 45--

PRESIDENT VEEDER: It says "Delegation includes a Government Order, directive, or other act transferring to the monopoly or State enterprise authorizing the exercise by the monopoly or State enterprise interposed of governmental authority."

MR. SHOR: Yeah, that too obviously is helpful. It's a directive to the monopoly. It was a directive to BC Hydro. Keep in mind the way the decision was characterized. Remember the

10:16:37 circumstances of G-38-01. BC Hydro went to the BCUC and asked for clarification of its obligation to serve. It wanted to know what its obligation to serve a self-generator was when it was selling self-generated electricity. And recall Mr. MacLaren's testimony when I gave him the example of I wanted to build a house in Vancouver, did BC Hydro have to serve me?

"Yes," he said.

"Can BC Hydro agree not to serve me? Can they enter into a contract with me not to serve me?"

"No. It is a completely regulatory issue." He stated that the only entities that have an ability to restrict the obligation to serve are the BCUC and the Government by Order in Council. Those are governmental functions. They are regulatory functions. They are not commercial functions at all.

The GBL, the self-supply obligation at its heart, at its core--and the BCUC has said that--at its core, it's a limitation on the obligation to serve, and that is a purely regulatory function. That is not a commercial function. It is not something BC Hydro

10:17:46 has the power to do on its own. And, in fact, it never set a GBL until it was ordered to do so by the BCUC and Order G-38-01.

ARBITRATOR DOUGLAS: Just as a hypothetical, suppose in the EPA BC Hydro just simply said we're going to purchase all your electricity above 50 megawatts.

MR. SHOR: Then we have no case. I fully concede that, and we conceded that in our--and that's the key distinction in this case. The GBL is used by BC Hydro to define its procurement obligation above that amount. But if that's all that we're doing, if it allowed third-party sales, for example, Mr. MacLaren's world in Germany when--the hypothetical I took him through, if that were the case--remember, our GBL is 349. The amount we sell to BC Hydro is 238. In that world where they weren't restricting our sales to third parties, where they weren't imposing a self-supply obligation, and they weren't limiting the obligation of the utility to sell, in that world all the Contract would need to say is BC Hydro agrees to purchase 238. You wouldn't need the word "GBL" at

10:18:54 all. You wouldn't need to refer to 349, and you wouldn't have the Exclusivity Provisions.

So, don't separate the GBL from the Exclusivity Provision. That's all we're concerned about. It's a single coherent Measure. And it's the restriction on third-party sales, the limitation of the obligation to serve, the imposition of a self-supply obligation that takes this out of the procurement realm. They could have bought 238 from us simply. They can have their own formula for calculating how they want to purchase. Those are the specifications in the procurement Contract.

But what happened here with the GBL is far more than that. It didn't just define what they would purchase. They imposed a self-supply obligation, a limitation on our utility's obligation to serve us.

MS. GEHRING FLORES: You can see Mr. MacLaren's quotation there from the transcript. "Who in BC has the power to impose limitations on the obligation to serve such that a utility could provide a customer with less than all the electricity it required?"

10:19:53 And Mr. MacLaren answered "That would be the Utilities Commission." As Mr. Shor mentioned, this is not a power that a private party would have. This a power that only the Government can exercise or delegate.

Moving on to Canada's third jurisdictional objection or admissibility objection. This relates to the procurement exception under NAFTA. Canada has repeated the term "procurement" ad nauseam in this Hearing evidently in hopes that mere repetition of the term will substitute for the evidence needed to sustain its objection. So let's put this one to bed once and for all. Mercer is not arguing that BC Hydro was required to purchase or procure a certain amount of electricity to establish its claims on liability.

PRESIDENT VEEDER: Let me stop you there because we have a first definition issue as to the meaning of the word "procurement." Now, we've had cited to us in the written submissions the French text and the Spanish text, and they seem to have a slightly different term, namely effectively "sales." Do you accept that "procurement" here means "sale"?

10:21:16 MS. GEHRING FLORES: Certainly, yes.

PRESIDENT VEEDER: And that "sale" is a broad term?

MR. SHOR: It requires a purchase. Purchase and sale. Procurement is the Government obtaining a good or service, and I guess our point is we're not arguing about the 238 they obtained. That, they purchased. That was a sale. We're complaining about the 349, which they didn't purchase and which they didn't allow us to sell to anyone else.

PRESIDENT VEEDER: Okay. Thank you.

MS. GEHRING FLORES: If you were to go into French or Spanish, "procurar" or "procure" in Spanish is "to obtain." It is to obtain. Obviously, the English comes more closely to "purchase." But as Mr. Shor mentioned, I think we're all talking about the same thing.

So, the basis of Mercer's claim is the fact that BC Hydro's Measures force Celgar to self-supply. The only reason why Mercer has mentioned that BC Hydro would purchase Celgar's above-GBL electricity is for purposes of damages calculations. It doesn't go to

liability issues. And, frankly, you're going to see this on the screen shortly, Canada's counsel has plainly answered the question of whether BC Hydro would purchase Celgar's above-GBL electricity. Indeed, BC Hydro's pattern and practice of buying all available electricity generated in the Province is confirmed.

Bear in mind that Canada's Witnesses have confirmed that setting a GBL is an inherently regulatory function. It goes to limiting the utilities obligation to serve and its rate setting exercise. Neither of these are commercial functions of ordinary commercial actors.

But let me bring the discussion back from the conceptual issue of what is a GBL and how it operates to the actual GBL at issue here. BC Hydro purchases 238-gigawatt hours per year from Celgar. That's not the GBL. Celgar's GBL is 349-gigawatt hours per year. Those 349-gigawatt hours per year represent the amount of electricity that Celgar must self-supply. It is forced to self-supply its 349-gigawatt hours per year.

Now, I wanted to walk you through a

10:23:59 jurisdiction decision flowchart, not as some remedial or rudimentary jurisdictional exercise, but out of the concern regarding Canada's pattern and proclivity for raising procurement as a free-standing jurisdictional, merits and damages defense.

So, let's start with the first question. Are Mercer's GBL claims within the limitations period? If they are not, then the Tribunal has no jurisdiction over Mercer's GBL claims, and Mercer's GBL claims are denied. The G-48-09 claims survive. If they are within the limitations period, move on to the next question.

Was there a delegation of governmental authority over Mercer's GBL claims? If not, there is no jurisdiction over Mercer's GBL claims. Mercer's GBL claims are denied, and G-48 claims survive. If there was delegation, move on to the next question.

Are the Measures at issue procurement? If they are, then there is no jurisdiction or the national treatment claim is inadmissible, and Mercer's national treatment claim would be denied or found inadmissible. But there is still jurisdiction over

10:25:27 1 our Minimum Standard of Treatment claim. If the
2 Tribunal decides that this is not procurement, the
3 Tribunal will go forward with its decision on
4 liability over both national treatment and Minimum
5 Standard of Treatment claims.
6 I wanted to pause here to remind the Tribunal
7 that, if you dispose of the issue of procurement in
8 your jurisdictional determination, there is no reason
9 whatsoever to consider the issue again in your
10 liability determination or in your damages
11 determination. Even if you were to decide that the
12 procurement exception disposes of our national
13 treatment claim, our Minimum Standard of Treatment
14 Claim survives. And procurement is not a defense to
15 unfair and inequitable conduct, nor is it some sort of
16 magic bullet that allows you to revisit jurisdiction
17 and liability in your damages determination.
18 ARBITRATOR DOUGLAS: Just before you move on,
19 when we're looking at the procurement issue, are we
20 looking at the Measures as a whole, or do we need to
21 look at each of the Measures separately?
22 MR. SHOR: With respect to the GBL Measures

10:26:48 and G-48-09?

ARBITRATOR DOUGLAS: Yeah.

MS. GEHRING FLORES: When you're looking at procurement--well, the procurement is only an admissibility exception or a jurisdictional exception to the 1102 and 1103 discrimination claims. But inside of that, both of the Measures go with the Claim that is being disposed of, but they would survive, and the Claim that would survive.

MR. SHOR: I think your answer is that you look at each Measure separately.

ARBITRATOR DOUGLAS: So, we look at the setting of the GBL in the EPA context as one measure, and BCUC's Order G-48-09 as a separate Measure.

MR. SHOR: I think that's right. I think G-48-09 certainly has nothing to do with procurement. It was limiting Fortis's obligation to serve us, and we also do not believe that the GBL and its related Exclusivity Provisions were, to use the U.S. Memorial--again, integral to the procurement for the reason you that you yourself mentioned, Mr. Douglas. If they allowed us to sell everything, they wouldn't

10:28:05 have needed a GBL, they wouldn't have needed the Exclusivity Provision. Those provisions are necessary only to enforce the policy objective and the regulatory objective of limiting the obligation to serve self-generators.

MS. GEHRING FLORES: Transitioning to liability, today we'd like to focus first on Mercer's Minimum Standard of Treatment claim. It's truly revelatory what we've witnessed over the past several days. Canada and its Witnesses have repeatedly told this Tribunal that Celgar's struggle for fair treatment is futile. They are essentially blaming the victim for the unfair and inequitable treatment it has received, saying that Celgar should have simply accepted it and moved on.

Canada has demonized Celgar for demanding that it be treated in the same manner as other self-generators in the same Province, the same regulatory regime, and the same industry. According to the repeated refrains of Canada and its Witnesses, Celgar demands that it be allowed to arbitrage the electricity that it generates through assets that it

10:29:21 paid for and improved out of its own pocket. And, in their words, that is nothing short of "asking for the moon."

Now, here we have quotes from the transcript demonstrating that Canada's treatment is arbitrary. We leave these here for your reference.

Next, Canada's treatment of Mercer has been discriminatory and grossly unfair. Again, we have references to the transcript.

Canada's treatment of Mercer has been nontransparent. I think at this point, that should be undisputed. Mr. MacLaren actually was rather forthcoming in the Ministry of Energy's negligence and lack of engagement in ensuring fair treatment, and you can see quotes to the transcript there. He was also rather candid about the Ministry's complete disregard for ensuring that the GBL-setting methodology or process was fair, transparent, and nonarbitrary.

So, where are we today? Celgar is still singled out for unfair treatment. Celgar alone is prohibited from engaging in arbitrage while being forced to provide load displacement services for free.

10:30:49 While British Columbia continues to try to fumble its way through a process that may eventually result in a province-wide policy that would allow for its fair application in accordance with the minimum standard obligations under Article 1105.

MR. SHOR: I'll now turn to Mercer's 1102, 1103, and 1503 claims for discrimination.

As we set out in the Opening, the legal standard is pretty straightforward. It requires treatment of a U.S. investment in like circumstances that is less favorable. We do not need to show that the State intended to discriminate based on nationality, that all investors suffered discriminatory treatment. We need not address every possible comparator, and we need not provide Canada's justification.

Mercer's Claim 1 is that B.C. required Celgar to provide load displacement services without compensation when it provided compensation to others. We refer to this as BC Hydro's desire to pay nothing for something.

I think we need to close the Hearing at this

point.

PRESIDENT VEEDER: Let's close the Hearing.

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

10:32:02 1 CONFIDENTIAL SESSION

2 PRESIDENT VEEDER: Let's close the Hearing.

3 The Hearing is closed.

4 MR. SHOR: The comparator we utilized is

5 Canfor, another pulp mill. Mr. Dyck confirmed that

6 Canfor signed an LDA in 2004, that it was amended in

7 2009, when an EPA also assigned, and that the

8 agreements <<[redacted]

[redacted] It is paid for EPA sales. It does not

11 have, unlike Celgar, <<[redacted]

[redacted]. The like-circumstances test

13 are met.

14 Canada's new justification for this

15 treatment, as best we understand it from what we heard

16 over the days, is that Celgar has options to sell its

17 below-load energy. There is no load displacement

18 obligation.

19 Again, that's my chart of Celgar in the box.

20 The answer to that argument is, none of the options

21 they articulate is as yet available. All remain

22 purely theoretical. None has any clear regulatory

10:33:39 definition or process. None exists.

Mr. MacLaren admitted in his testimony that, if the BCUC had simply extended Order G-38-01 to FortisBC by directing FortisBC to set GBLs for its customers based on historical usage, exactly like they did for BC Hydro, Celgar wouldn't be within the box and none of the problems we're here complaining about would exist.

Canada also tries to make the argument that BC Hydro doesn't really benefit, or B.C. doesn't really benefit from Celgar's load displacement. This is what we call the "direct harm but no direct benefit argument."

As best we understand it, BC Hydro contends that the harm from FortisBC selling PPA Power to Celgar is direct, causing BC Hydro to change the PPA. But the benefit BC Hydro receives from Celgar's load displacement somehow is too indirect for BC Hydro to have to Contract and pay for it.

But the dual impacts are the flip side of the same coin. They are not different. BC Hydro can only be harmed by Celgar's ceasing its load displacement to

10:34:54 the extent it benefited previously. This is the inconvenient truth Canada neglects. And, factually, it does benefit.

Mr. Swanson testified that FortisBC uses the PPA as its incremental supply. That means the benefit of Celgar's load displacement flows directly through the PPA to BC Hydro and its ratepayers.

On this issue, damages are fairly simple. With no obligation for self-supply, Celgar's GBL should have been zero.

Our second claim is the G-48-09 claim that B.C. imposed a net-of-load regulatory access standard on Celgar, allowing no arbitrage, where through G-38-01, it applied an historical usage standard to all other pulp mills, allowing some arbitrage.

Mr. MacLaren admitted that G-38-01 allows arbitrage, just not harmful arbitrage, which is incremental arbitrage.

The BCUC has admitted, unlike Canada, that G-48-09 has the effect, the practical effect, of requiring self-generating customers of FortisBC, including Celgar, to service 100 percent of their load

prior to engaging in sales.

Mr. MacLaren admitted that by putting Celgar in a net-of-load standard and by advocating before the BCUC for net-of-load standard, he understood that that was a more restrictive standard than was imposed on BC Hydro's customers.

G-48-09 is the genesis of Celgar's hiving dilemma, where we have to constantly try and figure out new mechanisms for hiving off that PPA Power in order to gain access to FortisBC embedded-cost power.

But understand that FortisBC's proposed solution, the NECP Rate Rider with its calculations that were incorrectly depicted by Canada--but we'll get to that later--does not give Celgar access to embedded-cost power. As Mr. Swanson admitted, all they get is--and I will admit not to understand this--the 2015 Waneta battery capacity argument. We get some capacity embedded-cost power, but we get no energy at embedded cost, because we are charged the full incremental cost of that block of power that has to go out and be bought for us to satisfy the hiving-off requirement. We do not benefit from any of

10:37:37 FortisBC's existing generation resources, unlike every other customer in FortisBC's service territory, and unlike the way BC Hydro pulp mills get the benefit from BC Hydro PPA Power--I'm sorry, BC Hydro embedded-cost power when they engage in arbitrage.

We established that G-48-09 expressly prohibits all arbitrage being used as replacement power, but the practical effect, as the BCUC itself mentioned, is to cover up FortisBC's embedded-cost power as well. Mr. Merwin affirmed that. Mr. Switlishoff affirmed that and Mr. Swanson effectively did as well. The like-circumstances tests are all are met.

And here, again, Canada's main defense is that we have options. There are other options available to us.

The hard truth remains that none of those other options they mention is available until the EPA Side Letter is activated to remove the Exclusivity Provision. That letter requires the parties to amend the EPA, and BCUC to approve the amendment.

Celgar took the first step twice. Mr. Merwin

10:38:52 testified that they wrote to BC Hydro, both in December 2011 and on January 23 or 26, 2012, asking BC Hydro to implement the Side Letter. And as of this date, they have failed to respond. Mr. Scouras' excuse was that we commenced the NAFTA case.

We're back to the box. Celgar was put in a box by Order G-48-09. The door of the cage was slammed shut, and there was no path out available at present, and there is no path even proposed that is equivalent to what BC Hydro customers get under Order G-38-01.

We heard inklings of the "G-48-09 only restricts Fortis' argument; it doesn't restrict Celgar." Again, I didn't go through these in the Opening. I won't go through them again. We have the references. The BCUC rejected that argument already.

Now, this is a little bit of a complicated point, but I think this is one point of common agreement between us and Canada. There are no separate damages stemming from the G-48-09 discrimination that are distinct from the damages that flow from the discriminatory setting of Celgar's GBL.

10:40:23 PRESIDENT VEEDER: To pick up the point by Professor Douglas, so that point it doesn't matter whether we deal with the Measures separately or collectively.

MR. SHOR: That's correct. I think we deal with them collectively.

May we take our break now?

PRESIDENT VEEDER: Any time that suits you. Let's take 15 minutes. We'll come back at 10 past. We'll come back at five to 11:00.

(Brief recess.)

PRESIDENT VEEDER: Let's resume.

MR. SHOR: I'd like to return to the question I was asked by Mr. Douglas about the provisions in the PPA. What we've put up on the board here is on the EPA--and there's a lot of "PAs" in this case.

What we've put up on the board is Provision 71(4) of the Utilities Commission Act, which is the Provision governing what happens when the BCUC terminates or fails to approve a contract like an EPA. And it says that, if an Energy Supply Contract is declared unenforceable, in whole or in part, the

11:00:25 Commission may order that rights accrued before the date of the Order be preserved, and those rights may be enforced.

So absent an Order by the BCUC, the contractual provisions in an EPA are of no force and effect if it's terminated by the Commission. So approval or the granting of rights under 71(4) is necessary before the Agreement really has any legal effect.

The effective date in the Contract is there because there are certain obligations that the Parties undertake prior to BCUC approval. There is an obligation to file with the BCUC. There is an obligation to obtain certain environmental permits. So those all obligations have legal effect and have to be undertaken. But the key provisions of the Agreement that we're complaining about, particularly Paragraph 7.4(a) in the Exclusivity Clause, that provision makes clear that there is no prohibition on below-GBL sales until the commencement date, which didn't occur until September 20, 2010.

So while there are filing obligations and

other provisions under the Agreement that have to be done and have legal effect, none of the substantive provisions under the purchase and sale transactions, none of the limitations on Celgar take effect until much later and require BCUC approval before those provisions can take effect.

PRESIDENT VEEDER: Can you give us the exhibit reference to this statute?

MR. SHOR: This is C-20.

PRESIDENT VEEDER: That's the Utilities Commission.

MR. SHOR: Act.

PRESIDENT VEEDER: Act. Now, that is what you meant by a condition subsequent, that provision?

MR. SHOR: Yes, it's a legal provision. It's not contained in the Contract, but it works by operation of law.

PRESIDENT VEEDER: Thank you.

ARBITRATOR DOUGLAS: Just on that point, on Slide 16 you refer to the <<[redacted] But my understanding is

11:02:34 that the EPA with Celgar doesn't have that clause.

MR. SHOR: It doesn't have that express provision in the EPA, but it exists by operation of law, yes.

ARBITRATOR DOUGLAS: You say that the effect is the same because of the statute listed?

MR. SHOR: Correct. I guess, like any lawyer, when you have a form contract, as you move down in time you always had more provisions to make things even more explicit. But what was implicit in all of the initial EPAs later became explicit in the later EPAs.

I'm now going to turn to Celgar's Claim 3, which is less favorable treatment in setting Celgar's GBL and the GBL-related restrictions and the Exclusivity Provision in Paragraph 7.4.

And before I begin, I just want to make clear that we're not claiming that the GBL and the GBL-related Exclusivity Provisions precluding separate sales are separate Measures. The GBL by itself is just a number. It is not a Measure, as Canada itself pointed out in its Memorial.

11:03:53 It is only the Exclusivity Provisions that determine the legal effect of the GBL. They impose the restrictions at issue. So please do not be misled by Canada's attempt separately to analyze the GBL and Exclusivity Provisions as distinct Measures.

Can I just clarify? Are we in closed session or are we in open session?

PRESIDENT VEEDER: We are still in closed session.

MR. SHOR: Okay.

Just to make sure we all understand that there is not--that the GBL doesn't exist separately from Canada's labels of new and incremental and preexisting generation, I have this little chart. So the GBL is the dividing line. This determines what is preexisting and what is new and incremental. Anything below the GBL is by definition defined as preexisting. Anything above is new and incremental.

Consequently, if the GBL was set too high because of discrimination or failure to follow consistent practice and you determine it's lower, then the effect is to lower the GBL line, and that changes

11:04:58 the definition of what's preexisting and what's new and incremental.

Now, Canada's Witnesses failed to accept this point, but that's just the reality of the situation. If the GBL had been lower, generation that Canada has defined as "preexisting" would be redefined as "new and incremental."

Contrary to Dr. Rosenzweig's assertion and as the Tembec case showed, preexisting is not preexisting. Canada loosely sticks labels on Celgar's preexisting 2007 incremental generation, and it sticks the label [redacted] but we must bear in mind that these terms have no inherent meaning distinct from the GBL setting rules defining them. As we have proven, BC Hydro had no coherent, objective GBL-setting methodology, and for both Celgar and Tembec Skookumchuck, it failed to even follow the general principles defined by Mr. Dyck in 2014.

This means that, in fact, the dividing line BC Hydro drew between "preexisting" and "new and incremental" were arbitrary and not, in fact, based on any purely procurement-related rules or purpose.

So, the GBL has a dual purpose, as we've discussed and as the BCUC has discussed. It's the generation level demarcation point above which BC Hydro will purchase because that it defines as new and incremental, and below which the self-generator must self-supply by virtue of the EPA Exclusivity Provisions. It's important to keep in mind that it serves those two purposes because Canada focuses only on one.

Our claims concern the GBL and related Exclusivity Provision that restrict sales to third parties. These Exclusivity Provisions and the GBL are necessary only because B.C. has chosen to impose a regulatory self-supply obligation limiting BC Hydro's obligation to serve. Mr. MacLaren admitted that BC Hydro could still purchase only incremental or idle generation if that's what its determined specifications required, but allowed third-party sales in which case the GBL-related Exclusivity Provisions in the EPA would be unnecessary. All the Measures at issue in this proceeding, including both the Exclusivity Provision and the G-48-09 Order, flow from

11:07:30 that regulatory policy choice.

ARBITRATOR DOUGLAS: Let me take you back to the language on your first bullet on Page 58. Is it true to say that they've imposed a regulatory self-supply obligation when, I guess, it could be said at the end of the day Celgar didn't have to sign up to the EPA; it's a contractual choice that they make. So how is that an imposition of a regulatory obligation?

We can see how G-48-09 could certainly be that, but if a Contractor decides to walk away from the negotiations leading to the EPA wouldn't be under the obligation?

MR. SHOR: Well, I'm--the fact of the matter is that Celgar really didn't agree to the GBL Exclusivity Provisions. That's why we had the Side Letter. So it wasn't an obligation we undertook willingly in order to get the consideration of the EPA.

We disagreed with BC Hydro on that point. We noted our disagreement. We went back and forth during the negotiations and ultimately concluded we couldn't reach agreement on that point and then had the Side

11:08:39 Letter that basically punted the issue to the BCUC. So there was no agreement on the Exclusivity Provisions.

ARBITRATOR DOUGLAS: Just so I'm clear, do your Claims survive if for whatever reason the conduct in relation to the EPA is excluded? So, in other words, are you still claiming on the basis of G-48-09 alone that that would be sufficient to violate the NAFTA provisions?

MR. SHOR: Yes.

ARBITRATOR DOUGLAS: All right. Damages would be the same is both cases? Just to follow it through.

MR. SHOR: Yes.

ARBITRATOR DOUGLAS: Okay.

MR. SHOR: With respect to our third claim for the GBL and related Exclusivity Provisions, Mercer has proven that there is no regulatory oversight as required by NAFTA Article 1503(2). That BC Hydro, in fact, had no coherent GBL methodology, much less one capable of consistent application. And, three, that BC Hydro departed even from the general principles

11:09:51 Mr. Dyck first articulated in 2014, not only for Celgar, but also for Tembec Skookumchuck.

Point 1, there was no oversight. The NAFTA obligation is clear. The Government has an obligation to ensure through regulatory control, administrative supervision, or the application of other Measures that its State enterprises do not engage in discrimination. Canada plainly breached that obligation. Just recall the cross-examination of Mr. MacLaren confirmed that the Government, through the Ministry of Energy, did absolutely nothing.

We've given you quotation after quotation. The only thing he could point to was the fact that BCUC provided oversight. But, as was clear, not all of the contracts, not all of the EPAs, not all of the GBLS even went to the BCUC for review. Many were excluded. So that was hardly a Measure that ensured regulatory oversight.

And then we had the testimony of Mr. Dyck as to how effective BC Hydro--how effective BCUC oversight on GBLs was. Mr. Dyck confirmed that it's BC Hydro's position that they would never give the

11:11:05 Commission enough information to evaluate a GBL unless you ordered them to.

Second point is that there was, in fact, no coherent GBL methodology capable of consistent application. I think we established that the most basic processes to ensure consistent treatment never were put in place. There were no written procedures, no audits, no common templates, no recordkeeping requirements, no transparency, no requirement to provide written reasons. And there is one more "not" point: These facts are not contested.

We also established that the GBL principle lacks any clearly defined objective type criteria, and that it has no integrity. There is no definition of the operating conditions considered to be "normal." BC Hydro was afforded virtually boundless discretion in setting GBLs, and they undertook no due diligence in cases when they abandoned historical generation for self-supply and relied on unsubstantiated hypothetical models.

As we pointed out in our Opening, the fatal flaw in the GBL concept articulated by Mr. Dyck is

11:12:26 it's a principle. It is not even a methodology even capable of consistent application. And that, we think, was most vividly demonstrated by the shifting and inconsistent rationalizations given by BC Hydro and the other Witnesses for Celgar's GBL.

We started with Mr. Dyck's First Witness Statement in Paragraphs 83 and 87 where he clearly lays out the math he used in establishing the GBL. It was the formula on the board that he refused to acknowledge in his testimony. He took total generation minus sales and added back the purchases from FortisBC.

When it was pointed out to him that it made no sense to add in the purchases from FortisBC, that his own methodology requires the use of generation used for self-supply and--self-generation used for self-supply and FortisBC purchases are not Celgar self-generation, he said, Well, that may be your math but it's not my math.

Then we got a different story from him in his Second Witness Statement and in his testimony here. And as best we understand it, it was that for Celgar

11:13:42 we used averages; that is--and this was a point that Mr. Merwin was examined on. He kept getting asked, Well, wasn't your self-generation on average sufficient to meet your load?

That's not the question under the standard. It's not about total generation. The question is what is the average level of self-generation used for self-supply? That's not anything any of the Witnesses looked for.

Then we had Mr. Dyck in the transcript say he was "not interested in paying for anything they normally do make." Again, that's an abandonment of the self-generation for self-supply test that he articulated. That seems to be looking at: "We're just going to look at your total generation. Forget about what's used for self-supply."

Then we had his next exhibit that we referred to the squiggly lines test where he said, Well, if you look at how Celgar's generation actually looks from hour to hour, when generation goes down, that's because pulp is going down, so load is going down, and you need look at it kind of in the granular hourly

level.

The problem with that is it is totally post-hoc rationalization because he didn't have hourly data when he was determining Celgar's GBL. He only had the overall data. And the squiggly lines analysis doesn't work because he's not following the squiggly lines. The squiggly lines reflect Celgar's actual self-generation, and he didn't use that. He used some kind of average that smoothed out the peaks and the valleys.

Then we had what we call the Celgar override of Addendum 8 theory. We presented Mr. Dyck with Addendum 8 to the PPA--I'm sorry--Addendum 8 to the Bioenergy Phase I RFP process, where BC Hydro itself in its procurement regulations defined "incremental power" for purposes of that acquisition--defined "incremental power" as preexisting generation that was being sold to third parties.

When we asked Mr. Dyck, "Did you apply this definition, your own definition, to Celgar?" He said, No, I had my own definition. I applied some other concept.

11:16:06 So his idea of how Celgar should get treated overrides the very procurement objectives and the procurement rules that he says he's applying.

Then we heard from Mr. Stockard for the first time, that said, Well, you shouldn't count--it's okay to count that excess generation Celgar had because it was out of balance. The out-of-balance theory. That was new. We hadn't heard that one before.

Mr. Stockard also said, Well, what's really going on here is there's some smoothing. That may just be another way of saying "averaging," we're not really sure, but that was another test that was proposed.

And all that smoothing and averaging really is a game of "let's pretend" because what BC Hydro is doing is pretending that Celgar's actual generation pattern is something different than what it was. And Mr. Stockard, in his analysis where he has the blue lines and the yellow lines and showing the availability in Celgar's generation, he himself described that as a normal level of variability in steam production, a normal level of variability in

11:17:11 1 electricity self-generation, yet it wasn't treated as
2 normal when it came to defining normal operating
3 conditions for Celgar.
4 Then we had Dr. Rosenzweig, who every time we
5 asked him a question he had a new theory. It started
6 with preexisting is preexisting. And then we pointed
7 out, Well, wasn't [redacted] And then
8 there was physics and observation. And then finally
9 we heard that, Well, Celgar's sales shouldn't count
10 because they were non-firm.
11 I urge you to look back at Mr. Dyck's
12 definition in his First Witness Statement and see if
13 you see any distinction whatsoever between firm and
14 non-firm energy. We had this cornucopia of
15 rationalizations.
16 No matter how you slice or dice the facts,
17 during 2007, the baseline year that BC Hydro selected
18 wrongly for Celgar, Celgar generated only 326.7--Can
19 we go back to Slide 1?--326.7 gigawatts of electricity
20 for self-supply. It didn't generate 349.
21 I guess the best way to think about this is
22 let's look at it in an aggregate basis and let's look

11:18:27 at it in an hourly basis. On an aggregate basis it was 326.7. On an hourly basis, if you think about it, BC Hydro's approach is even more absurd. Let's take an example.

In an hour in which Celgar hit what Mr. Merwin referred to as its target and generated 48 megawatts with its load at 40, BC Hydro effectively treated that 8-megawatt surplus that was actually sold to FortisBC on NorthPoint and not used for self-supply as being used as self-supply. And then the hour when Celgar underperformed, when it generated, say, only 35, BC Hydro pretended that there was no deficit and that Celgar was fully self-supplied because on average they self-supplied or they attempted to self-supply.

Not only was there no methodology, they didn't follow the principle Mr. Dyck articulated. Again we provided in Slide 72 the amount used for self-supply, the amount normally used for self-supply. Self-supply appears in every definition--not "total generation," but "self-supply."

Again, returning to the formula Mr. Dyck used, he didn't use the net generation for

11:19:42 "self-supply." That's Line 3. He added back in purchases from FortisBC. It makes absolutely no sense.

It's no wonder he refused to acknowledge his own calculations. The only way for him to get to 349 from this calculation was him to hold his nose and redefine "normal" to mean something other than the way Celgar was operating.

Remember what we asked him at the very beginning: "What about a self-generator's purchase of electricity from its utility? Do those ever count as part of the GBL?"

Answer, by Mr. Dyck: "No. We're looking at the generation amount, not the purchase amount."

The only way he gets to Celgar's GBL of 349 is to add in the purchase amount.

And then there is Addendum 8. Mr. Scouras clearly tells us what the rules were. Mr. Dyck clearly didn't follow them. His explanation is the explanation we always heard from all their Witnesses, Well, we didn't really have a clear rule because everything was unique. Everyone was unique. That

11:20:56 ultimately is the description of BC Hydro's methodology: Because every mill is unique, they can do what they want in establishing a GBL for each mill.

Let's turn to Tembec. This was the biggest surprise to us at the Hearing, and one, quite frankly, we were outraged by. These are the data showing Tembec's self-generation used to meet load, its self-supply levels in the four years leading up to the EPA, typically << [redacted] megawatts per hour. The next slide shows the generation in the three months after the shutdown.

The EPA was signed in July, so these are the three months immediately prior to the signing of the EPA. Again, generation is always << [redacted] They are using < [redacted] >> or so for self-supply. They got a GBL of 14. Did that follow the GBL principle that Mr. Dyck articulated?

We asked him, If you're going to reject the historical level of self-supply in favor of a claim that the Mill is going to behave differently absent the EPA, don't you have to validate that claim? Don't you have to substantiate?

"Answer: We would have to do an analysis in determination of their claim, yes."

Next page.

Is substantiation required? "We would have to substantiate the Claim for sure."

What did BC Hydro actually do to substantiate Tembec's claim about the <<[redacted]>>--to use Dr. Rosenzweig's term--nature of the <<[redacted] Absolutely nothing.

Mr. Dyck: "The due diligence I applied personally was zero."

He took Mr. Lague's word for it.

So, all you have to do is tell him it's uneconomic, and you just believe what he says?

"I have a tendency to believe."

Mr. Dyck didn't even bother to check whether anyone in BC Hydro had performed the analysis that he says was required to substantiate the Claim. He didn't even ask.

We asked Dr. Rosenzweig, What did you rely on?

He said, As I'm an expert, I'm entitled to

rely on the analyses and conclusions of others.

Okay. Tell us which analyses and conclusions you relied on. He couldn't point to anything.

And then we had Mr. Lague. At least he was honest. He confirmed that <<[redacted]>

I just want to be clear that it doesn't really matter whether the <<[redacted]> BC Hydro needed substantiation in 2009, as they themselves described their methodology, and they did not get any. The record still today does not permit us to draw any conclusion about whether the [redacted]

As Mr. Lague agreed, you need to compare all of the economic costs and all of the economic benefits of Tembec with and without the <<[redacted] It is not enough to show us those 2015 analyses that Canada thrust upon us at the Hearing have negative numbers. That's not enough. It can definitely be the case that a <<[redacted] if you look at it just on its own, is losing money for the company, but the question is whether it <<[redacted]

11:24:32 [redacted]> Because, as we saw with Mr. Stockard, if they start using the <<[redacted] from the other mill. You've got to do a proper cost-benefit analysis, and nobody--nobody--has ever done that, and they certainly didn't do anything in 2009.

And I also didn't evaluate--there are intermediate points between [redacted] You could cycle it. You can use--I mean, if it's even true that <<[redacted], we demonstrated that there was a substantial volume of <<[redacted]. No one ever analyzed whether that could be <<[redacted]> on and off for certain periods of time.

I now turn to my colleague Gaela, who will discuss the damages that flow from these breaches.

MS. GEHRING FLORES: So, yes, finally, we arrive at damages.

Again, there is no dispute with the--with respect to the applicable legal standard for damages.

11:25:40 I won't torture people with my Polish, but in performing a damages analysis, the manifestation of the legal standard is the But-For Scenario. This is an expression of what would be necessary to wipe out all the consequences of the illegal act. In this case, the But-For Scenario is, but for BC Hydro and BCUC's discriminatory and unfair treatment, Celgar would have been able to arbitrage with access to true embedded cost electricity and Celgar would have been assigned a lower GBL.

So, remember the reminder that I talked about during my discussion of jurisdiction. This is one of the instances where it comes into play. In an attempt to escape the But-For Scenario, one of Canada's principle damages arguments resurrects procurement. Canada also links the issue of procurement with an interesting assumption that BC Hydro set Celgar's GBL in a fair and nondiscriminatory fashion, per se, basically requesting that the Tribunal, as it's gone through its decision-making process. If you're at jurisdiction--sorry, if you're at damages, you've decided jurisdiction, you've decided liability. And

11:27:07 1 now they're asking you to revisit those decisions
2 inside of the But-For Scenario.
3 This is a somewhat ontological challenge for
4 me, I must admit, but I don't understand how Canada
5 can get out of the But-For Scenario when we're in
6 damages. You must assume a liability finding. You
7 must assume that the Tribunal has already found that
8 the GBL was set unfairly and discriminatorily and
9 must, therefore, be different.
10 ARBITRATOR DOUGLAS: Maybe it's just a
11 problem with terminology. The slight difficulty I
12 have is that when we talk about a but-for test in
13 every other context, we're talking about the
14 requirement of liability. We're talking about
15 causation in saying tort law. The way you're talking
16 about it here, you're talking about a particular
17 approach to assessing damages. Isn't that different?
18 MS. GEHRING FLORES: I mean, I think it's the
19 first step, and it certainly is talking about
20 causation. It is also the direct link between quantum
21 and the harm that is claimed. Without the But-For
22 Scenario, you can't establish causation or quantum. I

11:28:23 1 think the point is you're in damages. You've
2 necessarily determined liability. If you want to move
3 to causation, you need to consider the But-For
4 Scenario. Was the harm claimed by Mercer caused by
5 the Measures?
6 And you considered the But-For Scenario. And
7 within that But-For Scenario, can you go back to your
8 decision on, for instance, procurement and
9 jurisdiction? Can you go back to your decision on
10 liability? Because Canada's many arguments are saying
11 in the context of damages, "but we would never, ever
12 buy electricity below Celgar's GBL." But that's
13 presupposing, I guess, kind of like Dr. Rosenzweig
14 does, that BC Hydro's GBL determination is one of
15 natural law, physics, observation, preexisting is
16 preexisting generation. We heard him say all those
17 things.
18 All of those things presuppose that the
19 Tribunal has not made already a liability
20 determination that the GBL is unfair and
21 discriminatory and must be different. You know, the
22 Tribunal actually disagrees with the Tribunal. We

11:30:01 heard Mr. Rosenzweig say, no, absolutely not. The Tribunal cannot decide that our decision to put the GBL in a particular place was unfair or discriminatory or wrong because it is what it is. Preexisting is preexisting. It's a matter of observation. It's a matter of physics. I'm not exactly sure how to explain that argument, but I'm relatively certain that it is presupposing or it's revisiting the liability determination, and it doesn't make sense.

ARBITRATOR DOUGLAS: Perhaps, more of the problem with the relationship between damage and damages. When we talk with causation, we talk about but-for the Measures, would have this harm, would have this damage been caused to the Claimant? And if the answer is yes, then we go on and assess damages.

And the question is, does there need to be a relationship between the damage and the damages? I can see, for example, that--and you say it in your pleadings, that this harmed Celgar's--assuming liability, this harmed Celgar's competitive position in the market. So, the question is, Well, if that's the harm, what then is the link between identifying

11:31:15 that harm for causation purposes and assessing that harm when you get to the assessment of damages?

MR. SHOR: I think maybe this will help. The damages issue and the causation issue are related obviously. The harm or the liability issue is whether--was our GBL set in a discriminatory fashion? Should we have been allowed to sell more? Should we have been given greater access to embedded-cost power. If you find the answer to that question is yes, then the But-For Scenario applies on causation.

What harm flows from that? The harm that flows from that is our GBL would have been different. Yes, the things you mentioned certainly are true, it affected our competitive position, but the most directed harm--that's indirect harm. The most direct harm was that our ability to earn revenues from electricity sales was constrained. It would have been higher.

And that's why we get into our various GBL scenarios and into damages because we say, you know, but-for but for the measure, but for the discriminatory GBL, we would have had a higher GBL.

That's the causation. And the damages that flow from that are the amount of electricity we would have been able to sell at that different GBL. I don't know if that helps but--they are related, but slightly different.

MS. GEHRING FLORES: And I believe my colleague wanted to say but for the discrimination, our GBL would have been lower, not higher.

MR. SHOR: I did want to say that.

MS. GEHRING FLORES: I think we can--let's see, what slide are we on? Okay.

And an interesting moment was had with Dr. Rosenzweig again when he kept repeating what a lot of Witnesses have repeated, which is, well, in damages, if you were to somehow determine that the GBL was set unfairly and determine that it should have been lower, then you're necessarily affecting our procurement policy. You're forcing us to procure electricity. And as Mr. Shor pointed out to Dr. Rosenzweig, we're not forcing BC Hydro to purchase electricity from us. In fact, we are requesting that they pay us for a NAFTA violation, for the damages

11:33:47 caused by a NAFTA violation. We are not asking for specific performance here. They are not procuring electricity from us. They are paying us for damages caused by a NAFTA violation, for unfair treatment, for discriminatory treatment.

PRESIDENT VEEDER: If you exclude third parties, sales to third parties, where do those damages come from?

MS. GEHRING FLORES: If we exclude? It is our position that BC Hydro would have purchased this power.

PRESIDENT VEEDER: And if they say they wouldn't and we accepted that?

MS. GEHRING FLORES: Then that's a revisit of the procurement question in jurisdiction. So, if you've gotten this far, you've decided on the GBL issue, that this is not procurement, and it is either unfair treatment or discriminatory treatment and have decided that the GBL would have been lower. And it's no longer--it's--they're saying, Oh, but we set the GBL here, and we would never buy the electricity below that GBL, but your jurisdictional decision and your

11:35:09 liability decision lower it. It's no longer below--it is no longer below the GBL.

MR. SHOR: Let me try it this way, Mr. President. The argument that BC Hydro would not have purchased this electricity turns exclusively on the argument that it was not new and incremental, and that their purchasing regulations prohibited them from buying new and incremental. And, again, this is the separation between the GBL and the new and incremental that they're trying to draw.

Keep in mind Tembec's situation. BC Hydro saw Tembec. Tembec had existing generation from the <<[redacted]>> We don't think that met the definition of "new and incremental." It certainly didn't meet the test Mr. Dyck articulates. They didn't substantiate the claims at all. They purchased--that necessarily means that BC Hydro purchased from Tembec electricity that, under their own procurement, GBL terminology, was not new and incremental. It was preexisting, and they bought it.

I think the question you have to ask is,

11:36:27 1 Well, if Tembec's generation didn't meet your test of
2 new and incremental, and yet you bought it, why
3 wouldn't Celgar's energy, which you say didn't meet
4 the test, why wouldn't you have bought that? What's
5 the difference between the Tembec situation and the
6 Celgar situation?
7 That's the crux of our case. We want you to
8 understand that these definitions of "new and
9 incremental" versus "preexisting" were applied in a
10 wholly arbitrary fashion. There was no coherence to
11 the way they were applied. They were applied
12 restrictively to Celgar and much more permissively to
13 Tembec. And there is no distinction, therefore,
14 between "new and incremental" and "preexisting." They
15 like to attach those labels. They put the "new" label
16 on Tembec, and they put the "preexisting" label on us.
17 But that's just a labeling exercise.
18 They, in fact, bought from Tembec exactly the
19 same type of generation we say they should have bought
20 from us. And, in fact, ours was much newer. Ours
21 included generation from the Blue Goose Project that
22 was put online in the middle of our base

11:37:31 year--baseline year, and they also included in our GBL generation that was surplus that we were selling to FortisBC and NorthPoint that should never have been put in the GBL in the first place. So, that, under their own definition, already was new and incremental. So, they should have bought it, they would have bought it. It met their own definition.

PRESIDENT VEEDER: My question follows that stage. And I'm going back to your Slide 86, where you pose the But-For Scenario in this language: "But for BC Hydro and the BCUC's discriminatory and unfair treatment, Celgar would have been able to arbitrage."

Well, maybe the language more appropriate is "would have been able to seek to arbitrage." There is no guarantee, for example, that third parties would necessarily have taken part in arbitrage transactions. That's why he let that evidence that we've heard last week and this week. Now, if you couldn't prove that third parties would transact in arbitrage transactions with Celgar, you would have a liability. You might have causation, but you might be nominal damages, but you wouldn't have net damages in regard to third

parties.

Do you accept that so far?

MR. SHOR: We believe that we've established that, under their own procurement rules, under their own policies, under their own desire to make B.C. self-sufficient, under the fact that they themselves made much of the fact that Bioenergy Phase I was undersubscribed, that they didn't buy all the energy they sought to buy, that if our GBL had, in fact, been lower--not higher--if it would have been lower, they would have bought.

PRESIDENT VEEDER: That's the point. That's the point I'm getting at.

MR. SHOR: That's our primary point.

PRESIDENT VEEDER: You say they would have bought.

MR. SHOR: Yes.

PRESIDENT VEEDER: And then the Witnesses you've listed on this other slide say they wouldn't. And what you say is that they're using the same reason for not purchasing this power as they were using for the GBL--

11:39:38 MR. SHOR: Correct, for the GBL.

PRESIDENT VEEDER: --the unfair treatment in regard to the GBL.

MR. SHOR: That's exactly correct. Their whole justification--every argument that was made for not buying--why they wouldn't have bought that electricity depends on the GBL being at 349. If, under their own methodology or under a nondiscriminatory methodology, the GBL would have been lower, say, 249, nobody has given a reason. They keep talking about not buying below-GBL electricity, but if the GBL had been lower, what we're talking about would be above-GBL electricity, not below-GBL electricity. That's correct.

ARBITRATOR DOUGLAS: Is it a loss of opportunity to have the opportunity to go back to BC Hydro and obtain purchases of that additional power, or is it an absolute damages assessed on the--as if there were an obligation to purchase those additional watts?

MR. SHOR: I think the answer is probably neither. My understanding is damages are assessed

based on the reasonable likelihood of what scenario is most likely. All we have to establish is what likely would have happen but for the Measures. And the most likely scenario, the one that we think comports with the behavior of all the parties, was that BC Hydro would have purchased that electricity.

MS. GEHRING FLORES: Because if they would have fairly and nondiscriminatorily set the GBL, it would have been lower. It would have been lower, and they would have bought everything above it. That's what they do, and you'll see on Slide 91, citing to Mr. Scouras' Second Statement, at Paragraph 8, BC Hydro demands that it be the exclusive purchaser of all eligible electricity. What's eligible electricity? It's everything above the GBL.

ARBITRATOR DOUGLAS: I can completely see that the source of the obligation to pay damages, in your--on your case is not EPA. It's NAFTA.

MS. GEHRING FLORES: Yes.

ARBITRATOR DOUGLAS: I guess the question is, though, if, ultimately, the way you assess those damages is equivalent to a scenario whereby BC Hydro

would have purchased more, does that not indicate that we're talking about procurement?

MR. SHOR: Again, we don't think it does because for the procurement exception to apply, procurement has to be necessary to establish liability. We are not using--we are establishing liability independent of any procurement obligation. We are establishing it based on G-48-09 and based on the discriminatory treatment in setting the GBL and defining the self-supply obligation and the limitation to the obligation to serve.

Damages is a separate question. We don't think you bring back procurement concept into damages. Damages depend on what is likely--what would likely have happened absent the Measure. And there were not--we're not relying that they had an obligation to procure. It's not a source of liability or a legal obligation. We're just saying that is the likely scenario that would have flowed absent the Measure.

MS. GEHRING FLORES: And as Canada's counsel--basically talking about the likelihood of what would happen absent the unfair and discriminatory

11:43:27 1 treatment. What would happen, the GBL would have been
2 set lower, and in accordance with their own policy,
3 again, in a damages scenario, only trying to prove
4 what would have likely happened if the GBL had been
5 set lower. What would have happened? In the previous
6 slide, they buy everything above the GBL. They would
7 buy everything above the fair and nondiscriminatory
8 GBL.
9 If you're setting yourself in the damages
10 scenario, if you're setting yourself in the But-For
11 Scenario, and necessarily as an issue of liability you
12 have determined that that GBL was set in the wrong
13 place, then you have to determine what is likelihood
14 or what is likely to have happened if that GBL were
15 actually set fairly and nondiscriminatorily?
16 Well, in accordance with their own
17 procurement policies, they would have purchased it,
18 and, in fact, Canada's counsel said if the Claimant
19 actually had more incremental energy to sell, what
20 possible reason could BC Hydro have not to procure it?
21 And with respect to third-party sales,
22 there's been a lot said about access to transmission,

11:44:55 green energy prices. The fact of the matter is, that does not have to do with our primary damages scenario or our damages scenario at all. It is a diversion. It is our argument that BC Hydro, in accordance with its own practice and policies, would have purchased the electricity above a fair and nondiscriminatory GBL.

The issue of whether or not Celgar could sell at green energy prices into the Pacific Northwest is literally a diversion. It is irrelevant to our claims. It just so happens that you have actually heard testimony from Mr. Friesen, from Mr. Merwin that we actually--and actually Mr. Krauss. Mr. Krauss confirmed that you can set up long-term electricity sales with something other than just long-term firm transmission. He confirmed that and he and Mr. Friesen worked on contracts together that stitch together some long-term firm and non-firm, the lowest priority of all transmission.

Mr. Friesen is the only Witness who has been presented to this Tribunal that had firsthand knowledge of the reservation system, the OASIS

11:46:23 reservation system for reserving or acquiring transmission access. He's the only one. He was the only one presented to this Tribunal who said, I was looking at the reservation system, and short-term firm transmission access was available at that time.

Also, with respect to green energy prices, green energy prices, there is evidence in the record, are no different than long-run marginal costs. If you're in a long-term electricity sale, Mr. Friesen, other Witnesses confirmed, that the price associated with electricity sales of long-term contracts is basically equivalent to long-run marginal costs to supply, and those prices are virtually the same as green energy prices.

Moving on to--we have Navigant's chart with an updated damages analysis. Mercer's damages are the delta between the unfair discriminatory GBL and the that the Tribunal finds to be fair and nondiscriminatory and the additional electricity that Celgar would have been able to sell in that scenario.

PRESIDENT VEEDER: You said Navigant. Do you mean Navigant?

11:47:54 MS. GEHRING FLORES: Yes. This is Navigant's.

MR. SHOR: Mr. Kaczmarek.

MS. GEHRING FLORES: Mr. Kaczmarek.

PRESIDENT VEEDER: I was looking at the footnote underneath. I see. I've got it.

MS. GEHRING FLORES: Yeah, this is one of the tables from Navigant's--Mr. Kaczmarek's direct presentation.

But how does the Tribunal determine what is the fair and nondiscriminatory GBL? NAFTA's national treatment provisions require that Mercer be afforded best treatment, and NAFTA's Minimum Standard of Treatment Provision requires that Mercer be provided fair treatment.

In this case, if the Tribunal finds that BC Hydro had a methodology that applied to all pulp mills other than Celgar, fair and best treatment is the Application of that methodology to Celgar. If, however, the Tribunal finds that there was no methodology, fair and best treatment requires finding the fair and best treatment given to Celgar's

11:49:03 comparators and applying that analogous treatment to Celgar.

As we discussed during opening, Mercer is entitled to a zero GBL. There are two paths to this outcome. With respect to Canada's unfair and discriminatory forced load displacement, all of Celgar's generation should have been treated as new and incremental because BC Hydro had no right or claim to Celgar's generation asset as a BC Hydro resource, whether through an LDA, a subsidy, or another legal entitlement. This is the equivalent of a zero GBL. All of our generation should have been treated as new and incremental because BC Hydro had no right or claim to Celgar's generation asset as a BC Hydro resource.

This next chart illustrates the two paths to a zero GBL. Path Number 1 represents the damages caused by Celgar's forced load displacement. The same result is reached with Path 2 if the Tribunal finds that there was no consistently applied GBL methodology. In this case, what is the fair and best treatment afforded any comparator? That was the type afforded to << [redacted] which was

11:50:27 implemented in <[redacted]>, where they had a <<[redacted]

[redacted]

Should the Tribunal determine that another comparator received the best or fair treatment, Mercer provides those damages scenarios here. Again, we have Tolko here. We don't think that they are particularly a comparator, but again, Canada invited to us treat them as a comparator, I believe, in their Counter-Memorial. So we have that option here.

We have the Howe Sound 2010 EPA and the Tembec 2009 EPA.

Alternatively, if the Tribunal concludes that British Columbia applied the GBL standard or a GBL standard or methodology in a consistent and even-handed manner to everyone except Celgar, fair and best treatment would be the application of that standard, whatever it is. I say "whatever it is" because after this hearing, in particular, we find it very difficult to fathom that any GBL methodology can

be found by the Tribunal.

We've heard from Mr. Shor--you've heard from Mr. Shor about the myriad different and conflicting different methodologies that Canada and its Witnesses have claimed in this arbitration, many of which came out in this hearing. Preexisting is preexisting. Smoothing, squiggly lines, interesting math. In this scenario, we're not exactly sure what to propose as the methodology, but we give this scenario as one of our best guesses of the potential methodology that exists out there somewhere.

And one last note on damages. Should the Tribunal find that the Ministers' Order created some sort of restriction on Celgar's electricity sales, that conclusion would, at the most, cap Mercer's damages. Why? Because the GBL they would be assigned would have to be--would basically have to take into consideration the self-supply from generation assets and mill configuration that it described in the 1990 electricity project certificate Application. The purported commitment from the Ministers' Order could not extend into the increased electricity generation

11:53:10 that resulted from investments like Blue Goose.

Now, that in no way signifies that Mercer accepts Canada's rather farcical arguments regarding the Ministers' Order. The Parties' legal experts agree that the language in the Ministers' Order must be clear and unambiguous in order to impose a binding legal obligation on Celgar that restricts its right to sell electricity.

What you've heard from Canada's Witnesses is that there simply is no clear and consistent language in the Ministers' Order restricting Celgar's right to sell or mandating self-supply. Celgar's EPC, or electricity project Application, and other materials attached to the Ministers' Order are riddled with inconsistent estimates of Celgar's potential self-generation. And even today, 24 years later, Canada cannot clearly formulate what exactly it believes the Ministers' Order requires from Celgar.

Mr. Les MacLaren confirmed when the Ministers' Order--when he was confronted with the series of conflicting statements regarding self-sufficiency, the up to 90 percent, estimated

11:54:34 100 percent, all of those different inconsistencies in the Application, he acknowledged that the Ministry did not seek to clarify which of these statements would actually represent the supposed commitment in the Ministers' Order. The Ministers' Order itself, likewise, imposes to clear and unambiguous prohibition on electricity sales to third parties. And, of course, this is unsurprising because market sales by self-generators were not even possible pre-open access. And the Ministers' Order was issued, I think, approximately seven or eight years before there was open access in the FortisBC territory.

Finally, the conduct of the Parties for the past 24 years demonstrates that no one interpreted the Ministers' Order to impose an obligation on Celgar that restricted its sales of electricity. The B.C. Government had countless opportunities to raise the Ministers' Order over years of regulatory proceedings, negotiations with BC Hydro involving Celgar's efforts to engage in arbitrage. As Mr. MacLaren told us, the Order was never mentioned during all of these opportunities because the Order was buried in B.C.

11:55:57 1 governmental archives.
2 You can see Canada had never raised the Order
3 when the BCUC approved the electricity sales by Celgar
4 in 2001, not when the BCUC approved Celgar's 2009 EPA,
5 not in any BCUC regulatory proceedings where Celgar
6 plainly was seeking to sell its below-load
7 electricity, not when Celgar approached Ministry of
8 Energy repeatedly about these sales, not during the
9 Mill's 24 years of operation, and not ever until this
10 arbitration.
11 Now, Canada has argued in this arbitration
12 that the Ministers' Order prevents Celgar from being
13 able to sell any of its self-generation. Yet,
14 Canada's lead Witness on the issue, Peter Ostergaard,
15 who we weren't able to cross-examine, actually
16 approved Celgar's sales of self-generated electricity
17 in 2001 through BCUC Order G-15-01. It approved both
18 above- and below-load sales.
19 Now, Mercer's legal Expert explained
20 that--how BCUC Order 15-01 expressly approved the
21 Celgar and West Kootenay Power curtailment and
22 brokerage agreements, which specifically contemplated

and allowed for and expressly demonstrated below-load sales that, it actually already happened. This is what I tried to show Mr. Swanson when Canada presented Mr. Swanson as the one Fact Witness on the Ministers' Order about this Curtailment Agreement. But Mr. Swanson actually had no firsthand knowledge of this agreement, and he denied being able to understand objective numbers in the Brokerage Agreement, which includes metering data. Just plain old numbers that show how much electricity Celgar was buying from West Kootenay Power and how much Celgar was selling to West Kootenay Power. He just told me that he didn't understand.

Now, we get to Canada's half-truths and untruths. We've actually been puzzled, frustrated by many misrepresentations of Canada during these proceedings, and we'd like to point some out to you.

As the Tribunal has seen in the briefing leading up to this hearing and for the last nine days, Canada's arguments are a smokescreen of half-truths and untruths, illogical connections, circularity, and blatant mischaracterizations. All of these attempts

11:59:03 to distort reality in this proceeding are to avoid the inconvenient truth. When analyzing the granular moss on the forest floor of Canada's positions, the inconsistencies become stark.

Let's look at one. Canada contends, for instance, that Celgar's below-load electricity is not new and incremental and would not add to BC Hydro's resource base. What's the inconvenient truth that they don't want to face? Celgar's self-generated electricity is not BC Hydro's resource. It is Celgar's. And you've no doubt heard all of the various contortions regarding Canada's determinations regarding what is "new and incremental." So the problem with Canada's position is, if Celgar's self-generation is not part of BC Hydro's resource base, then it must be new and incremental.

Next, Canada argues that Celgar is trying to sell BC Hydro's own electricity back to BC Hydro. We really thought that we had disposed of this earlier on in the pleadings, but we guess not. Canada dismisses the Arbitrage Project as mere "wealth transfer." Canada argues that Celgar wants to sell BC Hydro's own

electricity back to BC Hydro, thus it claims that Celgar wants something for nothing. The inconvenient truth behind all this is that Celgar would have nothing to sell were it not for its own generation assets, which it has paid for and that have provided B.C. ratepayers with a benefit for more than two decades.

But the true inconvenient truth for Canada is that BC Hydro treated Celgar differently than everyone else. Canada surprisingly still argues that it has a consistently applied GBL methodology. I'm not sure how this is possible. There is no written GBL methodology that has been approved by the BCUC, and the unwritten GBL methodology is inconsistently applied. It has unfettered discretion and very little oversight.

The fact is Canada took no steps to ensure transparency with respect to this supposed GBL methodology or policy. Canada took no steps to ensure consistency.

Next, Canada attempts to argue that the BCUC did not direct BC Hydro to set GBLs in G-38-01. And

12:02:05 Canada's Witnesses kept repeating remarkably that G-38-01 did not govern GBLs. But the fact of the matter is Order G-38-01 plainly directs BC Hydro to set GBLs. Canada's position also ignores the very clear position of the BCUC on this issue.

Canada's Witnesses agree the Commission directs us to meet with our customers and based on historic generation or consumption levels to agree on a Generator Baseline. That was Mr. Dyck. The BCUC directed BC Hydro to negotiate with its customers and determine some kind of customer baseline based on either historical generation or historical load. That was Mr. MacLaren.

Next, Canada argues that BC Hydro would not purchase Celgar's below-load electricity. But clearly Canada was interested in purchasing any electricity that was not part of its existing resource base. BC Hydro's practice is to purchase any electricity that leaves the Province. Canada argues that Celgar could simply exercise its Side Letter with BC Hydro and then sell below-load or below-GBL electricity. That's not true. Celgar attempted to do that. The

12:03:40 ball is in BC Hydro's court, but they say that it's Celgar's fault.

Celgar can't exercise the Side Letter Agreement without BC Hydro's agreement and cannot sell electricity without access to replacement electricity. Celgar cannot access replacement electricity from FortisBC because there is no approved rate for this replacement electricity, and G-48-09 remains in effect. Canada would have you believe that Celgar single-handedly thwarted the B.C. proceedings that could have approved a rate for replacement power. This is not so. Those proceedings were suspended by the BCUC.

Now let's come to the NECP Rate Rider. Canada's counsel mischaracterized the NECP Rate Rider in their Opening Statement. It was stated that the NECP Rate Rider, or "their rate stays the exact same and they can arbitrage all the power they want." This is absolutely not true. They also say that Celgar has the NECP Rate Rider in its back pocket. We're not sure how that is possible. Not true.

So, Canada showed you a graph in its opening

12:05:11 presentation. And just as Mr. Owen stated, he actually mischaracterizes the NECP Rate Rider as a rate that stays exactly the same. In this graph, Canada compares spot Mid-C prices to the RS 31 rate and states that Celgar would never have been charged more than the RS 31 rate. What's the problem this? One, the Mid-C prices on this graph are in U.S. dollars, and the rates are in Canadian dollars. This would be why I was asking Mr. Swanson what monetary instrument do they use generally. That should all be Canadian dollars.

FortisBC did not propose to compare the market price, the Mid-C price, to RS 31. FortisBC actually proposed to compare it to the PPA price, not RS 31.

The NECP, third--the third problem is the NECP wasn't even proposed until 2012. To the extent that it looks like from this chart that the NECP Rate Rider has been available all this time, it hasn't. It is still not available. It was proposed in 2012, and those proceedings were suspended by the BCUC. It is not available.

12:06:50 So, let's see what happens when the truth of the matter comes out. This is a graph that we prepared with what--it seems Mr. Swanson said was the NECP Rate Rider that was proposed to BCUC in 2012. What happens? The little purple bar is the PPA price. The red bar is RS 31. You can see that RS 31 generally above the PPA price. Why does that matter? It matters because the NECP Rate Rider is triggered the minute Mid-C--at least according to Canada--the minute Mid-C prices go above the PPA price, not RS 31.

Also, Canada left off conveniently 2008. 2008 was when Mid-C prices were high. What would have happened to Celgar's rates? What would have happened to the NECP Rate Rider in 2008? It would have been up at $91, Canadian dollars, and the price of Celgar's electricity that it was looking to sell would have been at $119. That's quite a difference from Canada's chart.

You can see in the following years there are some years where RS 31, Celgar's rate more or less--although it doesn't have a replacement rate yet--where RS 31 is the same as the NECP Rate Rider.

12:08:35 Let's start looking at 2013. There's a little NECP Rate Rider that happens there. 2014, the same. But the most important aspect of this NECP Rate Rider came, I think, from Professor Douglas' question to Mr. Merwin about how this exposes you to the market. The way this exposes Celgar to the market is that Celgar was contemplating long-term electricity sales contracts, not short term. And as Mr. Swanson confirmed in his statement and here at the hearing, FortisBC had to buy a matching block of power all at once, the entire block all at once. Long-term electricity contracts have prices that are associated with the long-run marginal costs of replacement power for utilities. That is not even close to the Mid-C price. Maybe it could be one day if Mid-C prices go up, but they generally tend to be around the same price or more than green energy prices. And that's what you see in this last part of the chart.

If FortisBC, in accordance with Mr. Swanson, was to go out and buy a matching block of power for a long-term electricity Contract for Celgar's needs for maybe 10, maybe 20 years, the price, the incremental

price of that matching block would be transferred to Celgar.

When confronted with this question, Mr. Swanson had a very puzzling answer which is, oh, nobody buys electricity for periods that long. Nobody buys electricity for periods of 10 or 20 years. This entire proceeding is about EPAs that are 10 and 20 years long. We're not exactly sure where Mr. Swanson got that idea.

We also heard a little bit from Mr. Swanson about the Waneta expansion project, and Mr. Shor mentioned that. So, to be fair, Mr. Swanson at the Hearing and in his statement briefly mentioned the possibly of this Waneta Expansion project battery. We're not exactly sure how that works. That is not what he proposed to the BCUC. This is basically a correction of Canada's bar chart comparing the NECP Rate Rider with the PPA price and Mid-C prices.

The next slide is just paragraph 29 of Mr. Swanson's statement that that was his proposal to the BCUC of the NECP Rate Rider. Again, they say that we have the NECP Rate Rider in our back pocket. It's

not true. The BCUC suspended those proceedings while they consider other policy issues that are being considered with respect to the new PPA. The NECP Rate Rider may never come back depending on what is decided about the new PPA. Mr. Swanson agreed that the NECP Rate Rider proceeding has been suspended. They would like you to think that Celgar single-handedly suspended the case. It's not true.

The fact of the matter is Celgar can't sell its below-GBL electricity without being able to purchase replacement electricity. Celgar cannot purchase replacement electricity until it has a BCUC-approved rate for replacement electricity. Thus, the NECP Rate Rider must either be in place or the need for it obviated, neither which of has occurred.

MR. SHOR: I'd like to conclude where we concluded in our Opening Statements by returning to the nine questions or so we thought might be interesting over the course of the hearing. The first question was how can compelling Celgar to provide load displacement without compensation when BC Hydro pays others to provide the identical service not be less

favorable treatment?

I think we established that there is no justification other than BC Hydro's desire to get something for nothing, and this was the inconsistent harm and benefit equation that they refer to where the PPA somehow exposes them to harm if we sell electricity, but it doesn't give them a benefit when we don't.

Question 2, does Order G-48-09 subject Celgar to less favorable arbitrage restrictions than are applied to Canadian and third-country pulp mills under Order G-38-01? I think it was fairly undisputed that G-48-09 is more restricted. Mr. Merwin refuted Canada's contention that Celgar could engage in full arbitrage after BCUC Order G-188-11. And Mr. Swanson confirmed there is no rate available. Celgar is a net-of-load customer, has been since 2009 when G-48-09 was issued and remains so today. Mr. MacLaren admitted that G-48-09 is more restrictive.

Question 3, what concrete measures did B.C. implement to ensure that its self-generator arbitrage policy was applied fairly by BC Hydro so as not to

favor some mills over others? This is the essence of Canada's obligation under Article 1503. Mr. MacLaren confirmed that the Ministry of Energy did nothing.

Question 4, is the post hoc "current normal" GBL concept that we see in writing in the first time, Mr. Dyck's First Witness Statement issued in 2014, a detailed, objective methodology capable of uniform and consistent Application? It's not a methodology. BC Hydro used different arithmetic for different companies, different baselines, sometimes relying on data, sometimes relying on hypothetical models with no rhyme, reason, or substantiation. We established that BC Hydro used an ad hoc approach unconstrained by any written guidelines, procedures, templates, review process, recordkeeping, auditing or objective criteria.

Question 5, did BC Hydro exercise its discretion in determining GBLs so as to treat Celgar less favorably than it treated Howe Sound and Tembec? The answer to this, too, is obvious. BC Hydro gave Celgar the highest GBL possible. It is not possible to have a GBL higher than its load. There is no less

favorable treatment even possible. Everybody else got some benefit of the doubt. Tembec got an unbelievable benefit of the doubt. They didn't have to substantiate their claim that they would <<[redacted]> And Howe Sound got the benefit of the doubt. They got a GBL based on a <<[redacted]

I don't know what Canada's two Experts, Mr. Pöyry and NERA, added to the GBL analysis. They conducted no independent review. They did not attempt to substantiate anything. Their role was to question everything Celgar said and accept as gospel everything anybody else said.

Question 6--this gets to the crux of the matter of--what analysis did BC Hydro perform to validate Tembec's claim that it would cease <<[redacted] I think it's undisputed they did nothing.

Question 7--and my colleague just touched on

12:17:23 this--what clear and unambiguous language in the 1991 Ministers' Order created a prohibition on Celgar's electricity sales, and what actions did the B.C. Government take to enforce that prohibition? There is no clear language. They took no actions.

Question 8, why would BC Hydro not have purchased all of Celgar's electricity above a fair GBL? This was the question President Veeder and I addressed it seems like an eternity ago, but it was probably only 15 minutes.

Canada's counsel confirmed that BC Hydro would have purchased Celgar's electricity over a fair GBL. He himself asked why wouldn't BC Hydro have purchased all new and incremental energy? Again, if the GBL is set, anything above it is new and incremental electricity.

BC Hydro's Bioenergy Phase I tender was undersubscribed. They sought 1,000 gigawatts, and they achieved only 579. If they had given us a fair GBL, they would have had more to purchase. There is no reason at all they wouldn't have purchased it.

Question 9, the procurement question, is it

12:18:41 procurement for the BCUC and BC Hydro to limit Celgar's access to embedded-cost electricity while selling self-generated electricity? Mercer has established that Order G-48-09 limits the utility's obligation to serve. That is a regulatory term, not a commercial term. Mercer also has established that the GBL and related Exclusivity Provisions impose a self-supply obligation on Celgar which also necessarily limits the obligation of its utility to serve. These measures, all are regulatory, not procurement. BC Hydro remained free to purchase all the electricity it wanted without imposing a self-supply obligation on Celgar.

The self-supply obligation was not integral to the procurement.

That concludes our Closing Presentation.

PRESIDENT VEEDER: Go ahead.

ARBITRATOR ORREGO VICUÑA: May I ask you please to go back to Slide Number 101. It refers to in the first column to Celgar's average '94-2006. Would this be equivalent to the historical usage standard, or is it a separate concept?

12:20:11 MR. SHOR: This slide responds to Canada's Ministers' Order argument.

ARBITRATOR ORREGO VICUÑA: Yes.

MR. SHOR: Their contention is that the Ministers' Order imposed a self-supply obligation arising from the improvements that were made in 1993. So what we've done here is to look at what the self-supply level actually achieved was over the period in which that plant configuration was in effect. It started in 1993. We ended in 2006 because that was the last year before Celgar made additional improvements not contemplated or required by the Application it made in 1991 through its Blue Goose project. So, this is just a way to quantify, assuming there is some kind of self-supply obligation stemming from the installation that was made in 1993, what that obligation would be.

ARBITRATOR ORREGO VICUÑA: Now, I have a second question. Until approximately 2013, if I remember rightly, the BCUC made the point that applying a different standard was discriminatory. Did that disappear altogether in the discussions that took

12:21:29 place later, or is it still part of the ongoing discussion and reviews and whatnot?

MR. SHOR: I think I know what you're referring to. You're talking about the Kelowna Decision in 2013. I think it's important to understand what the BCUC views its role as.

In the 2013 Kelowna Decision, that was when Tolko (Riverside), which had been taking power from a municipal utility, the City of Kelowna, once FortisBC bought the assets of the City of Kelowna, it became a direct customer of FortisBC, and when it was in exactly the same position as Celgar under G-48-09, and it said, you can't have your GBL anymore, you have to be net-of-load just like Celgar, that, too, puts the lie to Canada's argument that G-48-09 really isn't any different from G-38-01 because it allows you to do the same thing.

They took away the GBL that they had awarded to Tolko (Riverside) back in 2001 to bring it into compliance with G-38-01 (sic). So, that illustrates that there are different regulatory standards.

But the BCUC--and the BCUC, in fact, said

there that it would be discriminatory for FortisBC to have a GBL system with one customer and a net-of-load system with another customer. But the BCUC has never addressed the discrimination between the FortisBC and BC Hydro systems, because it takes a different view of discrimination there.

It says it doesn't have the power--well, it doesn't say it doesn't have the power. It says it need not concern itself with whether the Province should have a consistent policy overall because its mandate is to ensure that each individual utility doesn't discriminate. So, it doesn't address discrimination between utilities caused by Provincial policy. It just asks the question whether a utility itself discriminates among its customers.

I hope that answers your question.

ARBITRATOR ORREGO VICUÑA: Yes.

ARBITRATOR DOUGLAS: Just a few questions, and by all means reserve them to your Reply, if you wish to do so.

The first question is, are there any obligations that BC Hydro undertook in the EPA with

12:23:55 Celgar that, in order to be performed, would require BC Hydro to exercise sovereign authority? In other words, are there any obligations in the EPA that couldn't have been performed by a private contracting Party?

MR. SHOR: An obligation--

ARBITRATOR DOUGLAS: An obligation, the performance of which requires BC Hydro to exercise sovereign power.

So, for example, in some production-sharing contracts, the State Party to the production-sharing Contract guarantees access to certain lands, and it is quite clear that a private party can't do that. Only a State enterprise.

MR. SHOR: Yes. We think the GBL-related Exclusivity Provisions, which impose which limit the obligation--which impose a self-supply obligation on Celgar and which necessarily limit FortisBC's obligation to serve Celgar, are not provisions a private party could have imposed without delegated Government authority. And we think that authority was provided by Order G-38-01.

12:25:07 ARBITRATOR DOUGLAS: They're the only one ones?

MR. SHOR: The only relevant ones.

ARBITRATOR DOUGLAS: The next question relates to the standard in Articles 1102 and 1103.

I understand it's your position that nationality-based discrimination is not required. Just taking what the United States Government says--and I suspect you're not going to agree with it, but they say de facto discrimination occurs when a facially-mutual measure with respect to nationality is applied in a discriminatory fashion based on nationality.

My question is, if that's right--and I expect you're going to say it's not correct--but one can understand what the threshold is, what the test is. Because the Parties have decided, the Contracting Parties of NAFTA have decided that you can't discriminate on the basis of nationality. That's pernicious in and of itself. If you take away the nationality element, what then becomes the threshold, and then what is the relationship between 1102, for

12:26:17 example, and 1105?

MR. SHOR: We are not saying that you take away the nationality element or it doesn't need to be nationality-based discrimination. I think all we're arguing about is kind of what proof is required of that. It is our contention--and it's been the consistent interpretation of other NAFTA panels that you don't--in the case of de facto discrimination, you don't need to find some separate element that it--the Government intended to discriminate against you because of your nationality, but nationality is an element. We have to prove that we're an American company, an American investment, and we have to prove that a Canadian or a third-country investor was treated more favorably.

That's the nationality-based discrimination. On a de facto basis, it is simply required that you prove that a U.S. investor was treated less favorably than a Canadian or third-country investor, and that there is no justification for it. Once you've proven that, you have proven that it's based on nationality because there, in effect, is no other explanation.

12:27:28 And Canada has never addressed our argument. The problem, I think, with the U.S. argument is, I don't understand it. You know, as a lawyer, I want to know, what is it I have to prove? Where can I go get the evidence? What do I have to present to a Tribunal? And what is it they're asking us to prove here? Do we have to depose the members of the BCUC that issued G-48-09, and ask them, what were you thinking? Was it because we were American, or did you have some other?

We would never have access to that information. What is it they're asking us to provide? Nobody has ever answered that question.

ARBITRATOR DOUGLAS: I'm with you on that, but I guess the question is, to what extent does the Tribunal need to make an inference that the reason for the deferential treatment was the nationality of the entities concerned?

MR. SHOR: I don't think 1102 or 1103 requires you to infer that there's a reason. I think the standard--and even Canada agrees with us on this--there are three elements. Treatment of a U.S.

12:28:34 investment that is in like circumstances to a Canadian and, third-country investment that is less favorable. Once you establish that the U.S. investor has been treated less favorably, you have the required inference of nationality-based discrimination. That is all that's required.

ARBITRATOR DOUGLAS: Finally, what's the scope of treatment? Because, naturally, as a Claimant, you're focusing on the particular measures that you say are in breach. But what extent do we take into account the broader context? I mean, just as a hypothetical, suppose a State agency is giving out scholarships to students, and it turns out that two students from a particular nationality have been denied these scholarships, but it turns out that they were getting some other benefit from some other agency, and on that basis, were excluded.

Is that part of the overall treatment, or do you just focus on the particular measures? I mean, you might say that there were no offsetting benefits at all, and therefore, it's irrelevant. But how broad or narrow is the scope of treatment?

12:29:41 MR. SHOR: I would start where you suggested I would start, that there were no offsetting benefits at all, so the question is purely hypothetical.

But I think you look at the particular measure. You look at the particular program. So, in your example, if you had a program to award scholarships, and it didn't say that, for example, Nigerian students were ineligible, that would be de facto discrimination. But, in fact, everybody got to--everybody got a scholarship except the two Nigerian students, then you would find de facto-based discrimination. And you wouldn't look beyond the contours of the program, the contours of the measure you were examining to see, well, maybe they got other benefits, if, in fact, they got other benefits.

Let's say they didn't get a Canadian federal-level scholarship because they got a B.C. scholarship, and they were able to go to college and got money. In that case you could say there wouldn't be any damages because they got the same benefit as everyone else, but I think there would still be discrimination in the measure, unless the measure was

defined as a program that provided scholarships to people who didn't have other scholarships. Then it would be incorporated within the scope of the measure.

But I think another way of approaching the answer to your question is that we're getting into the realm of justification, and that's Canada's burden. It's not our burden to prove that they had no justification; it's their burden to come forward. And they're not arguing about any broader program or other programs. They make some noise about the PPG, MTA, whatever program that was that paid for the second generator, but that was a federal-level program. It was a different level of Government not related to anything B.C. was doing.

And that's an example of a program that was applied on a nondiscriminatory basis; right? All pulp mills in B.C. were eligible, and everybody got paid in proportion. They got 50 cents a gallon for black liquor production over a defined period of time. Everyone was treated equally. There was no discrimination. It wasn't the case that Celgar got 60 cents and somebody else got 49 cents. Everybody got

12:31:58 1 the same.

2 But that's not relevant to what happened here
3 because that's outside the scope of the Measure or the
4 program we're talking about. BC Hydro, in setting
5 GBLs. We have Mr. Dyck's statement on what they
6 considered. They didn't consider other Government
7 programs or federal-level programs or anything. It
8 was just supposed to look at historical generation.
9 PRESIDENT VEEDER: Just to follow that up,
10 I'll put you on the spot, because I'm not sure you're
11 doing justice to the U.S. submission under
12 Article 1128.
13 I know you don't have it, but at Page 5
14 Footnote 14, when they deal with Pope and Talbot in
15 Grand River, they say Claimant is not required to
16 establish discriminatory intent. And they cite Grand
17 River, "The requirement to show discrimination on the
18 basis of nationality under Article 1102 does not
19 require a showing of discriminatory intent; rather, a
20 Claimant must establish that a measure, either on its
21 face or as applied, favors nationals over
22 nonnationals."

12:33:02 I want to give you the example that Professor Douglas gave, slightly more awkwardly.

There are four students, two Nigerians, two U.S., DC College. One Nigerian and one U.S. get scholarships. Would the Nigerian, assuming he came from a NAFTA State--we're being a bit imaginative here--have a claim?

MR. SHOR: Possibly. I think de facto discrimination requires you to demonstrate, as we think we've demonstrated here, that a different standard was applied. So if, in fact, the Nigerian student--on its face, there is no de jure discrimination. The numbers work out proportionately, so there doesn't appear to be discrimination.

But let me take your hypothetical and say that the DC College, their main criteria for admission are SAT scores. And if it turned out the Nigerian had higher SAT scores, the Nigerian who was denied admission had higher SAT scores than the U.S. Citizen who got admission, that would be a basis for a discrimination claim.

Again, they wouldn't have to show that there

was intentional discrimination because they were Nigerian. The facts would establish that, objectively, they were treated less favorably based on the criteria that were supposedly the basis for making the decision.

PRESIDENT VEEDER: Thank you.

MS. GEHRING FLORES: Just to follow up on that, Mr. Veeder, I think we've pointed out in our pleadings, and certainly in our response to the Mexican and U.S. submissions, that it's not a defense that you provided relatively good treatment to one other person in the Protected Class. That's not a defense.

PRESIDENT VEEDER: That wasn't my question. Don't worry. Different point.

We may have further questions later, but we'll stop here, and we'll come back at 25 to 2:00 for the submissions from the Respondent.

(Whereupon, at 12:35 p.m., the Hearing was adjourned until 1:35 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT VEEDER: Let's resume. We now have the Closing Oral Submissions from the Respondent.

CLOSING STATEMENTS BY COUNSEL FOR RESPONDENT

MR. OWEN: Thank you, Mr. President.

Why are we here?

The Claimant alleges that BC Hydro should have procured its existing self-generation in the context of a commercial Call for Power in direct contravention of B.C. Government policy. The procurement of this electricity would have added nothing new and only resulted in a large subsidy, no new electricity. What the Claimant wants is something for nothing.

The Claimant in the context of this call negotiated a Side Letter Agreement with BC Hydro which permitted it to sell its below-GBL electricity if it received BCUC approval. No other self-generator with an EPA has this preferential arrangement. They have gotten better treatment.

The Claimant, however, after getting the Side Letter Agreement, has adopted extreme positions before

01:42:08 the BCUC that would allow it to engage in harmful arbitrage with all of its below-GBL electricity. It has also agreed to suspend the NECP rate proceeding which would have allowed it to sell its below-load electricity. It is no fault of Canada's at this point that it does not have some sort of arrangement to sell some of its below-load GBL electricity.

As I present the facts today, we're going to start with the Claimant's allegation that BC Hydro set its GBL and its EPA less favorably and how that's false. We'll explain how the Claimant has not been denied access to embedded-cost power. And then finally, we'll turn to BC Hydro--how the BCUC and BC Hydro have not compelled the Claimant to self-supply to displace its load.

So, first point with respect to the allegation that the GBL was set less favorably, I'm going to go over first how not all GBLs serve the same purpose, the GBL methodology for BC Hydro, the claimant's "shooting for the moon" in the Bioenergy Call, its misguided comparisons to other pulp mills, and finally how the BCUC and the Ministry of Energy

and Mines have treated the Claimant favorably and fairly.

Not all GBLs serve the same purpose. So we've heard a lot from the Claimant this morning about there's no difference, they are all the same. What I hope to do here is explain what the real difference is in terms of the structure of these transactions and the Utilities Commission Act in British Columbia.

What I have up here is what we would refer to as a service GBL. And here BC Hydro is acting as the supplier of the electricity, and it's supplying electricity to the customer who then might, in turn, want to sell it to third parties.

In this type of arrangement, BC Hydro is a monopoly. And in the regulatory scheme of a Utilities Commission, the customer, the industrial mill in this case, needs protection. That's what Utilities Commissions are typically set up for.

There are examples of this. The Tolko Kelowna GBL is an example of this, and I'll touch on that in more detail in a minute. But this determines the limit of BC Hydro's obligation to supply the Mill

while it's exporting power.

And the key thing here is that it happens under a different section of the Utilities Commission Act. It happens under Section 38 of the Utilities Commission Act, which relates to the obligation to serve. Again, the principle of harmful arbitrage is at play, and that ended up informing future situations with self-generators interacting with their utility.

Mr. Dyck touched on this in his testimony. He explained G-38-01 was written by the Utilities Commission and based on a program at the time to sell energy to market. In that Order--from that Order they drew principles when they got to the procurement and design of their procurement, and one of the biggest principles is avoiding arbitrage--harmful arbitrage.

So what's different? Well, think about the transaction involving procurement. Here the industrial mill is a supplier and BC Hydro is the buyer. There isn't a monopoly situation in terms of BC Hydro being the only supplier. It's the exact opposite. In this case the transaction falls under Section 71 of the Utilities Commission Act, and the

01:45:59 purpose of Section 71 is to look at whether or not the potential procurement is in the public interest.

So, in this type of GBL, a procurement GBL, it determines the level above which BC Hydro will buy electricity. BC Hydro only wants to procure new or incremental generation, as any private or public utility would. And BC Hydro and Celgar negotiated a procurement GBL in their 2009 EPA, so fundamentally different.

Now, the Claimant said that the policy surrounding this was a secret 2002 policy I think is what I heard the Claimant's counsel characterize it as. But Mr. Merwin certainly didn't think of it as a secret; he actually referred to it in his testimony, and that's at transcript Page 339, Lines 2-10. So I'm not sure how it could be a secret when their own Witness mentioned it.

Okay. Just summarizing it. So two types, a service GBL and a BC Hydro procurement GBL. In the first instance, one is about how the utility serves its customer and how much it has to supply the customer. In the other instance, it's a utility like

01:47:15 BC Hydro procuring or purchasing power. They have different purposes, and the Commission role is somewhat different in the two different--with respect to the two different type of GBLs. Both are negotiated.

And I'd like to make this point. BCUC has never imposed a GBL. It has always engaged in negotiation. It has always let the Parties negotiate the GBL and then it's considered that. I think at one point there was a suggestion that G-113-01 was a BCUC-imposed service GBL. That is not the case. If you look at the actual record, the Parties in that case, it was the City of Kelowna and Tolko (Riverside), the Riverside sawmill at that time, and West Kootenay Power; they agreed and came with a proposal to the Commission for a 2-megawatt GBL.

ARBITRATOR DOUGLAS: Just on that point, though, there was the--you'll have to remind me what decision it was, but there was quite specific language that rejected an argument that there were two different things. I think it was in the earliest decision that was referred to us. How do we square

what you're saying with what the BCUC said?

MR. OWEN: So are you referring to G-38-01?

ARBITRATOR DOUGLAS: I think so. G-38-01, I guess.

MR. OWEN: Okay. If you look at G-38-01, that's really about the utilities' obligation to serve, so that self-generators could export power. And in that particular decision, they don't even refer to--use the term "Generator Baseline." In fact, they just say a baseline has to be established. And a baseline could be based on consumption or generation. So it's even less specific.

The Claimant says it directs BC Hydro to set a Generator Baseline. Well, equally you could look at it as being a suggestion that BC Hydro could set a baseline on consumption. But really, if you look at that decision--and I think it is Paragraph 5 of the Order--it refers to it as being a program. And it's a short-term program that was set at that time that was extended later in G-17-02, about a year later.

And significantly, if you look at some of the BCUC processes that have approved EPAs, for example,

01:49:46 E-08-09. We haven't heard that one a lot, but that is essentially the process that approved all the 2009 EPAs for the Bioenergy Call for Power. So it approved Celgar's GBL.

If you look at all the documentation in that--and it's on the record, and I'm sorry I don't have the references right off the top of my head--there is no reference to the short-term program established under G-38-01. They're looking at this under Section 71 and determining whether or not to accept for filing the EPAs because they are in the public interest--whether or not they're in the public interest. It is a completely different analysis.

PRESIDENT VEEDER: If we're on to this, and this may be a wholly irrelevant citation, and I forget how I marked it. Somebody must have referred to it. It is C-284. But it's the reasons for the decision that are in Appendix A, reasons in an Order G-19-14, and it's Page 6 of 8.

There was a passage, third paragraph from the bottom. "Because these self-generators are selling to BC Hydro, the GBL in these cases has a dual purpose.

01:51:01 On the one hand it is used to establish BC Hydro's obligation to serve under RS 1823 (Order G-38-01), and on the other hand it identifies how much idle self-generation is available for BC Hydro to purchase under an EPA. As pointed out by Celgar in its submission, these two amounts are reliant, and there is, in fact, only one GBL. This issue is analogous to two sides of the same coin."

Now, how does that fit in? You can come back to it later.

ARBITRATOR DOUGLAS: I would like to clarify my question; that was the language I was referring to.

MR. OWEN: Okay. Fair enough.

PRESIDENT VEEDER: This Decision, G-106-14, Exhibit C-284, is the 25th of July 2014.

MR. OWEN: This is a complex subject and I'm going to--

PRESIDENT VEEDER: It's extremely complex. Don't answer now.

MR. OWEN: I'm going to give Mr. Bursey a chance to give me some points here which I'll hopefully be able to explain clearly.

01:52:37 I mean, I think, you know, one of the other references that counsel pointed you to was the Kelowna Decision, and that's a more recent decision too. And it involved--and I can clarify that.

So the Kelowna Decision involved essentially that Tolko (Riverside) Decision all the way back from 113-01. And what had happened was at the time back in 2001 when that service GBL was established, and it was about looking at the obligation of West Kootenay Power and the City of Kelowna to serve the Riverside sawmill, that--the circumstances changed there.

And what happened was we had Order G-48-09, the City of Kelowna was actually taken over by FortisBC, and an action was--in the context of that action there was concerns raised about, Well, it has this old level of service GBL, and then there is also G-48-09 that applies throughout the service area of FortisBC. In that context--and I think Claimant's counsel initially referred you to that--it talked about G-38-01 being the genesis of the GBL. Well, absolutely.

I think when you're looking at G-38-01 and

01:53:50 you're looking at G-113-01, those 2001 decisions, they're decisions that have to do with a level of service a utility has to provide the self-generator. Okay? And they are the same. And when that language was used in that particular decision by the BCUC, in that particular decision it was about the level of service, and it was directly related to G-38-01.

ARBITRATOR DOUGLAS: So you're talking specifically about G-19-14 the President just mentioned?

MR. OWEN: No, I am not. I am talking about the Kelowna Decision. I'm sorry. I apologize.

I think to a certain extent there is sometimes in some of the BC Hydro documents and potentially the Utilities Commission itself, there's a little bit of loose language around GBLs. But really if you look at the regulatory scheme and the statutory structure, the two proceedings that you're talking about are different. The level of scrutiny that is received in the context of a certain level of service GBL is different because, again, in that context, BC Hydro or FortisBC is a monopoly. And the customer

01:55:02 has more safeguards and the Utilities Commission is going to look at that harder than the case where you have a procurement and the customer is selling something to a utility. That is more of a monopoly situation.

Sorry, I'm not enunciating my words particularly clearly.

But anyway, I need to move on and I will try to give you that answer about the other precedent.

Okay. So Celgar sells its electricity to BC Hydro, and it is served by its utility, FortisBC. And I think, you know, there are some interesting things that have come up in the context of this.

You had the testimony of Mr. Scouras where the Claimant's counsel asked him about, Well, these two GBLs, has this ever been set? Mr. Scouras answered quite honestly that Riverside sawmill at one point came to BC Hydro and said, We'd like to be part of your Standing Offer Program.

The Standing Offer Program is essentially a procurement process for self-generators, less than 10 megawatts.

01:56:04 And Mr. Scouras testified that they weren't satisfied with their old level of service GBL of 2 megawatts from a long time ago because that self-generator essentially had never used it and it was using its self-generation for self-supply. So they set it at <<[redacted]>> megawatts, <<[redacted]

Dr. Fox-Penner also in economic terms acknowledged that there is a difference between the types of situations that you're talking about here under the 2009 EPA and the situation with FortisBC.

So, let's talk about BC Hydro's GBL methodology. So starting from the very general, an EPA is intended to incent different behavior and cause increased generation, and that's to add resources to this BC Hydro stack.

Again, looking at the broader policy context, we're talking about something that is occurring within the context of the 2007 Energy Plan, the Province trying to become energy self-sufficient again and holding commercial calls for power. Mr. Allan, their own Witness, even characterized it as a commercial Call for Power.

01:57:19 The GBL established a framework from which both BC Hydro and the self-generating customer can determine what was incremental and what wasn't. It essentially demarcates it. And some of the Claimant's own Witnesses, there are hints of that in their testimony.

Mr. Switlishoff testified that the GBL concept was to incentivize new generation. Mr. Merwin also acknowledged that they knew that they were looking for incremental energy.

So, again, to define the amount of annual self-generated energy used for self-supply under current normal conditions with a prospect of--without the prospect of a negotiated EPA or LDA, and what Hydro is doing is it's looking at all the available information and they're trying to understand the operating data related to these self-generators that have very idiosyncratic plants.

These pulp mills have developed over a very long period of time. They are different pieces of capital equipment that have been installed, some of them work better than others. They have different

01:58:19 operating conditions. Some of them just produce craft pulp, others produce--have TMP operations. So there is a lot of differences.

It was intended to give Hydro some flexibility so that they could take into account the unique aspects of all these different generators. And they took these general principles and they tried to apply them consistently and negotiate with the self-generators in the context of a commercial Call for Power, what the reasonable Generator Baseline was.

Now, the Claimant really wants this to be a formula. It wants to reduce it to a formula. It has suggested there is a correct formula, and it suggested that Mr. Dyck used a formula for Celgar. It's not that simple. And I think Mr. Stockard, who is an expert in the pulp and paper industry--you know, it's a good illustration of what the potential problems are here. Mr. Shor handed him his Hypochuck example and said, here, calculate the GBL. Mr. Stockard said, well, what kind of hog boiler is it? What are the operations like? What are the process implications for--what's the process look like? And he didn't have

any way to assess the same way a Key Accounts Manager for BC Hydro would assess this information. I'm going to touch on the role of Key Account Managers in a little bit because it's very important.

The Claimant's own Expert, Mr. Switlishoff, has agreed GBLs can be a negotiated amount. They should give consideration to the unique circumstances of the negotiating mill, and he also testified that formulaic application of the GBL methodology would be too constrictive. The Claimant itself has taken the same position before the Utilities Commission. It said it supports the approach taken by BC Hydro and that a negotiated amount, given the unique circumstances of customers, would be appropriate.

Finally, it recommended--the FortisBC service area that a GBL should not be based on a set formula. All of this is consistent with BC Hydro's position. I'd also suggest looking at the Staff Report appended to Order G-38-01, and, in that context, there are a number of stakeholders, a whole range of stakeholders, that were interested in selling into the California energy market. This is different than the procurement

02:01:02 situation that we have here, but there's an organization called JIESC, which is essentially now called AMPC. It's essentially an organization of major power users in the Province--a lot of pulp mills are in it--with respect to BC Hydro's service area. And their JIESC's position is they prefer to negotiate bilaterally with BC Hydro.

BC Hydro explained its approach in two workshops during the Bioenergy Call for Power Phase 1 and held one-on-one meetings with proponents. BC Hydro's Key Account Managers negotiated GBLs with proponents following individual meetings, an exchange of technical information, to make sure they had an accurate understanding of each facility. This is meeting notes from one of the workshops, the second one that we referred to, that occurred on March 26, 2008, and, here, you know, Hydro is saying, we want to understand the unique attributes of each customer situation.

They're not making this up. This is what they're saying contemporaneously in the context for Call for Power. We want to sit down one-on-one with

you guys and really understand your operations. Help us to understand your unique operating conditions that are embedded with your annual GBL so that we can collectively review and understand the specific elements that are open to refinement. This isn't post hoc. They're saying this at the time. It is just a customer-specific case-by-case approach.

The Claimants allege that BC Hydro's GBL concept affords too much discretion, unbounded discretion to the decision-maker and ignore--but they ignore that the GBL was a negotiated term of the Contract.

Mr. Dyck didn't choose every single GBL in and of himself. He consulted his colleagues in power acquisitions, he talked to engineers in some instances, and he also talked to the Claimant. He talked to the Claimant extensively and other proponents.

So, let's talk about the Claimant in the context of the Bioenergy Call. And I'm going to go back a little bit to their acquisition of the Mill. I want to emphasize they bought the pulp mill out of

02:03:16 bankruptcy for $210 million in 2005. It was purchased for its ability to produce pulp. They didn't look at electricity sales. No investment was made by the Claimant in the existing 52-megawatt turbine, the turbine that is at issue in this case.

And you often see in their submissions, and it was suggested again in the Closing, well, you know, we're talking about our generation that we invested in. Celgar Pulp Company, the previous owner that went bankrupt invested in that generation. They bought the asset, and they bought it for a very good price, but they bought the entire asset, the entire facility.

And when Celgar Pulp invested in that 52-megawatt turbine in 1993, it decided to do so without Government assistance. It was a half-owned Canadian company. It could have presumably gone and sought assistance from the B.C. Government maybe the way Howe Sound had at the time. And it also decided to commit to use its turbine for self-supply so they could secure quick regulatory approval of the project through a Ministers' Order.

Blue Goose: Blue Goose occurred prior--the

idea for Blue Goose occurred prior to the acquisition of the pulp mill. And the Claimants own CFO--and I think he's now their CEO, actually--Mr. Gandossi got a promotion, I understand--has testified that prior to the acquisition of the pulp mill, they weren't even looking at electricity sales. But the entire project justification, and the reason for the debottlenecking projects that they flagged in Blue Goose, was essentially for increased pulp production, reduced chemical savings, and reduced natural gas costs.

Now, later on they do flag electricity sales, but it's the least important element of the project justification. And Mr. Shor has said just recently in his Closing, you know, the incentive was provided by the market. Exactly. The incentive was provided by the pulp market. The Claimant didn't need Government assistance or intervention or a subsidy to make this business decision. After the pulp mill had been capital constrained for so long, it had basically gone under because they had had huge cost overruns in the early 1990s. They hadn't been able to invest in any of this logical debottlenecking, things like chip

02:05:40 silos. I'm at a loss to understand how a giant silo of chips can be an energy optimization project.

But anyways, Mr. Merwin informed FortisBC that he would adopt a concept that was, moving on into 2007, an aggressive approach. And he didn't know what the electricity costs were or if there was a business case for what he wanted to do, but his aggressive approach was his Arbitrage Project. And the Claimant has continued to seek the Arbitrage Project in one form or another since that time.

At the outset, they knew the regulatory risk. Okay. His own internal management presentation indicated there's a risk that BCUC will rule in BC Hydro's favor. There's a risk the B.C. would even step in and pass an Order in Council to stop this.

Mr. Merwin's testified he was advised by George Isherwood, who was essentially the former Director of Regulatory Affairs. He held the post, I think, before Mr. Swanson or at some point earlier before Swanson. He had good regulatory advice at the time. And his only excuse about regulatory risk and not understanding the context is the one line e-mail

02:06:55 that he got in July 2008 when this transaction was almost done, that said that they were on "terra firma." And he says, "Well, you know, we didn't think regulatory risk was a big deal." The record doesn't bear that out.

Okay. Mr. Debienne e-mailing--here are some of the things we've come across: Mr. Debienne e-mailing Mr. Merwin to inform him that he's meeting with his external regulatory counsel and to set up follow-up calls. Mr. Debienne bantering openly with Mr. Merwin concerning the relevant regulatory precedence, the Tolko (Riverside) Decision I mentioned in a Draft Term Sheet, in December 2007; Mr. Debienne's notes that he provided us, indicating the Claimant preferred to go to the BCUC first to achieve regulatory certainty. That's from April 2008; the Claimant and FortisBC incorporating BCUC approval as a condition precedent into both their Term Sheet and their Power Supply Agreement; and, finally, Mr. Swanson's testimony, which is hearsay evidence, but he did talk extensively with Mr. Debienne to get his understanding of what went on.

02:08:08 So, the Claimant decided to participate in the Bioenergy Call, but it also decided that--why not put its Arbitrage Project in? It rebranded it the "Biomass Realization Project," and it submitted it despite the fact that Mr. Merwin was aware that the Arbitrage Project was inconsistent with B.C. Ministry of Energy's policy concerning procurement of existing self-generation. He also knew it was inconsistent with the terms of the RFP for the Bioenergy Call, and he understood that BC Hydro would potentially have a big problem with it.

The Claimant and his Canadian counsel attended BC Hydro's sessions on the Bioenergy Call which discussed GBLs. Here's some of the things that were said in those: In the February 20 information session, the GBL presentation emphasized that the GBL would be adjusted for unique customer circumstances, and it also mentioned adjustments for Rate Schedule 1880.

And I want to pause on that for a second because it's important. For BC Hydro customers, Rate Schedule 1880 is essentially a rate where if there are

process upsets, there are mechanical breakdowns, force majeure events, serious problems at a BC Hydro facility for an industrial customer, they can call on Rate Schedule 1880. Well, Hydro was essentially saying we're going to adjust the GBL to get rid of those types of events. Mr. Merwin confirmed on the stand that he understood exactly what Rate Schedule 1880 was. So, he knew that this type of adjustment for abnormal events would occur.

BC Hydro requested certain information from Mr. Merwin so he could negotiate a GBL. He had in-person meetings with, not just Mr. Dyck, Ms. Baum, and others, phone calls, more than half a dozen times concerning the setting of a GBL and the negotiation of it. He made only one proposal for a GBL of 33 megawatts, based on self-generation in 2006, and that was a year where they installed three Blue Goose Projects and had two annual shuts.

That evidence is unrebutted. Pulp mills don't normally have two annual shuts. They don't normally install three major pieces of capital equipment. The benefit they would have got out of

02:10:26 Blue Goose was all of the disruption and problems that were being caused as this equipment, this new equipment, was being adjusted to by the employees. That's exactly why Mr. Dyck discounted it in the first place. He couldn't go back to 2006 because he knew that things had changed a lot in that pulp mill, and that there was a new normal there.

Mr. Merwin also admitted that he normalized consumption of natural gas at Celgar when he did his own GBL calculation of 33 megawatts, in accordance with his auxiliary fuel baseline. And that's the baseline that Celgar understood would be the normal amount of natural gas they would use for process upsets and for start-up and shutdown of their different boilers.

Mr. Dyck explained with respect to Celgar's normal self-generation that the fact is, as I understand it and still do understand, is the Mill is trying hard to be self-sufficient all the time, but it's not always a perfect match. And, on average, when you smooth out the exports and imports, there are more exports than imports. And that's a state of

02:11:34 normal operations for the Mill, and that's the basis on which he looked at the Generator Baseline.

I think, more generally speaking, they were looking at a mill, and Mr. Merwin said over and over again that they were trying to meet their load. They were looking at a mill that was attempting, during normal operations, to be self-sufficient or even get a little bit over that.

And like Mr. Dyck testified, it is like having a car on cruise control and hitting an undulating train. Sometimes you're going to get a bit over and sometimes you're going to get a little bit under. The reason is, that energy generation at that pulp mill is completely tied to its pulp production process. Okay. That pulp production process is driving its energy production. So, it moves up and it moves down. It moves up and it moves down.

The main difference between our two positions is that we think that in that type of situation, what BC Hydro looked at and what Mr. Dyck looked at is, well, you know, if they're trying to be self-sufficient, if they're going for that, this is

what their generation pattern is going to look like. And I'm going to take that generation pattern, all of it, into account.

The Claimant, though, wants a formula applied. And what the Claimant wants to do is essentially shave off the peaks. Anytime it goes a little bit over and there's a little bit of export, shave it off. But that doesn't look like the generation pattern that the Mill would have in those type of circumstances.

Now, it's impossible to have an arbitrage of power above your load. So, Mr. Dyck looked at what their generation was, 350, and he--it's not the math that Mr. Shor said. He gave him a slight adjustment downwards to 349, of 1.3-gigawatt hours. There is nothing wrong with that. It is just a different way of looking at that baseline.

I know they want their formula based on self-supply, but a mill is never going to have a perfect line. You can't just turn the dial up and have it cruise along at 40 megawatts or 41 megawatts. There's going to be that variability, and Mr. Dyck

thought that that was appropriate.

I'd also like to stress that the Claimant was the only one in this situation. Celgar was the only pulp mill that met its self-supply needs, and Hydro had to make a call, you know, as to how it would treat that generation pattern for the purpose of the Bioenergy Call. And the way that it did, was it looked at what the Claimant was telling it, in terms of it meeting its own load, and it took that pattern and it used it to set its GBL.

Here are some of the representations again that were in Mr. Merwin's May 7 letter. It utilizes at its option its electricity to displace its load at its industrial facility. And then talking about the Green Energy Project, the new turbine would allow Celgar to generate up to 35 megawatts of energy in excess of that, which is currently being supplied to offset Celgar's load and, again, making the representation we know that many of our competitors haven't yet matched their mill loads. And he was right.

BC Hydro applied the GBL methodology and

02:14:58 determined that the Claimant should have a GBL of 40 megawatts. Mr. Merwin acknowledged that BC Hydro's GBL would provide Celgar with an opportunity to arbitrage below-load electricity this. And this is in one of his contemporaneous memos. He indicated that, in the future, as their pulp production grew from what it was in 2007, which was 476,000 air-dried metric tonnes, all the way to 2010, when they would hit half a million tonnes. Their load and their generation would continue to grow, and they would be able to arbitrage that.

Celgar's own internal documents confirm that it was a reasonable GBL. Think of the representation that they made to < [redacted] in the middle of 2007. Our Arbitrage Project is going to be about another additional 40 megawatts. Another draft memo that he had, had a scenario where BC Hydro had a Generator Baseload at < [redacted] megawatts.

So, what are some of the complaints about the GBL? There's a lot of complaints about FortisBC and NorthPoint's sales. But Mr. Merwin contemporaneously indicated with respect to FortisBC sales, there is

really no incentive for Celgar to innovate to produce more electricity or reduce its own demand. He also testified in his First Witness Statement that those transactions were for [redacted]

Think about the numbers. Celgar's gross pulp sales were <<[redacted]>> million in 2007. Its total energy sales were <<[redacted]>> million. This was not particularly important to the Claimant, and Mr. Merwin acknowledged that they made a minimal contribution to the awards or earnings during this period.

Mr. Merwin asserted that Celgar would have changed its operations in two different ways with these sales--without these sales. [redacted]

And then with respect to the NorthPoint sales, Mr. Merwin, we took him through the numbers, and he agreed that, at most, it could be [redacted]>-gigawatt

02:17:27 hours, and he had no proof whatsoever that, even during those <[redacted]>-gigawatt hours, there had been burning of natural gas.

Mr. Merwin alleged there were hog fuel costs but admitted on cross-examination that there weren't any hog fuel costs. Now, he would later say there was an opportunity cost, and I'll be fair to him there, but he didn't talk about sales of hog fuel. He talked about hog fuel costs. [redacted] that they needed that thermal energy during the winter at least some of the time.

His next theory was that they would operate the Mill in thermal balance, only providing enough steam for the mill to meet its thermal needs and that they would do so by presumably reducing the amount of steam going to the production process. But it doesn't make much sense. There are two loads here. There's a thermal load that they need for their pulp production process, and then if they want to meet their electrical load, which is higher, they need to put more steam through that turbine. If they don't meet

their electrical load, if they are not putting more steam through the turbine to meet their electrical load of 349-gigawatt hours, they have to pay the difference to FortisBC in terms of the rates. And the rates at that time were a time-of-use rate. Sometimes that was as much as $150 a megawatt hour. Why would they operate in thermal balance? And this is something that Mr. Stockard pointed out in his Second Expert Report.

The last theory that we heard is that Mr. Merwin would have the Mill vent high-pressure steam off the high-pressure header. But in reality, that would have imposed additional costs, too. It would have meant that essentially the pulp mill would have had to spend more money taking in water to replace some of that steam and treating it. That is potentially more expensive.

BC Hydro negotiated GBL with the Claimants that it could procure new or incremental electricity. The Claimant's GBL and the Exclusivity Clause were negotiated terms of the EPA. The Claimant could take the EPA or alternatively develop another opportunity.

02:20:00 It talks all the time about these prices that were existent for a brief period of time on Mid-C of approximately <[redacted]> a megawatt hour from time to time. And prices were high then. There is no doubt about it. It could have taken that opportunity. It could have made forward sales in the Mid-C market. It would have been a very, very poor opportunity because the Mid-C market collapsed after that, and the prices have basically remained very low ever since. But it had that option.

The Claimant's objections to the Exclusivity Clause were identified early on, and they were dealt with through the Side Letter Agreement. Mr. Merwin admitted in cross that they were essentially leaving the issue of the Side Letter Agreement to the British Columbia Utilities Commission. And he conceded the negotiations weren't BC Hydro strong-arming them. They were very amicable. Officials were very polite. They wanted to do a deal just like Celgar wanted to do a deal. Celgar wanted the assurance of an EPA. BC Hydro's officials wanted to secure [redacted] gigawatts of firm electricity.

02:21:09 The Claimant willingly decided to leave the issue to the Utilities Commission despite the regulatory risk that had been identified by its consultant and reiterated by FortisBC.

So, let's talk about comparisons to other pulp mills. Let's go to Tembec first. Again, just by way of background--and I'll move through this quickly--in 2006, the EPA became--Tembec's existing EPA, <<[redacted] In late 2007, Tembec would approach BC Hydro to say "Can we renegotiate this?"

And BC Hydro would say "No. Please try and go to the Bioenergy Call for Power." And in the context of the Bioenergy Call for Power, <<[redacted]> It didn't work for them. It wasn't a good process for them. They ended up being unsuccessful.

In December 2008 as <<[redacted] they approached BC Hydro again and asked to renegotiate the EPA. And the Parties agreed on a GBL that reflected how the

Mill would operate in the absence of the 1997 EPA in the spring of 2009, and the EPA was concluded later that year.

So, three phases to this. The first phase is that Tembec was operating under the 1997 EPA and it <<[redacted] And then the Parties assumed that Tembec <<[redacted]>>. And at Phase III they were essentially operating under the 2009 EPA. Now, what the Claimant really wants is a comparison between Phase I and Phase III. But what the Parties agreed was reasonable in this commercial renegotiation was a comparison between Phase II and Phase III.

We brought in Mr. Lague, a very honest man. He's testified that the agreement's <<[redacted] The statements that we produced to the Claimant showed one EBITDA analysis having [redacted] in 2008.

Now let's talk about some of the testimony we

had as to whether this was commercially viable. Mr. Switlishoff provided testimony on behalf of Claimant and said there would be a <<[redacted] But he incorrectly assumed that all of the electricity purchases <[redacted] He didn't account for the [redacted]>> at all. And he incorrectly attributes a benefit to the <<[redacted] of demand charge. He basically said the demand charge would increase from where it actually was at around [redacted] so that there would be this great change in Contract demand for Tembec.

Mr. Lague, however, provided you with--he basically ran the numbers for us. He properly accounted for avoided electricity purchases <<[redacted]>>, and he properly found and explained why there would be no change in the actual demand charges and that they would remain substantially the same. He explained that the mill <<[redacted]

02:24:46 We've been accused by the Claimant in its opening of--they said that they would present a hog and bull story. Well, we have the hog story; they have the bull story. In reality, Tembec would have <<[redacted] Okay.

The Claimant has posited three reasons why it would have been economic. <<[redacted]> But that was really the <<[redacted]> problem. The continued <<[redacted] but that--there has been no evidence to bear that out that's credible. And it also suggested that significant volumes of hog fuel remained economic.

So, again, Mr. Lague explained that the <<[redacted] And he's testified that his priorities from his managers were to <<[redacted] He had been following <<[redacted]

[redacted]

And, finally, he explained that there were [redacted] There was no analysis done by the Claimant of the actual quality of the [redacted] And you heard from Mr. Lague that the <<[redacted] that the Claimant placed so much stock in was actually the <<[redacted]>> that they had. They had engine blocks in there, air-conditioners, and all sorts of things. Its heat value wasn't good. And if you were [redacted]

Mr. Switlishoff admitted that he was not an expert on [redacted] operations, and he also admitted that he was not an expert on fiber supply. Mr. Lague has been working at Skookumchuck since 1987. He was Project Engineer and the Energy Coordinator at the Mill at the relevant time, and he's been operating the <<[redacted] since 2000.

He's testified that <<[redacted]

02:27:07 [redacted] Let's go to that now. This is essentially what we want to explain to you and just make clear in terms of the Contract. So, this is what the <<[redacted]>> was essentially doing. It was <<[redacted] And then when it was firing at a rate of <<[redacted] its efficient rate, as Mr. Lague has testified, that would get it <<[redacted] at the top. This is based on <<[redacted]> data.

So, what would have happened without the [redacted] And there would also be <[redacted]>

self-generation capacity. BC Hydro's own analysis from--shows that that <<[redacted] a year.

Now, Mr. Shor is fond of saying there is no analyses. At one point he was referring to R-189, which is Mr. Keir's memo. And just to refresh your memory, Mr. Keir works at BC Hydro. He was a former key accounts manager for Tembec Skookumchuck, and he produced a long analysis of what the situation was there. It basically reflects these numbers that I've just referred to about the <<[redacted]

Mr. Shor has argued that the Tembec EPA let Tembec sell more than double the amount of electricity could sell to BC Hydro, and Tembec did so by increasing its electricity purchases from BC Hydro. Pure additional arbitrage according to him. But for the purposes of the 2009 EPA, they were trying to figure out how Tembec would have operated afterwards, and that's the key critical difference. When they are properly compared, there's no increase in purchases. Okay. So, here you can see without an EPA what would

have happened, <<[redacted], and compare it now to the 2009 EPA where essentially the GBL was set at [redacted]

Mr. Lague has testified that the Parties agreed to an average hourly GBL of 14 megawatts and that he believed that this was a fair compromise and allowed Tembec and BC Hydro to continue negotiating the rest of the EPA.

Howe Sound, unchallenged. Fred Fominoff, the general manager of fiber and energy at Howe Sound, testified about some of the <<[redacted] This Witness wasn't challenged at all by the Claimant. Here are the levels for the Howe Sound EPA.

02:30:49 I must draw something to the Tribunal's attention. For some reason in our Opening, we had different megawatt hours than was reflected on this chart. This chart is accurate. So, I apologize for that in advance. Somehow there was a problem with--when we were pulling the materials together. So, this is accurate. The Opening is not.

PRESIDENT VEEDER: Do you recall which slide that was in your Opening?

MR. OWEN: I do not have it off the top of my head, but I will get it for you, Mr. President.

PRESIDENT VEEDER: Thank you.

MR. OWEN: BC Hydro rejected Howe Sound's proposal of GBL based on <[redacted]>-megawatt hours. Instead it decided to use <<[redacted] These problems aren't contested by the Claimant. Mr. Switlishoff has even agreed that there were problems there. And they chose a period between <<[redacted] for a few reasons. Again, there was a <<[redacted]

02:31:53 [redacted] Howe Sound also <<[redacted] [redacted] [redacted] And then the data was [redacted] So they decided to <<[redacted]> it in this manner.

Mr. Shor, again, wanted this to be a formula. He wanted the GBL spreadsheet that you saw to be a formula. And Mr. Dyck explained, no, the spreadsheet was information and data relating to <<[redacted] [redacted] One of the things they were talking to Fred Fominoff about was [redacted] That's a key role that the key account managers play.

So, again, the circumstances of Howe Sound's [redacted]>>. Generation--and this refers to the <<[redacted] [redacted]

02:33:12 Those <[redacted]>, if you look, are fully explained in the Witness Statement. Those type of <<[redacted]> are fully explained in the Witness Statement of Pierre Lamarche, the First and Second Witness Statements. <<[redacted] Again, that evidence isn't contested by the Claimant. They didn't even bother cross examining Mr. Lamarche.

So, again, they arrived at a GBL of <[redacted]>>-gigawatt hours a year for Howe Sound. And Mr. Fominoff has said that he believed the GBL was set on clear principles articulated by BC Hydro and was fair to both Parties. That's unchallenged.

Finally, I've touched briefly on--I've touched briefly on the fact that the BCUC, when it's dealing with procurement GBLs has--determines whether or not they're in the public interest and looks at that. They have the power to either accept for filing the GBL or declare it unenforceable in whole or in part. Celgar didn't oppose its EPA or its procurement GBL, and the BCUC issued an Order accepting Celgar's

02:34:31 EPA along with three others under Section 71.

Ministry of Energy staff met with Celgar on several occasions to understand their concerns. And why wouldn't they? Celgar is a major employer in British Columbia. Nobody wants Celgar and Mercer to do better than B.C. Mercer even has its business offices in Vancouver. And there's just no reason why the Government would want this pulp mill to do less well than other pulp mills.

I'll give you an example of this, a concrete example. Take a look at R-389. That's a Briefing Note from January 11, 2010, and in it you'll see a very balanced analysis where Mercer has gone in and met with two Ministers, Minister Bell and Minister Lekstrom, I believe, and talked to them, explained its concerns, and officials prepare, as officials do in a civil service, a variety of options, considerations, and offer the Minister a recommendation. And the Minister ultimately concluded that the BC Hydro policy was fair, that Celgar wasn't being discriminated against, and that BC Hydro should only procure incremental self-generated electricity.

02:35:55 The Claimant has not been denied access to embedded-cost power. I'll touch on this briefly. And this is the FortisBC GBL. Okay.

BCUC Order G-48-09, by its own terms, was supposed to be short term. And it did leave the door open, as both Mr. Merwin indicated at the time and as Mr. Swanson has testified. It left the door open in terms of the ability to set up Fortis at GBL. And that Fortis GBL, it's been complicated and it's been reflected in BCUC Decisions, in G-156-10, and other Decisions. The idea of that FortisBC GBL is a service GBL. They'd still have the procurement GBL in their 2009 EPA, but the BCUC is clearly contemplating whether or not Celgar could have a service GBL which would allow them to make sales to third parties.

Mr. Swanson has testified if they had been able to agree on a reasonable GBL, that they could reasonably demonstrate the BCUC that protected ratepayers, there's a good chance they could have got approval of that. Mr. Shor referred to the fact that he mentioned, well, you know, 41 was a potential starting point for that, but he did not discount the

02:37:05 fact that they could have, you know, agreed to something lower than the BC Hydro GBL either.

Our position is potentially. It could well have been possible to have a GBL below 40.

The problem is, the Claimant's position on this is completely unreasonable. You've seen it over and over again in their documents. They don't really want a GBL that protects other ratepayers. They want a GBL that allows themselves to sell everything or almost everything. They want to reach all the way back to 1993. They frequently justify that on the fact that they installed the generation in 1993, but they didn't. That was done by their predecessors.

They didn't install that turbine at all. Yet they want the BCUC or FortisBC to go agree to go back to that and set a GBL of zero megawatts, 1.5 megawatts, or 3.5 megawatts, based on data from that time frame from the early 1990s. And Mr. Swanson has testified, he's met with them, he's talked to them over and over again. But there's never a GBL that they've brought forward that Fortis thought they could defend.

02:38:14 A lot of the problem, too, is that, frequently, Celgar brought its complaints in the context of other proceedings that weren't really appropriate. Rate design proceedings. It started a complaint about a lack of a General Service Agreement, and then, eventually, on Celgar's own suggestion, the BCUC started looking at a rate design as a potential way of dealing with their problem.

It had basically seen Fortis and Celgar show up over and over again and Celgar say, we want a GBL, and we want a GBL about 1.5 megawatts or 3.5 megawatts, that I think by the time it got to G-188-11--this is speculation on my part--it jumped at the idea that maybe it could do something for the two parties by a rate design. Because its own utility and Celgar could not agree on a GBL that was reasonable, mostly because the GBLs that were being proposed were 3 megawatts or 1.5 megawatts.

Mr. Swanson has made the point, though, that Celgar never filed a formal Application with the BCUC to set a GBL. Okay.

And here are some of the different proposals

over the years. We're now at a position where there's a PPA, new PPA, that's been negotiated between BC Hydro and FortisBC. What is Celgar doing? It's challenging the fact that there should be any restriction on potential sales to third parties. Why? Because it wants the moon again.

Celgar has attended--tended, in fact, it's a consistent pattern of basically trying to remove the restriction as opposed to acceptance of a tool to deal with restrictions. They're not willing to compromise. And part of that is trying to gain that competitive advantage that Mr. Merwin referred to in his briefing notes back in early 2007, to the Board of Directors. They want to be able to arbitrage everything, they'll be able to get a leg up on their competitors.

Mr. Swanson has talked about some of the different options that were available over the years for them to secure additional power, including his long chat with Mr. Merwin at Zuckerberg Island, and that was the genesis of this idea of the NECP. So, let's go to the NECP.

So, the Claimant has a right to sell up to

02:40:36 100 percent of its power. Mr. Switlishoff has essentially agreed to this, and that came out of the G-202-12 decision.

None of the BC Hydro customers that the Claimant complained so much about, Tembec or Howe Sound, have that right. It's a right that no other mill in the Province holds. The Claimant can stop self-supplying purchased embedded-cost power from FortisBC and sell its self-generated electricity once it gets a rate.

So, how would the NECP work? Self-generating customers such as the Claimant could nominate up to 100 percent of their load for self-generation and sale to third parties while receiving service. FortisBC would source an equivalent block of power from the market to basically put onto its nonembedded cost of power resources, in order to prove that it wasn't drawing on more PPA Power.

And maybe--just to discuss this for a minute--there are two elements to FortisBC's sort of embedded-cost power resource stack. There is the energy component, and there's the capacity or demand

02:41:47 component. FortisBC, with Waneta, has 100 percent of its capacity that it needs. So, there is really going to be no change to the standard industrial rate, Rate Schedule 31, from the service capacity element of the charge. Okay. That's a strict sort of embedded-cost element to it.

With respect to the energy component, what would happen is, you have a resource stack with a sort of ratio of resources. Part of that ratio is BC Hydro PPA Power, let's say 15 percent, for the sake of argument. FortisBC would go and get that 15 percent and basically source it from market through a long-term purchase, maybe a year or something like that, and that would essentially be what they would look at and compare to their existing Rate Schedule 3808.

If that 15 percent was slightly more than PPA Power, they would put on a slight Rate Rider for that. But it is an embedded-cost rate, because it also reflects the value of all of the other resources.

So, I know that's a little bit technical, but there is a lot of embedded cost within this rate.

02:43:02 It's--the only thing that's being substituted out is the proportion of BC Hydro, PPA Power that's being taken from market.

And right now the markets have been very reasonable. And the Claimant even indicated that in its own submissions in G-188-11. And we took you to that in our opening, where they were basically saying, for the foreseeable future, there is not going to be a problem buying off market. FortisBC has had the exact same position.

The Rate Riders only applied, only applied, when the NECP is greater--when the cost would be greater for that market-matching block purchase of power. And I think it's important to note that that Rate Schedule 31 is the same Rate Schedule that almost all of the transaction that the Claimant was going to do in 2008 under the Power Supply Agreement, that was almost all Rate Schedule 31. 36 megawatts were going to be Rate Schedule and 4 megawatts were going to be Rate Schedule 33, which is a time-of-use rate. It was blended, but it was almost exclusively RS 31.

So, in terms of--this is very close to what

they had in 2008, and that's something you should take note of.

ARBITRATOR DOUGLAS: Just on that point, Claimant says that when Fortis has to go out and buy the block of extra energy to supply Celgar, effectively, they're going to have to pass on the cost of going to the market to Celgar if they sell them that block. If I understand it, you say that that's not correct. The rate they'll actually come up with will be blended across the different energy resources that are available to Fortis, except for the PPA Power with BC Hydro.

What's the best document to take us to, to demonstrate who's correct and who's wrong?

MR. OWEN: There are a couple of FortisBC submissions on this. One is quite confusing. And the reason that is, is at the same time FortisBC was also considering--I think you probably heard about the stepped-rate that BC Hydro has. So, at the time, not only were they working on doing the NECP Rate Rider, they were also working on implementing a stepped-rate, which I believe was referred to at Rate Schedule 34.

But maybe we could explain this in writing. We'll dig up the references. Okay. Fine.

So, I think we provided an explanation. Mr. Swanson has testified about this, that it is not simply the market rate that the Claimant would have you believe. Okay. And that it's a fair and cost-effective way for the Claimant to withhold electricity to replace its self-generation.

And I think the other thing that was interesting was the emphasis on the fact that they could purchase the cheapest non-firm power, and essentially purchase that electricity, store it in their capacity that they now have in the Waneta Dam, and use that to essentially firm up the product and increase its value. So, again, another way that the NECP is quite economic.

The Claimant said it was dead. No, it isn't. It's a suspended proceeding. They say the BCUC suspended it, as if it would never come back, ever. The BCUC suspends lots of proceedings. It starts them back up again. Okay. The reason why it's suspended is the Claimant wants to challenge Section 2.5, so it

02:46:47 can have no restrictions. Shooting the moon again.

The Claimant doesn't really have an incentive to pursue NECP. And this is what--I think this is very indicative of the situation they find themselves in. They don't really have a market in which they can currently get a premium power price. And while the NECP would probably be--if markets rose, it would be lower, probably, than markets.

There's no financial incentive for them to push to have it right now. They're half a BCUC proceeding away from having it. The BCUC has made all the rulings. It's said it's entitled to this. They can get 100 percent. The principles are established. FortisBC has set out a lot of its methodology. Why push it now? Why not try and get Section 2.5 of the PPA removed? Why not do other things, take other legal actions?

And, I think, importantly here, Mr. Friesen, the Claimant's own Witness talking about their power sales, didn't talk about 20-year power sales and 20-year power purchase agreements in the United States. And if the Claimant were really able

to get a 20-year Power Purchase Agreement for something equivalent to green energy prices, like its chart suggested, why hasn't it gone and done it?

Why not go out? They'd make loads of money. NECP isn't that expensive. They can go and sell their electricity to Puget Sound and make a ton of cash. But the reality is that Mr. Friesen was looking at forward Mid-C prices, as he's testified, and that isn't very economical.

Claimant is right. We had U.S. dollars on here for Mid-C. So, we apologize for that. Always good to have the same currency on the slide. They are right, too, that 2008 was a completely different market. But since then, of course, and we're talking about the NECP and moving forward, the natural gas boom has essentially lowered the Mid-C price considerably. And because the electricity prices, as multiple witnesses have testified, are tied heavily to the natural gas market, Mid-C prices are bound to stay low for the foreseeable future.

Load Displacement in the PPA.

PRESIDENT VEEDER: Stop there. Do we need a

02:49:02 break now? We've been going just over an hour.

MR. OWEN: Yes.

PRESIDENT VEEDER: Let's take a 10-minute break and come back at 3:00.

(Brief recess.)

PRESIDENT VEEDER: Let's resume.

MR. OWEN: Okay. Very quickly, I'm going to do my best.

I'm going to return to something that you asked earlier, Mr. President, and that relates to two Orders with respect to the two different kinds of GBLs, and there was a reference to being two sides of the same coin. And the first Order is G-19-14, and the second Order is G-106-14.

Now, I'm going to have to delve briefly into the murky world of rates in BC Hydro's area to explain this. So I think the Panel has heard a few times that BC Hydro has a stepped-rate and the first 90 percent of that stepped-rate is relatively low and the last 10 percent is high. And that's a conservation Measure designed to encourage self-generators to keep within--to keep their consumption low.

03:07:57 As part of that process each year, BC Hydro establishes a customer baseline. It is essentially a consumption baseline, how much are they consuming. And as part of the information filing that it made on contracted GBLs, the one that we've heard about from 2012, there is a discussion about how, if you have a plant, you have this consumption baseline, this customer baseline set each year. And then if there is self-generation at that plant, there must be also sort of what's called either an uncontracted baseline or uncontracted Generator Baseline.

So, again, there's these other concepts of a CBL and a GBL, and that a CBL plus a GBL should equal the entire plant load.

Now, what does that have to do with these Orders? Well, CBLs are a very important part of rate design within BC Hydro's service territory because they relate directly to whether or not you're within that Tier 1 price that's cheap or whether or not you're in that Tier 2 price. And as a result, the Commission was looking at a filing, a TS 74 filing, in the First Order for Rate Schedule 1823 customers. So

03:09:19 that's large industrial B.C. customers like Howe Sound and Tembec.

And it was looking at the concept of uncontracted GBLs or the fact that you'd have this other GBL concept, and it said, Well, that's very similar to contracted GBLs. And they adopt a language that suggested that, perhaps, contracted GBLs or Procurement GBLs and EPAs would fall within the actual rate structure for Hydro.

Hydro has asked for reconsideration. That's a second Decision, G-106-14, and there are a number of references that basically indicate that the Commission is fairly aware that these are not necessarily the same concept, that they are different concepts.

So, for example, in the second, in the Reconsideration Decision, the Commission said, "In the TS 74 Decision"--so that's a Tariff Schedule 74 Decision, the first one I referred you to--"the Commission agreed with BC Hydro that in considering when a GBL was a rate, it is necessary to look at the use to which the GBL is being put and the specific context for that use. The Commission acknowledges

03:10:31 that a GBL in the context of an EPA and/or an LDA, a Load Displacement Agreement, is not a rate. However," they go on to say, "there are some interesting connections between the two." So, it is currently reconsidering that. The reference for that is G-106-14, and it's at Pages 6 and 7. So I hope that clarifies.

PRESIDENT VEEDER: Is that C-284, the exhibit?

MR. OWEN: Yes, it is.

PRESIDENT VEEDER: Thanks.

MR. OWEN: I need to move on. I wanted to touch briefly on this idea that there's load displacement at no cost.

Celgar displaces its load in FortisBC's service area and FortisBC benefits. BC Hydro has to supply resources to be ready to meet its PPA contractual demand. Fortis regularly nominates its maximum PPA demand. So that means the capacity that BC Hydro has on hand to deal--to basically provide to FortisBC what it wants really doesn't change.

Here we have Mr. Switlishoff. I don't

03:11:50 1 believe there is any connection between the draw of
2 Celgar on Fortis and FortisBC's nomination to
3 BC Hydro. I don't think those two are connected.
4 And, again, Mr. Swanson explaining that the capacity
5 that has to be available is 200 megawatts, and that's
6 every hour of every day and every year under the
7 original PPA. Okay.
8 Now, finally, briefly, the Minister's Order.
9 There is no issue here I think as to whether the
10 Ministers' Order remains in force. The Experts
11 actually agree on that point. And the Order excepted
12 Celgar from having to obtain--and this is Celgar Pulp
13 Company back in 1993--from having to obtain an Energy
14 Project Certificate and an Energy Operating
15 Certificate for the installation of its 52-megawatt
16 turbine, as long as Celgar used it to supply its own
17 mill's own load.
18 The Ministry of Energy at the time was
19 concerned about this. And we brought multiple
20 Witnesses forward to testify who had direct knowledge
21 of how this Ministers' Order was established.
22 So, we're relying on the testimony of

03:12:59 Mr. Ostergaard, Dr. John O'Riordon, and Denise Mullen. Neither Dr. O'Riordon nor Ms.Mullen were cross-examined by the Claimant. Each was staff responsible for the review of the Energy Project Certificate Applications. Dr. O'Riordon even went so far to talk to his colleague, Mr. Doug Dryden, about ensuring that his recollection was accurate of the events surrounding this particular EPC Application. They had direct knowledge of Celgar's project and testified that Celgar's Ministers' Order was approved based on the commitment they made to use their electricity for self-supply.

Mr. Allan had no direct knowledge of the Energy Project Certificate application. He had no direct involvement in analyzing such applications. He didn't produce a single document, and, you know, essentially indicated that his staff had done--in his opinion, without really ever being involved in the process--a good enough job.

The final thing I'll touch on is BCUC Order G-15-01. We don't really think this is a particularly important point. Mr. Ostergaard was the Chair of the

03:14:13 BCUC at the time this Order was filed, but Mr. Ostergaard is the Chair of the British Columbia Utilities Commission. He was not responsible at that time for enforcing Ministers' Order. That responsibility left away with the Environmental Assessment Office.

The BCUC does not go around doublechecking whether or not, you know, the commitments under a Ministers' Order have been dealt with by a proponent who has to report to the Environmental Assessment Office. It is outside their jurisdiction.

In any event, it related to a Curtailment Agreement, and the main purpose of that Curtailment Agreement was to essentially reduce the load during these peak periods, and there was a California energy crisis on.

The Claimant has suggested that this is sometimes done by increasing self-generation. I think the key thing here is that, from the perspective of the utility, they just wanted them to reduce their load. And that was essentially how the Agreement was structured, and that was how it was presented at that

time.

ARBITRATOR DOUGLAS: Just before you move on, BCUC Order G-202-12, which is R-265.

MR. OWEN: Yes.

ARBITRATOR DOUGLAS: It says it reaffirmed the entitlement to non-BC Hydro PPA embedded-cost power by a self-generating customer may be as high as 100 percent of load as nominated by that customer.

Now, Celgar was participating in those proceedings. Clearly, if you're right about the Ministry Order, the BCUC is proceeding on a mistaken basis. And why would they say that, if Celgar had an obligation to self-supply?

MR. OWEN: I think that one of the problems that we've had is this did come up relatively late on and it would have been something relevant to raise before the BCUC, and we certainly wished it had.

Yes, it did--it did--it was something that didn't come to light for many, many years. The Claimant is right about that. But it's still a valid binding legal Order that gave Celgar the right to do something, essentially to build a thermal electric

plant in 1993 and get exempted from more rigorous review by the British Columbia Utilities Commission at that time either as a--for a Certificate of Convenience and Public Necessity or a full-scale BCUC review. So they get the benefit of that Disposition Order subject to certain conditions. And one of the things they did over and over again was promise to self-supply.

And so I think also it is important to realize that--and this is referred to in the contemporaneous minutes that we found concerning the Energy Project Coordinating Committee. There was a large review going on as part of the Major Project Review Process and a federal environmental assessment too. It is clear that the review of this actual Ministers' Order and the thermal electric plant that there was overlap between the two, and that's what the minutes indicate.

So I think some of the technical review and due diligence that Mr. Allan suggested might have been lacking on the staff was actually being done by the same people in the same context of a parallel

environmental review.

I'm cognizant of the time, and my colleague Mr. Douglas is up next, so no further questions?

Go on?

PRESIDENT VEEDER: We may have some later, but pass the baton, please.

MR. DOUGLAS: Thank you very much.

May I have just two minutes to set up? No need to move, but just give me two minutes to--

PRESIDENT VEEDER: Of course, on your clock there.

(Pause.)

MR. DOUGLAS: This is a very ominous first slide. "The Law."

So let's discuss a bit about the law. There are three measures at issue, the Claimant's GBL, the Exclusivity Provision, and BCUC Order G-48-09. It is important to keep these in mind as we progress through the law because it all--Measures for which the Government of Canada is liable, not claims. Why don't we turn to jurisdiction and admissibility first.

The procurement exception, which states that

03:19:39 Articles 1102 and 1103 do not apply to procurement by a Party or a State enterprise.

Both the United States and Mexico confirm in their Article 1128 submissions that the procurement exception is broad. And as Mr. Shor indicated in his Opening, the definition is quite broad.

The issue is whether the GBL and Exclusivity Provision in the Claimant's EPA falls within the procurement exception.

Now, the Claimant confirmed in testimony that the purpose of a BC Hydro GBL is to demark incremental from existing electricity. It defines the line above which BC Hydro will procure from the Claimant. If they have a lower GBL, BC Hydro will procure more. That is the very purpose of the GBL.

The Claimant's testimony confirms the veracity of their submissions to the BCUC on the purpose of GBL, which we highlighted in our Opening. The statements the Claimant has made before the BCUC also confirm that the purpose of a GBL is to demark incremental from existing generation.

Finally, perhaps there is--sorry, not quite

finally, Canada's Witnesses and Experts also confirm in testimony the purpose of a BC Hydro GBL. Again, it is to define the amount of electricity above which BC Hydro will procure. It does not serve another purpose.

And, finally, there is, perhaps, no greater evidence that this fact that the Claimant's entire damages case is premised on a series of lower GBLs and BC Hydro procuring more electricity from the Claimant.

The Claimant tries to confuse the purpose of the BC Hydro GBL in its arguments. First, Mr. Shor argues that BC Hydro was not required to procure the electricity for the purpose of liability. This argument, however, makes little sense. If BC Hydro was required by international law to have negotiated a lower GBL with the Claimant, then the lower GBL would be inserted into the EPA and BC Hydro would procure as incremental the energy above that amount. BC Hydro is not setting a GBL for another purpose.

Second, the Claimant's argument that the BC Hydro GBL defines the level of self-supply is incorrect. The Claimant conflates the GBL with the

Exclusivity Provision in the EPA. It's the Exclusivity Provision that is the restriction on third-party sales, not the GBL.

Moreover, the EPA does not define a level of self-supply. The EPA is a contract that the Claimants signed. Nobody has forced them to do anything. If the Claimant wants to breach that Contract, that is their own prerogative. If they don't want to self-supply, that is their own prerogative. Nobody is forcing them to do anything.

Third, the Claimant argues that the BC Hydro GBL defines BC Hydro's obligation to serve. This is a bit of an interesting argument. I think what they're actually suggesting is that somehow the BC Hydro GBL defines FortisBC's obligation to serve; that somehow by setting a BC Hydro GBL, FortisBC is prevented from supplying electricity to the Claimant.

That would be a gross overstatement of jurisdictional territory. BC Hydro has no authority to define FortisBC's obligation to serve.

The Claimant also confuses the purpose of a BC Hydro GBL with a GBL that, according to Mr. Owen,

03:23:11 discussed such as in G-38-01, which is the obligation to serve. There is an obligation to serve in the context in which one of your customers wants to export. In the context of a BC Hydro procurement GBL, the purpose is much different.

Finally, the Claimant's argument that the BC Hydro GBL is not related to procurement because it is a rate under the UCA, the Utilities Commission Act, is wrong. My colleague Mr. Owen covered this point. I will not go into detail except to say that that is not what the BCUC has found. It has found that a contracted GBL, that is, a procurement GBL, is not a rate; and that the issue of whether a GBL under the Utilities Commission Act--one of those service GBLs, one of those G-38-01 GBLs--falls within the rate scheme is currently the subject of reconsideration before the BCUC. It is the subject matter of ongoing proceedings.

The next issue is whether the Claimant's Exclusivity Provision falls within the procurement exception. As the United States and Mexico confirm in their 1128 submissions, procurement includes all terms

in a Procurement Contract that are integral to the procurement project. Those are the words of the United States.

The Claimant's Exclusivity Clause is an integral part of BC Hydro's procurement of electricity. As Mr. Scouras confirms in his Witness Statement, the main purpose of the Exclusivity Provision is to provide certainty to BC Hydro that it will have the security of supply that it has contracted for with project proponents. The Claimants asked Mr. Scouras no questions about the purpose of the Exclusivity Provision. This testimony goes unchallenged.

Mr. Scouras was the head of procurement at BC Hydro and should know what the Exclusivity Clause is for. The Claimant's exclusivity clause, thus, falls within the procurement exception and any Claims regarding it are inadmissible under Article 1102 or 1103.

Turning next to delegated Governmental authority. The next bar to the Claimant's Claim is Article 1503 of the NAFTA. Under this provision,

Canada is only liable for the Measures of its State enterprises when they exercise delegated Governmental authority. To pass this test, the Claimants must show that the Claimant was delegated Governmental authority when it signed procurement contracts with various mills.

The first question to ask is, Was there delegation? In order for there to be delegation, there must be an affirmative transfer of authorization of Governmental authority. The Claimant alleges that the BCUC directed BC Hydro to procure energy in Order G-38-01.

As the testimony confirmed, however, Order G-38-01 did no such thing. 38-01 deals with BC Hydro's obligation to serve its customers who want to sell its electricity to third parties. It directed BC Hydro to establish a program for that purpose. It did not direct BC Hydro to procure electricity. The Claimant is, therefore, wrong.

The next question to ask is whether procuring electricity was governmental authority. It is not, however, the business of the Government to procure

energy. It is the business of BC Hydro to do so. The Claimants' GBL and Exclusivity Clause are contractual terms as part OF a procurement contract. They are commercial terms. They are not governmental authority. BC Hydro's procurement of electricity does not fall within Article 1503 of the NAFTA.

ARBITRATOR DOUGLAS: I'll ask you the same question.

MR. DOUGLAS: I was waiting.

ARBITRATOR DOUGLAS: Good. Could a private entity sign up to the Exclusivity and GBL Provisions, or is there any reason, in principle, that that would be impossible?

MR. DOUGLAS: I'm sorry; I just couldn't hear you.

ARBITRATOR DOUGLAS: Sorry, I'm too far away from the microphone.

Is there any reason why a private entity could not have signed up to the GBL and Exclusivity Provisions and performed those provisions? In other words, is there anything about the performance of those provisions which requires sovereign authority?

03:27:30 MR. DOUGLAS: In our view, no.

ARBITRATOR DOUGLAS: Is there any--on the record, is there any example of a nongovernmental utility that signs up to similar provisions?

MR. DOUGLAS: Well, FortisBC.

ARBITRATOR DOUGLAS: I had a feeling you might say that. We'll see what the Claimant says about it.

MR. DOUGLAS: I had a little help.

The final jurisdictional bar to the Claimant's claims is time bar under the NAFTA. Pursuant to Article 1116(2), a Claimant must file a claim within three years of first acquiring knowledge of breach and loss. Under the time bar, knowledge does not have to be actual. It can be constructive, as Mr. Shor stated in his Opening, and the period starts to run on the date the Claimant first acquired actual or constructive knowledge. The time bar date is April 30, 2009, and the Claimant must, thus, first have acquired knowledge sometime after this date. The Claimant alleges that date is July 31, 2009, when the BCUC reviewed its EPA under Section 71 of the

Utilities Commission Act.

PRESIDENT VEEDER: I'm sorry, I had the 6th of May. Is it July?

MR. DOUGLAS: Did I misspeak? I said July 31, 2009, for the BCUC acceptance.

PRESIDENT VEEDER: I have that down as 6th of May, but maybe you're right. It doesn't matter for present purposes. It's July.

MR. DOUGLAS: Oh. It's G-48-09 that's the 6th of May.

PRESIDENT VEEDER: Okay. Thank you.

MR. DOUGLAS: The acceptance for filing by the BCUC, under Section 71 of the Utilities Commissions Act, that's the acceptance of the EPA. That transpired on July 31, 2009.

PRESIDENT VEEDER: Thank you.

MR. DOUGLAS: But in Canada's view, that is not a credible date to suggest that that is when the Claimant first acquired knowledge of breach and loss of the GBL and Exclusivity Provision. The GBL was set on May 30, 2008, almost a year before the time bar date. The Claimant used that GBL to make a bid into

the Bioenergy Call for Power on June 10, 2008.

Now, Mr. Shor suggested that, for the purpose of time bar, the limitation period does not begin to run until Tembec signed its EPA or until Howe Sound signed its EPA because they didn't know that they got a raw deal on their GBL.

This is a memorandum from Brian Merwin to Jimmy Lee. It's an internal memorandum, and you can see down at the very bottom, and on the next page. This is the 7th of June 2008. This is before they made their bid. They stated, "We are currently debating our GBL with Hydro as we believe they have not treated assignment of this number the same as they have done for other pulp and paper mills." This is clear evidence of knowledge well before the time bar date of January 27, 2009.

Mr. Shor glosses over the Tembec 1997 EPA to which they also compare themselves to. He also glosses over the Canfor, which was an agreement signed in 2004, which would also put them outside the time bar date. What he suggests for time bar is that a new limitation period happens with every single

03:31:35 comparator. This has serious policy implications from a legal standpoint for the NAFTA Parties.

The United States, in its 1128 submission, has said that that cannot be the case. That would toll the limitation period into infinity. What if an agreement was signed tomorrow? Two years from now? Three years from now? Could the Claimants bring a NAFTA claim then, based on their EPA signed in 2007? That would put a huge burden on the Government.

Moreover, there has been jurisprudence on this issue. In the Grand River Jurisdictional Award, they found that, when you have a series of related Measures, you cannot split them into splinters in several different pieces. If they are related Measures, the limitation period begins to run at the very first instance. The Claimant here has elected to choose Canfor and the '97 EPA as the comparators. It must have had knowledge, and by that memorandum of June 8, 2008, it's clear that they did.

Now, we've had--

ARBITRATOR DOUGLAS: Sorry. Isn't it possible, though, that if we are looking at a claim

03:32:41 for discrimination, that you're only going to get to the threshold that makes it actionable if there's a patent of discrimination. And so suppose in a hypothetical back to our students who are receiving student loans or something of that nature, suppose one student from a particular nationality is denied and then a year later another one and then a year later another one. Surely, the time bar wouldn't have started to run at the first denial because at that point you haven't got the pattern of discrimination that would give rise to an actionable claim.

MR. DOUGLAS: I might--we'll get into this when we get to nationality, but when we talk about a pattern of discrimination, a usual 1102, 1103 claim involves--de facto claim--involves a law that applies on a uniform basis that applies across board to everybody. But in its effect, it will have a discriminatory treatment in comparison to some as comparison to others.

The type of example that you're providing, which is analogous to the Claimant's Claim, is exercises of discretion. It's not a pattern of

discrimination or a series of discretionary decisions. It has fewer greater linkages to intentionality, which has far greater linkages to a claim for de jure discrimination, a de facto discrimination.

ARBITRATOR DOUGLAS: Well, if I understand it--I don't think anyone is suggesting that the GBL documents that establish the principles of the GBL on its face purport to discriminate against a particular nationality. I think what the Claimant is saying is that their Application discriminates.

Don't we need to see certain incidences of this Application before you rise to the threshold of a breach of NAFTA? And if that's the case, can we really start the time running at the first instance?

MR. DOUGLAS: Well, and then I guess it depends on how broad you want to have a pattern of behavior. The Claimant compares itself against individual mills, although there were 20 bids into the Bioenergy Call for Phase I in which the Claimant participated in. Four contracts were ultimately accepted; two of them were American. The remaining were rejected Canadian investors.

03:35:01 So, do you start there? Or, there was a different call, the IPO call. Do you wait until that happens in 2010? What about the next Call for Power that happens? I mean, how far of a pattern do you need to develop? I mean, I think the act of comparison for the Claimant is in the 2007 area amidst those other mills that invested.

Moreover--may I finish, just on that one point? Because there is three years from the date of first acquiring knowledge and breach and loss, and I think three years would be sufficient for whatever pattern needs to play out to prove a case. But you have that first instance of acquiring knowledge of breach and loss, and that's what's important.

My apologies, Professor Vicuña.

ARBITRATOR ORREGO VICUÑA: No. I was asking whether you had finished.

Let me ask you about something that has not been discussed in a direct manner, but which I think might be relevant and not necessarily for you to answer right away, perhaps at a later point. But you are certainly familiar with a question that is much

03:36:25 debated about wrongful acts under international law, and particularly about those acts that are other either continuing--they repeat and they repeat themselves--or even that are cumulative, that they begin with one that might not look quite clearly wrongful, but then another, another, another, until you get to the--and the view that those kinds of acts would really come to be assessed at the end, not at the beginning. Because you don't know. On the way, you are not certain whether that is a wrongful act yet. How would you envisage that in the context of this discussion? Will it be a fair question? Or, as we didn't discuss it, maybe it's not fair.

MR. DOUGLAS: So, with respect, I think it would be an unfair question because I don't think there is a continuing act here. There was--what is at issue is an Electricity Purchase Agreement that was signed between BC Hydro and the Claimant on a very specific date, and I think it was that date, and that date was the Measure.

So, first of all, I think you have to get into the world of continuing Measures, but even once

03:37:45 you're there, and I think there is some jurisprudence outside of the NAFTA that discusses continuing acts, but the NAFTA has lex specialis. It has very specific language when it comes to limitations period, and the key word in 1116 is "first." You cannot first acquire knowledge every single day. That is not what the limitation period is for. It would erode the limitation period. It would write it out of the NAFTA. You first acquire knowledge on one date, and you have three years, then, to bring your claim.

And all three NAFTA parties have held this consistent view. I know you are familiar with it from Merrill, have held it in other cases as well, and it will be Canada's view that that is, you know, a subsequent agreement under the Vienna Convention that this Tribunal must take into account should it find that any of these Measures are, in fact, continuing.

ARBITRATOR ORREGO VICUÑA: Let me make an additional aspect of the question. I will agree with you that normally first is first, but what happens if you have a series of acts, one after the other, months or weeks or whatever intervening, and you cannot with

any of those individually come to realize that they are really wrongful and that are causing a damage to yourself, to the Claimant or whatever? Would it not be the first moment, the first moment in which you come to realize that that is what has happened? That would meet the definition you mentioned about NAFTA. The first would be not the first date, but would be the first instance in which you get the certainty that something wrong went about, and you are damaged.

Would that make any difference to the fairness of the question?

MR. DOUGLAS: Well, so a couple points on that: The knowledge is actual or constructive. So, when you talk about constructive, it's what can be imputed to a Claimant bringing a claim. So, whether it's--there is proof or actual or not, there is a reasonableness. When should they have first acquired knowledge? What's the reasonable date? And the test is the knowledge, absolutely. And it's from the knowledge that that limitation period would start to run.

But in terms of loss--this is my second

point. In terms of loss, it is not a high threshold. There has been jurisprudence, I think, in both Grand River and the Mobil Case about this very point, that knowledge does not have to be your full knowledge, or you do not have to know the full extent of your damages. You need to know only that there is some, even if that amount is undefined. And the only evidence that I've seen so record is the memorandum that I've just shown you.

Do you guys know the exhibit number?

I think it was R-559 which shows that Mr. Merwin believed well before the time-bar date that his GBL was set too high. That's knowledge of loss. If your GBL, you believe, is too high and it should be lower, you've lost the ability to sell that electricity to BC Hydro. So, that knowledge crystallizes on that date. And that's sufficient to start the limitation period running.

ARBITRATOR ORREGO VICUÑA: Thank you.

MR. DOUGLAS: You're welcome.

PRESIDENT VEEDER: You cited to us Paragraph 59 of the Grand River Decision. There's

another paragraph, Paragraph 81.

MR. DOUGLAS: 81.

PRESIDENT VEEDER: Is that helpful to the questions you've been receiving?

MR. DOUGLAS: It is. Paragraph 81 deals with this idea that, when you have a series of related measures, the Government commits--the term "Measure" is very broadly defined in the NAFTA. So, it's almost as if, whenever the Government breathes or does something, it could be a Measure. But if there's a series of related Measures, the limitation period does not start to run at the final instance. It starts to run at the first because that is precisely the word that exists in 1116(2).

PRESIDENT VEEDER: If we look back to the wording of Article 1116(2) there, we don't see knowledge of the Measure. We see knowledge of the alleged breach.

MR. DOUGLAS: Correct.

PRESIDENT VEEDER: So, it would have to be a Measure in circumstances where they gave rise to an allegation or could give rise to an allegation of

breach.

MR. DOUGLAS: Correct.

PRESIDENT VEEDER: You accept that?

MR. DOUGLAS: I do.

PRESIDENT VEEDER: Thank you.

MR. DOUGLAS: There has been some talk about the legal effect or the effective date of the Agreement, which I think is uncontroversial. The Agreement, by it's very term, discusses or defines precisely when its effective date is, which is January 27, 2009.

Mr. Shor, in his Opening, suggested that Section 71 was a condition precedent to the EPA taking effect. That is not correct. There is no wording in the EPA that conditions acceptance by the BCUC, and if you look at Section 71(4), the language actually refers to the fact that there are agreements existing at one point in time and are submitted to the BCUC as acceptance for filing at another point in time. It's what's called a negative disallowance scheme.

The BCUC does not approve Contracts. It only has the authority to review them and to--and to accept

for filing or not. It only has the negative power to disallow them. It does not have the power to approve them. For these reasons, the Claimant's EPA with BC Hydro, including its GBL and Exclusivity Clause, in Canada's view, are time-barred under the NAFTA, and this Tribunal has no jurisdiction to hear claims relating to these two Measures.

Now, assuming the Tribunal does have jurisdiction, I'd now like to discuss national treatment and Most-Favored-Nation treatment. In order to find a breach of NAFTA Articles 1102 or 1103, the Claimant must show three elements: that it was accorded treatment, that treatment was less favorable, that the treatment was accorded in like circumstances to a domestic or a third-party investor.

Now, the Claimant, in its Opening, posited its theory of Articles 1102 or 1103; that nationality is irrelevant, that the treatment to other investors is irrelevant, that it can selectively choose its only comparators, and that it need only establish a prima facie breach before the burden shifts to Canada to justify that prima facie breach.

03:45:24 I'd like to review each one of these, in turn. All three NAFTA Parties have repeatedly confirmed that Articles 1102 and 1103 protect against discrimination on the basis of nationality. This has been the consistent view of the NAFTA Parties for years. It is Canada's view that this constitutes an authentic interpretation of the provisions that this Tribunal must take into account under the Vienna Convention. The Claimant is wrong in law when it asserts that nationality plays no role.

The Claimant also alleges that other U.S. investors are irrelevant to the analysis. Again, this is not correct. The treatment accorded to other U.S. investors is relevant to determining the existence of the nationality-based discrimination. In this case, there is another U.S. investor, Domtar, which Canada discusses in his Counter-Memorial at Paragraph 375 and at Paragraph 245 of its Rejoinder.

The Claimant does not contest that Domtar was given the same treatment as Howe Sound and Tembec and every other mill. This is not an irrelevant fact as the Claimant supposes, but is evidence that there was

no nationality-based discrimination.

The next element is the Claimant's selection of comparators. The Claimant has identified primarily two comparators in this case, Tembec and Howe Sound. It should be noted, however, that there are several other pulp mills in British Columbia who each have an EPA with BC Hydro as well as a GBL. Canada produced thousands of documents relating to the setting of these GBLs.

To get to just Tembec and Howe Sound, the Claimant's Expert created a list of factors to reach an assessment of what he considers to be fair comparators, but he crops out all of the other mills with EPAs and GBLs by having as a factor only mills who invested in generation equipment 10 years prior to G-38-01. But this factor is irrelevant for the purpose of assessing the consistent Application of BC Hydro GBL methodology. All mills have invested in generation prior to the 1990s, and some have invested in the 2000s.

By cropping the picture using irrelevant factors, Claimant is able to focus on the peculiar

circumstances of Howe Sound and Tembec to fabricate a narrative that BC Hydro's GBL methodology was not transparent, not well understood, and not well defined. However, no one else made these complaints. In fact, Canada's Witness, Mr. Fominoff, of Howe Sound, testifies contrary to the Claimants in his Witness Statement. It is easy to understand why the Claimant did not call him to testify.

Moreover, for his First Expert Report, Dr. Rosenzweig analyzed the same thousands of documents that Canada produced to the Claimant and testified that a consistent GBL methodology was applied to each mill. The Claimant did not rebut his analysis in their Reply Memorial. In Canada's view, it is not credible to attack a procurement system like the one employed by BC Hydro without doing the full analysis.

The Claimants allege there is no--pardon me--the Claimant alleges there was no GBL standard, that BC Hydro did what it wanted and had complete discretion. But you cannot credibly make out this argument by analyzing only two mills.

03:48:51 Finally, the Claimant argues that it need only show a prima facie or first impression breach of NAFTA Articles 1102 or 1103, and then the burden shifts to Canada to justify itself.

However, Article 1102 and 1103 do not say anything about shifting burdens, and all three NAFTA Parties agree that a burden shift would be contrary to the ordinary terms of those provisions.

Now, let's look to the treatment itself. Let's discuss the Claimant's GBL. First, what is the treatment we are assessing? The treatment is assessing the GBL methodology, which we discussed in the facts was fully transparent and well understood.

Mr. Douglas, you asked--Professor Douglas, pardon me. My dad's name is Mr. Douglas. He asked a question in terms of the scope of the treatment, and I'm assuming-- actually, I'm not going to assume. Let's assume, for the sake of argument, the Claimant received a $58 million subsidy from the Federal Government so that it could maximize the use of its EPA and have the full benefit of the revenue stream from that EPA. And let's assume that's not a

hypothetical because that's exactly what happened. Is that a relevant consideration? I think it is.

Now, we usually define treatments in 1102 and 1103 to focus more on the Measures, but in light of the nationality considerations or the lack of nationality considerations at play, if we really had it out for foreign investors in this particular instance, why would we dole out such a large sum of money so that it could have such significant benefits and reap significant rewards? It is not an irrelevant consideration. But when it came to the GBL methodology, the GBL methodology came first. And so we're going to discuss the GBL methodology and how it was applied on a consistent basis to each of the mills.

ARBITRATOR DOUGLAS: Are you aware of any authority that has discussed this point, the scope of treatment in that context?

MR. DOUGLAS: Off the top of my head, I'm not.

ARBITRATOR DOUGLAS: That's okay.

MR. DOUGLAS: But I have faith my colleagues

are furiously researching as we discuss.

But in addition to the GBL methodology, the Claimant alleges that the treatment at issue is the below-load access percentage. Its Expert, Dr. Fox-Penner, argues that BC Hydro was in the business of allocating arbitrage profits between mills, and Mr. Switlishoff argues that the Claimant was given less of a percentage than other mills. The BLAP metric, however, is the not the treatment at issue. It is something of the Claimant's own creation. Not only does it conflict with the 2007 Energy Plan concerning the procurement of incremental generation only, but by Mr. Switlishoff's own admission, it conflicts with the principles of G-38-01, which is the very basis on which he assesses treatment between mills. The BLAP metric is, thus, highly flawed, and it's not the treatment at issue. The question is whether BC Hydro applied the GBL methodology in a way that was less favorable to the Claimant.

Now let's look at what Claimant alleges. The Claimant argues that BC Hydro had total discretion

when setting GBLs and that it simply chose to exercise that discretion in a way that was less favorable to the Claimant. But this argument make no sense when you consider the facts. The Bioenergy Call for Power, as I said in my Opening, had a goal of procuring a 1,000-gigawatt hours of incremental electricity per year. The Call received 20 bids and resulted in only four contracts.

The four contracts totaled 579-gigawatt hours of electricity, and BC Hydro did not meet its target. In fact, it met only 58 percent of its procurement goal. I asked Mr. Switlishoff about this in testimony. And his answer at the bottom was that, fair, BC Hydro did not meet its procurement objective, but it set the Claimant's GBL where it did so that it could force it to displace its load. There was no evidence of this. There is no evidence on record that BC Hydro did anything but apply the GBL methodology.

In this context, why would BC Hydro arbitrarily choose to procure less electricity from the Claimant? If the Claimant actually had more incremental electricity to sell, what possible reason

could BC Hydro have not to procure it? Sorry. On the graph there are supposed to be some lines, I think. I think actually there are some faint lines.

You have heard the Claimant advance a number of arguments this past week. For example, the Claimant argues that BC Hydro should have paid incentivized prices for generation out of the unincentivized Blue Goose project. You have heard that Mr. Dyck failed to properly account for the Claimant's sales to NorthPoint. But these arguments don't make any sense in light of their context. BC Hydro not only wants to procure electricity, it needs to procure electricity. It needs to add to its energy resources. Why? So that it can meet the policy objective of becoming self-sufficient. BC Hydro had no incentive to give the Claimant a raw deal. To the contrary, it had every incentive to procure as much incremental generation as it could.

What is this NAFTA claim about? It is about the Claimant's quest to have BC Hydro procure all of the Claimant's existing generation at high incentive prices. The Claimant's existing generation wouldn't,

however, have had added anything to the Province's resource portfolio, and it would run counter to the policy objective of becoming self-sufficient. BC Hydro is not in the business of giving out subsidies or transferring wealth.

Now, the Claimant has dedicated over three years in this arbitration to putting a magnifying glass over Howe Sound and Tembec and the way the GBLs were set for those mills. But let us not lose sight from the forest, from the trees. None of these mills got what they wanted. They all wanted better deals. They all wanted lower GBLs. But at the end of the day, the same methodology was applied to each. And BC Hydro had the same objective each time, to procure incremental generation only.

Canada has serious concerns with a case like this from both a legal and policy standpoint. Canada does not share the Claimant's view that Articles 1102 and 1103 open the door to NAFTA Tribunals to scrutinize specific technical terms of large procurement contracts signed by State-owned enterprises. A complex case like this, if not

03:56:22 properly defended, has the potential of causing a commercial chill from coast to coast.

Moreover, where is nationality in the Claimant's analysis? Canada produced tens of thousands of documents to the Claimant from all levels of B.C. Government, and not a single document has arisen regarding the nationality of the Claimant. And the Claimant presented no evidence to this Tribunal of any nationality-based discrimination these past two weeks.

The Claimant argues that nationality is irrelevant. It argues that it need not prove an intent to discriminate. However, it is the Claimant who argues that BC Hydro intentionally treated them differently. The Claimant's argument is that BC Hydro intentionally set the GBL to force them to self-supply, that BC Hydro had an incredible amount of discretion, and chose to exercise it in a way less favorable for the Claimant. These are allegations of intent for which there is no evidentiary basis. If they allege, they must prove.

According to the Claimant's theory of

03:57:31 Article 1102 and 1103, it is sufficient to scrutinize and compare the negotiated contracts and find differences. And if it finds any differences, that is sufficient to find a breach of 1102 and 1103. But as I said in my Opening, this is not the forest, this is not the trees. This is granular moss that sits on the ground. And while Mr. Shor may characterize this as a mythical forest, it's a forest with real consequences for the State of Canada. The types of allegations the Claimant makes are not the place for a NAFTA Article 1102 or 1103 claim.

Now, to the extent that this Tribunal finds any differences between Tembec's GBL or Howe Sound's GBL, that does not have anything to do with nationality or Most-Favored-Nation treatment. It has to do with the unique circumstances of each mill. I won't review the key differences in the mills. There's a table--a couple of tables. We've tried to summarize some of the key points for you.

I think just as a final point on this, BC Hydro's goal when procuring electricity has always been the same. It is to demark incremental from

existing electricity for the purpose of procurement. It wants to increase its energy resources. The GBL methodology was employed on a consistent basis to meet this objective.

Now, the Claimant has a few comparators, which I'll review quite quickly, which, in Canada's view, are not relevant. The first is Tembec's '97 EPA, which is the basis for the Claimant's allegation that BC Hydro ought to have given them a zero GBL. As Mr. Switlishoff confirms, however, the concept of GBLs was not even invented at the time the 1997 EPA was signed. So, of course, it didn't have a GBL. That agreement came under a completely different policy regime.

The Claimant also compares itself to Tolko; however, even Mr. Switlishoff and the Claimants in their Opening confirmed that Tolko does not meet the test of the Claimant's like circumstances and is, therefore, not irrelevant.

The Claimant brings up the fact that it's Canada who raised Tolko. Canada raised Tolko--and maybe we'll get to this in just a moment--for the

03:59:52 context of G-48-09 because Tolko is in FortisBC territory and is subject to the same Orders as the Claimant. It is for that purpose that Tolko is more like the Claimant. The Claimant, of course, uses Tolko to compare itself to Howe Sound and the BC Hydro GBLs, which is not like at all, and they admit the same.

Turning to the Exclusivity Clause, every mill that has an EPA with BC Hydro has an Exclusivity Provision, including both Tembec and Howe Sound. The Claimant has been treated no different. The Claimant has, in fact, received more favorable treatment than any other mill through its Side Letter Agreement. Finally--sorry. I misspoke. For this reason, on the Side Letter issue, there can be no less favorable treatment. No other mill has the right to two GBLs, which is precisely what the Side Letter Agreement has allowed the Claimant to achieve.

Finally, the final measure is G-48-09, which the Claimant mischaracterizes. First, the Order did not restrict their access to PPA Power. Mr. Swanson testifies a FortisBC GBL using PPA Power was available

04:01:11 to the Claimant. However, it was the Claimant who refused to take a reasonable position on its FortisBC GBL. Canada is not liable under the NAFTA for the Claimant's aggressive stance on its GBL and failure to negotiate with its own private utility.

Second, G-48-09 had no effect on FortisBC's ability to draw on its other resources to supply electricity to its self-generating customers. In fact, through the NECP, the Claimant had 100 percent access to power for the purpose of arbitrage, a right that no other mill holds including Tembec and Howe Sound. So, when it comes to access to power for the purpose of arbitrage, the Claimant has received greater access than any other mill, not less favorable treatment.

I would now like to touch on Article 1105, which protects against violations of the customary international law Minimum Standard of Treatment. Now, the Parties agree that the FTC note is binding on this Tribunal, and that is the customary international law Minimum Standard of Treatment that must apply. A high level of deference must be accorded to domestic

04:02:31 1 authorities under Article 1105. It is precisely for
2 this reason why the threshold is high.
3 Under Article 1105, the Claimant bears the
4 burden of proving a customary norm. The Claimant
5 alleges that this burden rests on the Tribunal, which
6 is not the case. It is the Claimant's burden to prove
7 both opinio juris and State practice, and the Claimant
8 has provided neither. Instead, the Claimant has
9 elected to take isolated words from various arbitral
10 decisions to establish new customary norms at
11 international law. That, however, is not a valid
12 basis to prove custom. Arbitral awards are not,
13 however, evidence of State practice.
14 For example, the Claimant takes the word
15 "discrimination" from the Waste Management decision
16 and argues that the differential treatment between
17 nationals and aliens is prohibited at customary
18 international law. When it comes to this point in its
19 pleadings, to establish discrimination under 1105, the
20 Claimant merely says CR1102 and 1103 claim. This is
21 not the correct approach to 1105. They have proffered
22 no evidence of State practice or opinio juris. The

04:03:45 type of discrimination the Claimant alleges is not a customary norm.

Turning to the Claimant's second pillar, again, they have failed to show that Canada owes a duty of transparency in this context. They have provided no evidence of State practice or opinio juris. In any event, BC Hydro was transparent when setting GBLs. It held numerous information sessions, assigned individual employees to be responsive to the needs of bidders, and had countless meetings and phone calls regarding the bid and the GBL process. This can hardly be said to be untransparent.

Turning to the third pillar, Canada does agree that it owes a customary international law, a duty, not to treat the Claimant in a manner that is manifestly arbitrary. But it is very important to understand what this term means. As the International Court of Justice held in the ELSI Case, arbitrariness is not so much something opposed to a rule of law, it is opposed the rule of law itself.

In some of Canada's recent experience, Tribunals have interpreted "arbitrariness" to mean

"reasonableness." That, in our view, is not correct. To be manifestly arbitrary, the conduct must have willful disregard. It must shock and surprise. In our view, none of the conduct at issue here comes remotely close to meeting this standard. Whatever the Claimant may feel with respect to its BC Hydro procurement GBL, the way it was negotiated was hardly manifestly arbitrary. Neither was the treatment grossly unfair, unjust, or idiosyncratic. In its pleadings, the Claimant suggests that BC Hydro gave favorable deals to those with political connections. There is, however, no evidence to support this claim. And the way the GBL was set was not grossly unfair.

Finally, the Claimant's argument that the BCUC violated the Minimum Standard of Treatment in G-48-09 must be dismissed. This has some important policy implications for Canada because only a claim--and for the NAFTA Parties, I should say--only a claim for a denial of justice can be made against the BCUC as an adjudicative body. The Claimant did not appeal the decision, nor did it properly ask the BCUC to reconsider the decision. In fact, at times it

04:06:27 expressly told the BCUC not to reconsider the decision. The Claimant thus, did not exhaust its local remedies, and a denial of justice claim in that context is not credible.

With that, I will turn over my remaining time to my wonderful colleague, Mr. Kurelek, who will discuss the issue of damages unless the Tribunal has any questions, of course.

PRESIDENT VEEDER: We may have later, but we'll hear your colleague on damages.

MR. DOUGLAS: Okay. Thank you very much.

MR. KURELEK: Could I just ask the Tribunal Secretary how much time exactly is left?

PRESIDENT VEEDER: I can tell you the answer is 15 minutes.

MR. KURELEK: On to damages.

Canada's position today is that regardless of what the Tribunal's finding is with respect to liability, Mercer has failed to make out its damages claim against Canada. Claimant's counsel was correct, I believe, when she said today that we agree on the legal framework here. I would say that's true with

04:08:14 one exception, and the only exception is the one that Mr. Douglas brought up, my colleague, Mr. Douglas, about the procurement Article of NAFTA.

I won't be dealing with that, because he already has, so what I'm going to be dealing with instead are six evidentiary themes that relate to Navigant's damages model.

And in terms of what we've got here are, Number 1, Celgar could not have sold its below-GBL electricity to third parties in an economically viable manner.

Second theme, BC Hydro would not have bought Celgar's below-GBL electricity.

Three, it's highly speculative to assume that BC Hydro will renew Celgar's EPA in 2020 at the same price and with the same GBL.

Four, a valid 1991 B.C. Ministers' Order regarding Celgar's self-supply obligations either erases entirely, in Canada's view, or at the very last caps, in Mercer's view, Mercer's damages claim.

Five, many of Mercer's damages calculations rely on a metric, the BLAP, that is arbitrary,

04:09:29 unrelated, and contrary to B.C.'s resource acquisition policies and is not causally connected to Mercer's liability claim.

Sixth and finally, Navigant's damages calculations are replete with errors, all of which, as Mr. Rosenzweig pointed out, served to overstate Mercer's damages, thus rendering its quantum calculations unreliable.

So, if we could turn now, Chris, to the six evidentiary themes, starting with the first one, and our little diagram there.

This is a metaphorical bridge, which is the Claimant's damages model. We have released Celgar from its cage or box, or what I would call a prison, and now they're driving a truck. Mercer's truck is empty. It's looking to be filled with the money that is on the other side of the bridge. All it needs to do is cross that bridge, and if it makes it over that bridge successfully, then it will fill its truck with the necessary Damages Award--or the requested Damages Award.

Now, these six themes are represented by the

six pillars that hold up the bridge. So, stay tuned in the brief time I have left. Let's see how they do.

First theme, Celgar could not--Canada's position is that Celgar could not have sold its below-GBL electricity to third parties in an economically viable manner.

There are three subthemes to this issue. Canada's position is that during the relevant period, the selling price for Celgar's energy was too low. The price of its remaining--replacement energy was too high for Celgar to have arbitraged below-GBL energy at Mid-C prices.

Second point, Celgar could not access sufficient long-term firm transmission, the type that was required to secure a long-term, multiyear energy sales contract, nor has it offered any evidence that it would have been able to secure even generic long-term energy sales agreements.

Third, Celgar's energy was not eligible as renewable energy in various Canadian and U.S. markets.

So, quickly, turning to selling versus purchase price. I don't think there is too much

dispute anymore about Mid-C prices. Mr. Krauss, Mr. MacDougall, even Mr. Kaczmarek, when I cross-examined him the other day, all agreed that in 2008, Mid-C prices took a precipitous and sustained decline in 2008.

Mr. Friesen, in his statement, noted that he was looking to make energy sales for Celgar on Celgar's behalf based on Mid-C prices. So, there's our link to Mid-C. Mr. Kaczmarek also agreed that he calculated Mercer's damages based on a replacement power cost of Rate Schedule 31 and 33.

So, Chris, if we could go to figures--NERA Figures 3 and 4 from the second NERA Report, I brought this up, I think, in cross-examination. And these two are the spot prices and the forward prices for Mid-C at the relevant time, versus the Rate Schedule 31 and 33 prices, which show that, in this time period, based on these figures, Celgar could not have arbitraged its power successfully in the Mid-C market.

So, let me return briefly to what Claimant's counsel said today about, well, we're not looking for green energy prices--which I'm getting to--what we're

04:13:08 talking about here is that green energy is similar in price to long-run marginal cost. What's the answer to that? Our answer to that is the following:

First of the all, Mercer has provided no proof that it was even engaged in discussions with the Party for such a long-term energy contract. More importantly, though, even if it was, which we haven't seen evidence of, the problem with such a contract would be finding a utility that would be interested in such an arrangement.

And we're talking here about risk. A number of Witnesses, including Mr. MacDougall, Mr. Krauss, and Mr. Rosenzweig, all talked about the various risks that would be associated with trying to wheel a long-term energy contract with only short-term firm transmission.

In this case, it would be particularly risky, considering that the energy generation is ancillary to the pulp mill's production capability. So, if there's an issue with pulp mill prices or the market costs that go into creating the pulp, then that could affect the reliability of the power generation.

04:14:24 Secondly, we've got the transmission issue. As the various Witnesses pointed out this week--thank you Chris--there are real concerns regarding risk associated with getting bumped or curtailed by higher-level priority transmission.

And, thirdly, Mr. Krauss brought up the idea that--and Mr. Rosenzweig, as well, in their testimony, that the regulators of these utilities would also have a concern about wheeling this type of power, the long-term energy Contract power over the short-term transmission because, again, of the reliability. It wouldn't necessarily meet the reliability standard.

Turning to insufficient transmission space, I think we've dealt with that extensively this week. I'll just summarize it by saying it seems the Claimant's position here is both confused and desperate. It is confused in the sense Mr. Friesen said he could get firm energy for Celgar. Mr. Kaczmarek, in his Report, said, I think we could get long-term transmission. When I pressed him on whatever we could get both, he said, I'm not an expert, and I didn't really draw a distinction between

those technical terms.

So, then, finally, the Claimant's landed on what they say is the short-term firm and non-firm transmission that they use for a variable--sorry, for a viable long-term energy sales Contract. But, again, Mr. Krauss, Mr. MacDougall, and Mr. Rosenzweig all indicated that such an arrangement--such a wheeling arrangement with that little amount of transmission was not viable.

Renewable markets, quickly. Mr. MacDougall's evidence regarding the ineligibility of Celgar's renewable energy in the Pacific Northwest and Alberta has been uncontradicted regarding Ontario and Quebec. It is just not economic. It is too far to wheel to do it on an economic basis. Mr. Garrett from Puget Sound wasn't even called here as a witness. He couldn't even remember meeting with Mr. Merwin, if you recall.

So, turning the second theme of the six themes, BC Hydro, in Canada's view, would not have bought Celgar's below-GBL electricity. We've rehashed this theme again and again and again. Mr. MacLaren, in particular, and Jim Scouras, all of them say

04:16:51 BC Hydro would not buy Celgar's below-GBL power.

One thing we didn't raise in the slides here, but one of the claims that Mercer has made is that B.C. didn't want the power to leave B.C. Les MacLaren, in his second statement in Paragraph 16 said, we didn't care where it went. We're fine with it leaving the Province. That's not our priority here.

And this brings to us a key problem for Mercer, which is that Mr. Kaczmarek's damages calculations are based entirely on sales to BC Hydro. It's as though they've abandoned this notion of trying to sell to third parties. It is just not realistic. And he provides no alternative or additional calculations based on potential sales to third parties.

Now, in his defense, Mr. Kaczmarek had a bit of a robotic remit in that he said, I'm not here to test or even decide on some sort of summary judgment, the way the Claimant--in the Claimant's case. I accept the case of what they're pleading, and I calculate the damages from that.

04:17:49 So, very quickly, as I'm running out of time, Number 3, it's highly speculative to assume that BC Hydro will renew Celgar's EPA in 2020 at the same price and with the same GBL.

Here, Mr. Kaczmarek, in his direct presentation, brought up "The sky is falling" 2008 LTAP quotations about BC Hydro needing all this resource power. That was then; this is now. The 2013 IRP indicated, as I pointed out to Mr. Kaczmarek, that BC Hydro is in a surplus situation. They have adequate energy supply until 2028, adequate capacity to 2019. And in terms of new price, the SEEGEN EPA managed--BC Hydro managed to obtain a lower EPA price of $43 in 2014, compared to the $60 they negotiated in 2003.

A valid Ministers' Order, Mr. Owen dealt with that. Claimants' counsel has admitted that at least there's a cap on damage for that. Although in their slide, it said 75 million. I think in Mr. Kaczmarek's Table 15, it says 73. I'm not sure why there's a difference there. And both, I think, include tax--sorry, interest.

04:19:09 So--but at least there's a cap, in Mr. Rosenzweig's view, the Ministerial Order, if it's valid, damages go to zero. There's no artificial limit from 1994 to 2006.

Regarding the fifth theme, BLAP, if this Tribunal agrees with Canada and finds it's an inappropriate metric on which to calculate damages, then that obviates a number of Navigant's numbers because the damages model relies on BLAP.

And then, finally, regarding the errors, again, we can spend a whole boring day going through all of the detailed errors that NERA has alleged that Navigant has committed. I raised three or four of them the other day under the Footnote 899, "Agreed-to Errors," there are a number of others that are in Footnote 900 of Canada's Rejoinder, and then there are the new errors that are in Footnote 9--sorry 901 of Canada's Rejoinder. In all cases, every time there was an error, it always artificially inflated or magnified Mercer's damages, which leads us to conclude that Mr. Kaczmarek's damages calculations are not to be relied upon.

04:20:26 And so, as you might expect, all themes are destroyed, and Mercer's truck doesn't get to go across the bridge.

Thank you. Those are my submissions, hopefully on time.

PRESIDENT VEEDER: Right on time. Thank you very much, indeed.

MR. SHOR: Mr. President, could I just note for the record that we think the truck is too small.

PRESIDENT VEEDER: It's noted. Maybe you should have more than one truck.

Let's take a 10-minute break now, and then we'll hear the Reply.

MR. SHOR: Can we ask for 20 minutes. We haven't had any time to prepare our rebuttal.

PRESIDENT VEEDER: That's true. Let's make it a bit longer. We'll give the Respondent 20 minutes to.

MR. SHOR: But they had lunch. They had lunch to prepare their rebuttal.

PRESIDENT VEEDER: But they didn't have lunch, actually.

04:21:17 MR. SHOR: Well, they were doing their rebuttal.

PRESIDENT VEEDER: We'll break for 20 minutes. We'll start at 20 to 5:00.

(Brief recess.)

PRESIDENT VEEDER: Let's resume.

CLOSING REPLY BY COUNSEL FOR CLAIMANT

Claimant has the floor.

MR. SHOR: Mr. President, Members of the Tribunal, our rebuttal is going to have three themes. The first theme is I'm probably going to have trouble reading my own handwriting; the second theme is Canada must have been at a different Hearing than the one we attended; and the third theme is that Canada has no shame. I hate to say it, but it's true. Canada must have been in a different Hearing because their presentation of the facts seemed oddly divorced from what witnesses actually said in this proceeding.

Let's start first with Mr. Owen's discussion of service GBLs versus procurement GBLs. That was introduced by Canada for the first time in their Closing Statement. No Witness ever raised that

04:48:45 distinction. As far as we can tell, they are an invention purely of Mr. Owen's mind.

He draws that distinction because he has to separate G-38-01 from the GBLs that were actually set and make the argument that G-38-01 is not applicable to contracted GBLs. In making that argument, he resorts to partial quotations--and this is the Canada-has-no-shame part--partial quotations from BCUC Decisions. Let me read to you what the BCUC actually said. I'll point out where Mr. Owen stops reading, and then I'll continue.

In Order G-106-14, which is Exhibit C-284, on Page 6 of 8, the Commission notes that "Because self-generators are selling to BC Hydro"--exactly our context--"a GBL in this context has a dual purpose. On the one hand, it is used to establish BC Hydro's obligation to serve under RS 1823"--Mr. Owen omits that portion--"and the other hand, it identifies how much idle generation is available for BC Hydro to purchase under an EPA. As pointed out by Celgar in its Submission, these two amounts are aligned, and there is, in fact, only one GBL. The issue is

analogous to two sides of the same coin."

And then in the bottom paragraph--and this is where he stops reading because it's not convenient for him to continue reading. In the last paragraph, in the TS 74 Decision, the Commission agreed with BC Hydro that: "In considering, one, GBL as a rate, it is necessary to look at the use to which a GBL is being put and a specific context for that use. The Commission acknowledged that a GBL in the context of an EPA and LDA is not a rate." That's where Mr. Owen stopped reading. But the Decision goes on, and this is the critical language. "However"--he left out the "however" part--"However, when establishing this GBL, BC Hydro is simultaneously determining the GBL Baseline that would apply to RS 1823 under TS 74 used in the GBL mechanism, which is a rate." The Commission never determined that a GBL is not a rate. The Commission determined that it is a rate but that it should be filed in a different proceeding rather than a TS 74 proceeding because of this dual purpose.

So, they continue. "Therefore, when establishing a GBL in the context of an EPA or LDA,

the GBL Guidelines attached to that customer's Rate Schedule would apply." And the GBL Guidelines are the very guidelines we're talking about here. So, the Commission is saying here undeniably that G-38-01 and the GBL Guidelines BC Hydro is filing are a rate and have to be filed with the Commission.

Also, some of this text is repeated in our Slide 57, which talks about the dual purpose. Canada ignores the dual purpose and focuses exclusively on one.

The third point I'd like to touch on is the setting of Celgar's GBL that Mr. Owen described as being set perfectly in accordance with the GBL methodology. Now, if you remember the slide I had with all the testimony of the different BC Hydro Witnesses on how GBLs are set starting with math, not math, squiggly lines, whatever, we've been calling that GBL Bingo because you can pick a number and get a different GBL methodology each time. Mr. Owen gave us a new number. He said Celgar's GBL was justified being set at load because "they were attempting to meet their load. They were trying to meet their

load." It reflected what generation, what Celgar's generation was going to look like, not what it actually looked like; what it was going to look like. And he referred to "the generation pattern the Mill would have."

Now, the interesting thing about that GBL methodology is it's not supported by the testimony of any Witness in this proceeding. The Witnesses that had actually presented who calculated the GBLs all have different theories. None of them worked. So, Mr. Owen in Closing comes up with a completely new theory.

Moreover, to make his theory, he has to misconstrue the facts as well. And, again, this is another element of Canada has no shame. He says that the factual basis for that, he said, is that--oh, before I get to the factual basis. Not only didn't any Witness testify that that was the basis of the GBL, but if you read carefully, what he's saying is we didn't rely on the actual data, we relied on our assessment of how the Mill would perform in the future. Mr. Dyck, who actually set the GBL, testified

04:53:54 to the opposite. He said he relied on actual 2007 data. So that's just utter nonsense, Mike. Thank you for inventing it for us for Closing.

Moreover, Mr. Merwin didn't support the argument he made. Mr. Owen tried when he was cross-examining Mr. Merwin to establish that point, but it didn't work. Let me read from the transcript, Paragraph 391, Line 17 to 22.

Okay. Mr. Owen, asking the questions. "Okay. So, in 2007, you were generally--you were aiming to sort of meet your load, and you were generating to essentially offset your electricity load; is that right?"

Answer from Mr. Merwin: "No, we were generating to maximize our power generation."

Page 392, Lines 1-12, "Okay. But let's put it this way. I'll rephrase my question so you can agree with me and we'll get on. Your overall generation levels were a little bit above your load. You generated 350,000 gigawatts, and your load was 349. And sometimes you were above, and sometimes you were below."

04:55:03 Answer: "Sometimes we were above and sometimes we were below, but our focus was to maximize our generator output that year. And in that year and some days, we were above; and the days we couldn't maximize, we were below."

So not only isn't the methodology the methodology that's articulated by any Witness in the proceeding, but the factual predicate for it that Celgar was attempting to meet its load all the time isn't even established in the proceeding as well.

Another fact on the they must have been at a different hearing theme, the Tembec Skookumchuck GBL. As Canada presented it, it made it sound like BC Hydro had actually bothered to substantiate Mr. Lague's tale about the <<[redacted] It's uncontested in this proceeding, however, that he didn't do so. Apparently Canada believes that, if they repeat something enough times that Tembec's <<[redacted] we might actually believe it. But there was no substantiation, no evidence of it. The only evidence they referred to in the presentation was that the documents and the analyses that were presented in the

04:56:18 first time during the Hearing in 2015. This was nothing that was available to BC Hydro in 2009 and nothing they relied upon.

Next, we still have repetition of the fiction that G-48-09 did not restrict Celgar because there are alternatives available. We heard about the FortisBC GBL and the NECP Rate Rider again. I want to emphasize under the Exclusivity Provisions of Celgar's GBL, none of those alternatives is available until BC Hydro activates the Side Letter, which they haven't done yet. So none of those alternatives are available. Celgar has no access to embedded-cost power while selling power because it is restricted in the EPA from selling any of its below-GBL energy.

Finally, before I turn to my colleague, we have the argument that the NECP Rate Rider is in effect because it is Celgar's fault that they suspended the proceeding because they're fighting on certain issues. Another untruth. Canada has no shame.

The truth, which we established through Mr. Swanson, is as follows: When BC Hydro filed the

04:57:34 2013 PPA, Celgar objected to the restrictions because they were the same restrictions that were in the 1993 PPA. Celgar succeeded on several points and the provision was modified, but it wasn't satisfied enough, so it appealed to the B.C. Court of Appeals. That appeal remains pending, but it had no effect whatsoever on anything that followed afterwards in the BCUC.

The BCUC proceeding continued. They approved the EPA, the 2013 EPA, and it went into effect. Now, that EPA had several provisions governing GBLs. And it had a provision for BC Hydro GBLs and it had a provision for FortisBC GBLs. And the Commission directed FortisBC to file, since it was not at far along as BC Hydro in the GBL-setting process, it directed FortisBC to file GBL Guidelines, file general principles governing--I think they call it general--high-level self-generator principles for FortisBC service territory.

Because of that, since it was back at square one deciding what the principles were, the Commission approached the Parties and said, it doesn't make sense

for us to go forward on the NECP Rate Rider, which is the end of the process, while we're still discussing principles. Let's set the principles first. And it said--and it asked the Parties, should we suspend the proceeding while we decide on the principles?

This has nothing whatsoever to do with Canada's fantastic tale that Celgar somehow obstructed the NECP Rate Rider from going into effect because it challenged the very concept of a restriction. That appeal is pending, but it has nothing to do with what's going on in the BCUC.

I turn to Gaela.

MS. GEHRING FLORES: I think, continuing on the theme of not the same hearing, with respect to the NECP Rate Rider, we heard Canada state repeatedly that this is a blended rate, that it really is just excluding the 15 percent of PPA Power. That is not true, and that's in accordance with Mr. Swanson himself.

This is not a blended rate, and Mr. Swanson quite clearly confirmed that. If we can go to transcript 1708, and et seq., there's a very long

05:00:03 discussion from 1708, at least to 1711, where we begin "Right."

"I believe in Paragraph 29 of your Statement, you state that FortisBC will have to make a matching purchase for the entire amount; is that correct?

"I believe so," his answer is, "but let me just double-check. Yes, I do say that."

"And in your example, the cost of that matching block--is the cost of that matching block, is somehow 15 percent of that taken out to represent PPA Power?

"I'm not sure I understand the question. I guess.

"So it's been represented that about 15 percent of FortisBC's resources comes from BC Hydro's PPA Power.

"I understand what you're asking me.

"Okay. So, I'm just trying to make sure here. FortisBC, as you say in your Statement, would have you buy the entire amount nominated by, in this hypothetical, Celgar. They would have to go out and purchase 349-gigawatt hours, is that right, or is

there some sort of accommodation for the 15 percent of PPA Power?

Answer: "There's really no accommodation, per se, of the 15 percent of PPA Power, and here is why. It is because although PPA Power, on an actual basis, only represents about 15 percent of FortisBC's load, a lot of FortisBC resources are already used up, so we can't go and get more power from them."

The transcript goes on, and he talks about how they can only shift the incremental cost or the marginal cost of going out and buying this matching block of electricity all at once to Celgar, everything. It is not a blended rate. It is not--they are not just exposed to 15 percent of the market; they're exposed to 100 percent of the market. So we don't just lose the 15 percent PPA Power; we lose, actually, 100 percent of our access to FortisBC's true embedded-cost power.

With respect to the Ministers' Order, again, not sure what proceeding we're in. They say that they've presented Witnesses who have direct knowledge of the Energy Project Certificate or the project, and

05:02:23 I think if you go to Ms. Mullen's Statements, Mr. O'Riordan's Statement, you will find that Ms. Mullen distances herself and her experience from the EPC and from the Ministers' Order. And Mr. O'Riordan's firsthand knowledge of the Ministers' Order and the EPC is not particularly firsthand either. Their most important Witness on the subject was the first Witness they presented on the subject, and that is Peter Ostergaard, and Peter Ostergaard signed Order 15-01.

In his Witness Statement, he makes relatively clear that this supposed self-sufficiency requirement--or at least what then was being labeled as a self-sufficiency requirement--now it's a restriction on electricity sales, but in his First Statement he said that the supposed 100 percent self-sufficiency requirement was pretty important to the Ministry.

Now Canada would have you believe that when he was at the BCUC, and he signed Order G-15-01, he forgot about it. Forgot. And Canada says that Mr. Swanson says that the Curtailment Agreement just

was about curtailment.

This kind of sounds like preexisting is preexisting. Curtailment is curtailment, but the fact of the matter is, the Order had the Brokerage Agreement attached, the Order was approving not only the Brokerage Agreement but the Curtailment Agreement. The Brokerage Agreement had an actual example of how the Curtailment Agreement worked in real life, from November--from November 2000, and it showed all the metering numbers, and it showed when Celgar was buying electricity and when it was selling electricity to West Kootenay Power.

Again, in the face of those numbers, Mr. Swanson said, I don't know what that means. He was the Director of Regulatory Affairs at FortisBC.

PRESIDENT VEEDER: You have three minutes.

MS. GEHRING FLORES: Thank you.

Just scrolling down. With respect to the UPS Decision, I believe Canada showed you a rather excerpted quotation from the UPS Decision. You can find it at CA-016. This is with respect to proving national treatment and the elements of national

05:05:19 1 treatment. You will note that the Tribunal in UPS is
2 talking about the three elements of proving a prima
3 facie case of national treatment. They are not
4 talking about the burden shifting to the State when
5 the State might elect to come up with a justification
6 for the discriminatory act or for the different
7 treatment. That's different. And, in fact, pretty
8 shameless.
9 I think my last point would be on the
10 damages, that Celgar could not have sold its
11 electricity to third parties. I think we've already
12 addressed the fact that, in accordance with
13 Mr. Friesen, they certainly could have. They decided
14 not to cross Mr. Friesen on these issues. He's the
15 Expert. He actually saw the reservation system.
16 Instead, they crossed Mr. Kaczmarek on these issues.
17 One wonders why.
18 In any event, putting all that aside, the
19 Parties contemporaneously acted as if Celgar could
20 sell its electricity to third parties. Everyone was
21 acting like that. Why did BC Hydro start the G-48-09
22 proceeding? Because--and they argued very

05:06:45 vociferously before the BCUC--they were certainly of the opinion that Celgar was going to export its electricity to third parties from the Province, and they wanted to stop it. They said it was going to cause an inordinate amount of harm through their sales.

And at transcript Page 2026, Mr. Rosenzweig states, "The whole purpose of the GBL process is to identify resources for BC Hydro to add to B.C.'s resource stack on a firm basis. It is our position that when BC Hydro contemplated the notion that Celgar's resource would no longer be considered or be able to be BC Hydro's resource, that is when BC Hydro went into action."

This is what Dr. Rosenzweig says drives BC Hydro's procurement decisions. If that is what drives BC Hydro's procurement decision, then BC Hydro would have purchased Celgar's electricity.

And I'm afraid I can't read my colleague's writing, so I'll have him make that note.

MR. SHOR: It was just one follow-up point.

The notion that Celgar couldn't sell its

electricity into other markets is belied by the conduct of all the Parties at the time. Celgar signed an agreement with FortisBC to buy replacement power. FortisBC designed the Agreement for Celgar. BC Hydro went in and tried to stop it. The City of Nelson signed an agreement with FortisBC. That was also something BC Hydro tried to stop.

In fact, what happened at the time was the City of Nelson had begun selling its electricity. So the notion there weren't markets available for this is something that is belied by the conduct of all the Parties at the time.

PRESIDENT VEEDER: Thank you. We're going to have to shop you there. You've come to the end your 20 minutes.

We now have the Respondent. Do you need or want to break before you start? If so, how long?

MR. OWEN: Yes, absolutely. Just 20 minutes, please.

PRESIDENT VEEDER: 20 minutes. We'll come back at half past 5:00.

(Brief recess.)

05:32:24 PRESIDENT VEEDER: Let's resume. We now have Respondent's Closing Reply.

CLOSING REPLY BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: Thank you very much, Mr. President. Just a few remarks.

First, the Claimants in their Rebuttal have raised some surprise about the existence of two GBLs: Service GBLs and procurement GBLs. There is a plethora of discussion in Canada's materials about the difference between G-38-01 and procurement GBLs. Canada's Rejoinder Paragraphs 217 and 273 are just but two.

Just to clear up this issue, G-38-01 was a program established by BC Hydro to allow its customers to export to market. It has been used since 2001 only once and it has not been used since. So it is complete sort of a red herring. It established principles that were used in the procurement process. You heard countless testimony from Lester Dyck, Les MacLaren, Jim Scouras on this very point.

The third as well. We have the FortisBC GBL which cannot possibly come as a surprise to the

05:33:47 Claimant. They have made countless submissions to the BCUC asking for GBLs of various sizes, 1.5, 0, 11. I'm trying to get a FortisBC GBL. So these are different concepts that apply in different circumstances and should not come as any surprise.

We're trying to clear up this matter of the Claimant has sort of hung its hat on this one Decision that says that a GBL is a rate. I want to put this on record: there is G-19-14, which is R-204; and then there's G-106-14, which is C-284.

The Claimant takes a complicated issue well out of context, arguing somehow that a contracted GBL, a procurement GBL, is a rate under the Utilities Commission Act. That is not the case and that takes these proceedings out context.

The proceedings relate to BC Hydro Industrial Customer Tariff Rate Schedule 1823. The BCUC explicitly confined its findings in that context, i.e., to BC Hydro serving its customers. This is at G-19-14 at Page 25. That is R-204.

BCUC decided that setting a GBL for service under Rate Schedule 1823 related to the 1823 rate. It

also decided that setting a GBL under an EPA and LDA also has implications for Rate Schedule 1823 customers who have EPAs and LDAs. This is its reference to the two sides of the same coin.

Thus, the BCUC directed BC Hydro to file the contracted GBL Guidelines as part of Rate Schedule 1823. But the BCUC has agreed that a GBL in an EPA or an LDA is not a rate. That is at G-106-14, Pages 6 and 7. It is Claimant's Exhibit 284.

The connection of the contracted GBL to Rate Schedule 18--the connection of a contracted GBL to Rate Schedule 1823 is under connection, but it is not a rate.

Next, the Claimants make in this allegation -- oh, I said "under reconsideration," not "under construction," apparently. I had little sleep last night.

The NECP suspension, the Claimants allege, if I heard him correctly, that the 2014 PPA is the same as the 1993 PPA. That is absolutely not true. The 2014 PPA makes explicit what is already implicit in the 1993 PPA. Section 2.5(ii) provides for a GBL

05:36:32 mechanism to be set. It is precisely this mechanism that is being challenged at the B.C. Court of Appeals.

This is what the Claimants are seeking in this arbitration is the GBL methodology. And yet, they are challenging it in the B.C. Court of Appeals because they want everything. This is what Mr. Swanson testified was "the moon." They want no restrictions.

And it is because of that challenge that the NECP proceedings have not suspended. If they can have the moon, then the NECP is irrelevant and they have consented to that suspension, the NECP not dead.

(Comment off microphone.)

Next, the Claimants argued about Order 15-01, G-15-01. Mr. Swanson testified that all sales to Celgar would be surplus. Celgar in that context is supplying the Mill first. There is no conflict with the self-supply obligation in the Ministers' Order.

Regarding third-party sales, there are no facts to support the existence of third-party sales. The Claimant has provided none. It has provided no damages assessment based on the existence of

05:37:52 third-party sales. It alleges that submissions in G-48-09 are somehow proof that those sales existed.

The hypotheticals--the amounts put at issue in G-48-09 are hypothetical amounts whereby FortisBC would take all PPA Power to supply both the City of Nelson and the Claimant in a situation where they would become what's called a "full load customer" that take and buy all the electricity. So it would be entirely PPA electricity, and they were completely hypothetical amounts and they were not assessed on the basis of the possibility of any existence of third-party sales whatsoever.

And with that, I will turn it over to my colleague, Mr. Owen. A little bit jittery.

MR. OWEN: Too much coffee, I think. I'm guilty of that myself.

I'm going to try to add clarity to the murky world of the NECP rate.

Can we bring that up transcript, please. If we could just bring it up.

So here we have Mr. Swanson's testimony on Day 6 and he's being asked, Is it embedded-cost power?

"Yes.

"How much can they nominate?

"100 percent."

And it's compared by calculating the cost of embedded-cost power including the PPA to the cost of embedded-cost power excluding the PPA.

Now I want to--

PRESIDENT VEEDER: Just give us the reference to the transcript.

MR. OWEN: I'm sorry. Thank you, Mr. President. This is Page 1644, Lines 7-15. I think conceptually maybe a good place to start with this is there are two elements to Rate Schedule 31, which is a standard industrial rate in the FortisBC service area. And one is an energy charge, so how many megawatt hours are they getting?

And the other is a demand charge, essentially the size of the pipe they're going through.

Celgar is familiar with this because it complained a lot about having a demand charge. It got moved from the time of the use rate RS 33 on to RS 31 where there is a demand charge.

05:40:07 Fortis has 100 percent capacity right now. It has all the capacity it can handle, including the Waneta Dam expansion which is coming on line. That element, the demand element, is fully an embedded-cost resource and part of the embedded-cost rate. So for the demand charge side of the rate, that is fully embedded cost and the Claimants have the benefit of that.

What we are talking about with the NECP is a Rate Rider. So you're talking about an embedded-cost rate, RS 31, and there's potential for a rider to be added on in certain circumstances. Now, my understanding is that essentially there is a matching purchase--maybe we could go to Lines 16-22 here. Here Mr. Swanson is being asked, Is the NECP a market purchases?

"No, it can include some portion of market, but the NECP is really all of FortisBC's resources excluding the PPA."

Could we go to 1645, Lines 10-19, please.

Here we have Mr. Swanson talking about capacity and the fact that the Waneta Expansion is

05:41:24 coming on and that they have lots the capacity and all of that is an embedded-cost resource. I think the Tribunal may recall Mr. Swanson talking about how they could make purchases of non-firm power on the market, essentially on the spot market, very cheap, and they could firm up that resource for the Claimant by essentially using--storing the water behind the dam and then using it to firm up the power source for the Claimant.

Could we go to 1645, Lines 20-22? And 1646 Lines 1-10. Can you get that for me, Chris.

So, again, yes, I think in different iterations FortisBC has contemplated that it would make a matching block market purchase potentially under a long-term contract, potentially on the spot market. You know, there are different options open for it, and that would essentially, my understanding is, offset the fact that there is no PPA Power on the energy side of RS 31. If there was any increment in cost, that small increment in cost would be passed on to the Claimant.

On the demand side, there is no change

whatsoever. So it is an embedded-cost rate. It is based on FortisBC's embedded-cost rate, RS 31, with an adder or a rider on top of it. And FortisBC has said to the BCUC--and you can look at different exhibits, R-462, R-501. There they're saying that essentially there will would be no additional cost for the foreseeable future. And, indeed, the Claimants took the position in G-188-11 that this would be a good thing; Fortis could source from market because for the foreseeable future there would not be additional costs if they were managed properly.

So I think that's--I hope that's add some clarity to this. I don't think I have anything else. Oh, actually one thing. Just one moment.

The Claimant suggested that our Witnesses do not have direct firsthand knowledge of the Ministers' Order, and they did acknowledge that Peter Ostergaard did, of course, because he handled it directly. Dr. O'Riordan indicates, however, in Paragraphs 73-76 of his Witness Statement that he actually does have firsthand knowledge. And Ms. Mullen has testified that, although she does not have a current

05:44:08 recollection of it, she was present at an Energy Project Coordinating Committee meeting where she was responsible for taking the notes, and if you look at her Witness Statement, there's an excerpt from there about the Celgar project where the Energy Project Coordinating Committee, including Ms. Mullen were discussing that, and she was, indeed, the author of those minutes.

So, I don't have anything further. Thank you.

PRESIDENT VEEDER: Well, thank you for that. We've come to the end of the Parties' submissions at this hearing. We've now come to the end of the hearing. There were certain housekeeping matters we raised yesterday and others we need to raise now. First of all, a very minor one, but we understood that the Respondent's wish to correct one of the slides that was given to us in Opening Oral Submissions, and we'd just like to confirm that it is Slide Number 53, which is now corrected by the Closing Submission Slide 62.

MR. OWEN: We apologize for that. It

05:45:16 Slide 53. Thank you, Mr. President.

PRESIDENT VEEDER: We raised last night the possibility of some form of written submissions. We've had a very full day, which we have found extremely useful, and we appreciate the amount of work that has gone into preparing both the written form--that is, the slides--but also the oral submissions. And for our part, for the time being, we're not minded to require post-hearing written submissions, but you may have formed different views.

We ask the Claimant first?

MR. SHOR: I think we're too tired to come to a conclusion right now.

PRESIDENT VEEDER: I can understand that.

MR. SHOR: Can we think about it?

PRESIDENT VEEDER: Can we leave it there?

Unless the Respondent has a strong feeling about this.

Do you want to think about it? When you see the transcript of today, you may have a better way of judging whether you think it is important.

MR. OWEN: You know, I certainly am not going

05:46:32 to rush and encourage you to give us a bunch of Post-Hearing Briefs that we have to do over August, but, you know, if there are specific issues that you are concerned about or have additional concerns about, narrow issues, we're happy to provide you with something further.

PRESIDENT VEEDER: I wasn't including the possibility that, if we thought later on we needed help on a particular issue or particular topic, of course, we reserve the right to ask you to assist us with that by way of further written submissions, but we're not in the position to say that tonight.

Do you want to think about it? I think we're all a little bit concerned that, although we had very full Opening, Closing Submissions, so to speak, you've had a very truncated time to reply, and if you thought there was something which you needed to rebut, which you haven't done, given the shortage of preparation time or the shortage of time, think about that, and then apply to us for permission to do so.

You were about to say something.

(Comment off microphone.)

05:47:37 1 (Laughter.)

2 PRESIDENT VEEDER: Okay. So no Order for the
3 time being for post-hearing written submissions, but
4 we reserve the right to ask for some help if we need
5 to.
6 The other technical matter is the transcript.
7 It is obviously in full form before the Tribunal. It
8 is being copied to the United States and Mexico. The
9 first thing I think we'd ask you to do is go through
10 the transcript to see if there are any corrections
11 that you need to make. And if you could do that
12 fairly promptly; not obviously minor matters, but if a
13 negative is missing or something, we need to know that
14 within two or three weeks.
15 Is that possible? Or, that will be August.
16 MR. SHOR: Yeah. I think the problem is that
17 everyone is getting out of dodge as soon as this
18 Hearing is over.
19 PRESIDENT VEEDER: How long do you need?
20 Actually, I've just been handed the Order. It's funny
21 how you forget things. We agreed that it would be
22 done by the 25th of September. The Parties are to

submit to the Tribunal the agreed, corrected, and redacted versions of the transcripts on the 9th of October in PDF version. It is Paragraph 14 of Procedural Order Number 9.

MR. SHOR: We were very foresightful. Is that a word?

PRESIDENT VEEDER: Shall we leave it like that?

MR. SHOR: That's fine with Claimant.

PRESIDENT VEEDER: Respondent?

MR. DOUGLAS: That works for us, Mr. President.

PRESIDENT VEEDER: Sorry, we mentioned last night whether you wanted to make any submissions on costs and whether you discussed that between yourselves as regards to form and date.

MR. SHOR: We have not discussed it. I think we'd prefer that to be due sometime after the transcript corrections get done. I don't think there is any urgency on that, maybe November sometime. Is that...

MR. OWEN: Let's touch base after we're done

05:49:58 with the transcripts, and we'll figure it out.

PRESIDENT VEEDER: Just as regards to the form, we don't need an audit, but we do need a little bit of detail simply to allow the other party, if they think they have queries about the assessment to actually ask for explanations as to what the assessment should be. But that means that you one exchange, it should be simultaneous, and then after a certain period of time, you could do a response.

MR. SHOR: Why don't we discuss with Canada what the form might take and see if we can reach agreement. If not, we'll apply to the Tribunal.

PRESIDENT VEEDER: Well, we're happy with that. If you come up with an agreement, you can assume it will work with us.

Anything else?

We ask the Claimants first.

MR. SHOR: Nothing on our end.

PRESIDENT VEEDER: And on the Respondent's side?

MR. OWEN: Nothing further, Mr. President.

PRESIDENT VEEDER: Well, I think two things

05:50:51 from us. I'm sure I speak for all of us in thanking Dawn Larson and David Kasdan for their extreme patience. Don't forget that it was in this arbitration that we launched the "no" button, and it may become a feature of ICSID Arbitration. But thank you for the transcript.

But also on our part, we'd like to thank the Parties and counsel. It's been a very efficient and productive hearing. We've covered an enormous amount of ground. We know it's much harder for you than for us, and I suspect the last few days have been extremely difficult in terms of no lunch and lack of sleep. So, we appreciate it. And we thank you all, not only those that we hear and see, but we know at the end of the table and behind the walls, there are a lot of other people working very hard to keep this arbitration working, so thank you to them too.

And with that, we close the Hearing. So, thank you all very much, and bon voyage.

(Whereupon, at 5:52 p.m., the Hearing was concluded.)

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.

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DAWN K. LARSON