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IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

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

WITNESS STATEMENT OF DENNIS SWANSON

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I, Dennis Swanson, of Kelowna, British Columbia, Canada, MAKE OATH AND SAY AS FOLLOWS:

A. Introduction

1. I am currently the Director, Regulatory Affairs, at FortisBC Inc ("FortisBC"). I first joined FortisBC, and its predecessor Companies, in 1997 as an accountant. I have since held the positions of Internal Auditor, Manager of Budgets and Forecasts, Manager of Corporate Reporting and Manager of Administrative Services. I was appointed Director, Regulatory Affairs, on November 26, 2007.

2. My experience at FortisBC is relevant in several respects to this arbitration. This experience includes:

- my responsibility for FortisBC's regulatory filings to the British Columbia Utilities Commission ("BCUC");
- my general implication in most of FortisBC larger business activities which are almost all regulated;
- my involvement in the negotiations of energy purchase and supply agreements, including with Celgar and the City of Nelson; as well as
- my general participation in FortisBC's interactions with Celgar and BC Hydro relating to power purchase and power sales arrangements.

3. Prior to joining FortisBC, I was employed as an accountant at a sawmill operated by Weldwood of Canada.

4. I hold a Diploma in Financial Management from the British Columbia Institute of Technology. I am also currently enrolled in the Institute's Certified Management Accounting Program.

5. I attach my *curriculum vitae* to this witness statement as Appendix A.

6. In the present witness statement, I provide background concerning FortisBC, explain FortisBC's relationship with BC Hydro, and detail FortisBC's interactions with Mercer International Inc. ("Mercer" or the "Claimant") concerning the Celgar pulp mill. I also outline the various regulatory proceedings involving FortisBC and Celgar.

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

B. FortisBC - Overview

8. FortisBC is a privately-owned public utility that is responsible for supplying electricity to much of the West Kootenay and Okanagan regions in the southern interior of British Columbia ("B.C.").[1] FortisBC is the only significant investor-owned public utility within the province of British Columbia that provides electricity service. Electricity is served to the rest of the province primarily by BC Hydro, a provincially-owned Crown utility, and by five municipally-owned utilities.

9. FortisBC services a range of customers including residential customers, industrial customers (at both distribution voltage and transmission voltage), commercial customers, lighting customers, and irrigation customers. Four of the province's five municipal utilities operate in our service area and are served by FortisBC as wholesale customers.[2]

1. Historical Background

10. The predecessor of FortisBC, the West Kootenay Power and Light Company ("WKP"), was founded in the late 1800s by a consortium led by Sir Charles Ross, a Scottish landowner and manufacturer of the infamous Ross rifle. WKP was incorporated

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[1] FortisBC, *Service Area*, online: http://www.fortisbc.com/About/ServiceAreas/ElectricityUtility/Pages/default.aspx**, R-3**

[2] Specifically, the City of Nelson's, the City of Grandforks', the City of Penticton's and the District of Summerland's municipal utilities.

in 1897 pursuant to the *West Kootenay Power and Light Company, Limited, Act, 1897.*[3] In 1916, Teck Resources Ltd. (formerly Cominco) purchased WKP to develop an economical power supply for the growing copper and gold mines in south central British Columbia.

11. In 1929, WKP expanded its operations pursuant to an amendment to the *West Kootenay Power and Light Company, Limited, Act, 1897,* which permitted it to supply other local municipalities and customers, including the Cominco smelter in Trail, British Columbia.[4]

12. In 1987, WKP was purchased by Missouri-based Utilicorp. In October 2001, WKP was renamed Utilicorp Networks Canada BC Ltd. The name was subsequently changed to Aquila Networks Canada BC Ltd in May of 2002. In May 2004, Newfoundland-based Fortis Inc., the largest investor-owned distribution utility in Canada, acquired all the distribution, transmission and generation assets of the former WKP company and renamed it FortisBC.[5]

2. The Regulation of FortisBC

13. FortisBC is regulated by the BCUC as a public utility under the *Utilities Commission Act* ("*UCA*").[6] As a result, FortisBC has an obligation to its customers to provide safe, reliable and cost-effective service.[7] In doing so, FortisBC must take into consideration the regulatory principles that may influence how it provides that service. Like many industries, B.C.'s public utilities have a unique set of rules and laws

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[3] *An Act to Incorporate the West Kootenay Power and Light Company, Limited*, BC Statutes of 1897, c. 63, **R-206**

[4] *West Kootenay Power and Light Company, Limited, Act, 1867, Amendment Act, 1929*, BC Statutes of 1929, c. 76, 19 Geo. 5, **R-207.** This amendment granted a non-exclusive right to operate an electricity utility within 150 miles of the City of Rossland**,**

[5] FortisBC, *About*, online: http://www.fortisbc.com/about/Pages/default.aspx**, R-208.**

[6] RSBC 1996, c. 473**, R-205.**

[7] Under section 28 of the *UCA*, FortisBC's customers must be located within 200 meters of these supply lines. Sections 29 and 30, of the *UCA*, enable the BCUC to order that a customer beyond 200 meters may be eligible for service and that a utility may have to extend its supply lines to serve such customer.

applicable to them. Oversight by the BCUC ensures that FortisBC is meeting its obligations as set out it the *UCA*.[8]

14. Pursuant to the *UCA*, the BCUC sets FortisBC's rates by determining how much revenue FortisBC reasonably needs to recover the costs of providing service to its customers, including how much FortisBC should earn for its investment.[9] In doing so, the BCUC also generally examines FortisBC's cost structure and the prudency of its expenditures to ensure that any rates charged are fair, just and reasonable.[10]

15. FortisBC's Rate Schedules (showing all of its rates), as well as the terms and conditions under which it provides service are contained in its Electric Tariff.[11] Under the *UCA*, FortisBC serves customers in its territory according to the terms of its Electric Tariff.[12] Electric service to its industrial customers may also be conditioned by the conclusion of service contracts,[13] namely General Service Agreements ("GSAs").[14]

16. Section 71 of the *UCA* requires FortisBC to file energy supply contracts[15] for acceptance by the BCUC. The BCUC reviews these contracts to determine whether or not they are in the public interest, guided by several factors, including the price of the energy

[8] FortisBC's main BCUC regulatory filings include: Revenue Requirement Applications, Rate Design Applications and Cost of Service Analysis, Applications for Certificates of Public Convenience and Necessity for capital infrastructure projects, Power Supply Agreements and Applications for approval of other major contracts.

[9] British Columbia Utilities Commission, Understanding Utility Regulation – A Participant's Guide to the British Columbia Utilities Commission, Original Publication: October, 1996, Revised: July 11, 2002, Ch. 5, p. 37, **R-209.**

[10] *UCA*, ss. 58 to 64**, R-205.**

[11] FortisBC's Electric Tariff No. 2 for Service in the West Kootnenay and Okanagan Areas, **R-210.**

[12] *UCA*, s. 63, **R-205.**

[13] Both tariffs and contracts between a utility and a customer pertaining to electric service constitute rates under the *UCA*, s. 1. After a hearing, the BCUC may, in cases where provisions of these contracts are unduly preferential or discriminatory, declare such service contracts unenforceable either wholly or in part (*Ibid.*, s. 64).

[14] It is my understanding that FortisBC's GSAs serve similar purposes as BC Hydro's Electricity Supply Agreements (or "ESAs") with its industrial customers.

[15] These are agreements under which utilities, such as FortisBC, purchase power from independent power producers ("IPPs") or customers with self-generation facilities

and certain factors found in the *Clean Energy Act*.[16] In addition to these supply agreements, the BCUC is also responsible for reviewing FortisBC's expenditure plans and capital projects and determining whether these projects are in the public interest.[17]

17. While the great majority of *UCA* provisions apply equally to FortisBC and to BC Hydro, there are certain requirements that, in conjunction with the *Clean Energy Act*, apply only to BC Hydro. For example, BC Hydro is under the obligation to become energy self-sufficient by 2016[18] and to reduce its expected increase in demand for electricity by the year 2020 by at least 66%.[19] These obligations do not apply to FortisBC.

18. However, under the *Clean Energy Act*, FortisBC, when preparing its long-term resource plans, "must consider British Columbia's energy objective to achieve electricity self-sufficiency."[20] Similarly, under the *UCA*, when the BCUC reviews FortisBC's applications regarding capital projects,[21] energy purchases,[22] resource plans,[23] and expenditure schedules,[24] it must consider the energy objectives listed in the *Clean Energy Act*,[25] including the objective to reduce demand and conserve energy.[26]

3. FortisBC's Rates

19. FortisBC has two rates for customers taking electric service at the transmission level: Rate Schedule 31, which is a "flat rate" for industrial customers, and Rate

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[16] S.B.C. 2010 c. 22, s. 2, **R-154.**

[17] *UCA*, s. 44.2 and 46, **R-205.**

[18] *Clean Energy Act*, s. 6(2), **R-154.**

[19] *Ibid.*, s. 2(b) ("the objective of the authority [i.e. BC Hydro] reducing its expected increase in demand for electricity by the year 2020 by at least 66%").

[20] *Ibid.*, s. 6(4).

[21] *UCA*, s. 46(3.1), **R-205.**

[22] *Ibid.*, s. 71(2.1).

[23] *Ibid.*, s. 44.1(8)**.**

[24] *Ibid.*, s. 44.2(5)**.**

[25] *Ibid.*, s. 1**.**

[26] *Clean Energy Act*, s. 2(b) ("to take demand-side measures and to conserve energy […]"), **R-154.**

Schedule 33, which is a "time-of-use rate" for qualified customers. The Celgar pulp mill is currently served under Rate Schedule 31.[27]

20. FortisBC employs a new "stepped-rate" for residential customers, which is intended to encourage conservation. The BCUC recently considered whether FortisBC should provide stepped-rates for industrial customers, but decided against implementing such rates at this time.[28]

4. FortisBC's Electricity Requirements and Generation Assets

21. FortisBC meets the needs – referred to as "electricity requirements" – of its customers from several sources, including its own generation assets, BC Hydro supply, and other power purchases, in the following proportions:

- FortisBC owns four hydro-electric generating plants on the Kootenay River (with an installed capacity of 225 MW) which provide approximately 42% of its electricity requirements;

- BC Hydro supplies approximately 28% of FortisBC's electricity requirements under BC Hydro's Rate Schedule 3808 and the terms and conditions of the 2014 Power Purchase Agreement ("2014 PPA");

- Brilliant Power Corporation provides approximately 24% of FortisBC's electricity requirements pursuant to the long-term Brilliant Power Purchase Agreement;[29] and

[27] This rate is 4.8¢/kWh, which is somewhat higher than the average 2013 Mid-Columbia ("Mid-C") market price of 2.9¢/kWh. As discussed in Section E.2.c) below, Celgar is currently charged this rate on an interim and refundable basis.

[28] BCUC, Order G-67-14 and Decision, in the Matter of an Application by FortisBC for Approval of Stepped and Stand-By Rates for Transmission (Voltage) Customers, May 26, 2014, pp. (i)-(ii), 17-18, **R-211.**

[29] While FortisBC operates and maintains two generating plants with a total generating capacity of 599 MW, i.e. the Brilliant Dam, owned by Columbia Power Corporation subsidiary Brilliant Power Corporation, and the Waneta Dam, owned by Teck Resources Ltd., it currently only purchases power from the Brilliant Power Corporation under the Brilliant Power Purchase Agreement.

- Independent Power Producers ("IPPs") and the Mid-C spot market meet approximately 5% of FortisBC's electricity requirements. A small fraction of this 5% may, at times, come from self-generating industrial customers, or other self-generating (non-industrial) customers.

22. FortisBC typically does not purchase any significant portion of its required power from IPPs or self-generators, because it has access to long-term, lower-cost power in large enough quantities to meet its requirements.[30] If Mid-C market prices are lower than the BC Hydro Rate Schedule 3808 rate under the FortisBC-BC Hydro Power Purchase Agreement, FortisBC may purchase small amounts of power from the market, IPPs or self-generating customers. The savings that are achieved as a result of these lower cost purchases are then passed on to all FortisBC customers.

23. In the future, after completion of the Waneta Hydroelectric Expansion Project[31] (expected in 2017), FortisBC will be able to supply all of its capacity requirements beyond its own generation assets, purchases from BC Hydro, and the Brilliant Power Purchase Agreement, through a BCUC-approved long-term capacity purchase agreement with the Waneta Expansion Power Corporation. In light of these long-term, high capacity arrangements, FortisBC's resource planning has not included large procurement processes targeted at IPPs or customers with self-generation facilities, similar to BC Hydro's calls for power.

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[30] FortisBC, 2012 Integrated System Plan, Volume 2, 2012 Long Term Resource Plan (2012 Resource Plan), June 30, 2011, p. 29, **R-212.**

[31] Columbia Power Corporation, Service Plan 2014/15 – 2016/17, p. 2, **R-213** :

> The project involves the development of a 335MW Generating Station on the Pend d'Oreille River near Trail, BC. It is owned by the Waneta Expansion Limited Partnership (WELP) a limited partnership owned by Fortis Inc. (51%), Columbia Power (32.5%), and CBT [i.e. the Columbia Basin Trust] (16.5%). WELP is managed by a general partner, Waneta Expansion General Partner Ltd. (WEGP), which is also owned by Fortis Inc., Columbia Power and CBT. […] FortisBC will be responsible for operations of the facility.
>
> The energy and capacity generated from this facility will be sold by WELP under long-term contracts with BC Hydro and FortisBC, respectively.

5. FortisBC's Demand-Side Management Programs

24. FortisBC manages demand in its service territory by attempting to encourage energy conservation, through various demand-side management ("DSM") measures. In particular, FortisBC offers the PowerSense DSM program to all of its classes of customers.

25. PowerSense offers financial incentives that range from a portion to all of the incremental costs associated with a DSM measure which reduces the load FortisBC serves by increasing the customer's energy efficiency. In other words, the focus of FortisBC's DSM measures is mainly to lower customers' power purchases by making them more efficient users of electricity.

26. The Celgar pulp mill has in the past been a beneficiary of FortisBC's PowerSense program. For example, starting in 2007, FortisBC contributed a total of [redacted] to energy-efficiency measures which reduced the mill's electrical load.[32]

27. As a result of its different marginal cost of supply and different planning constraints, FortisBC has fewer cost-effective DSM measures available to it compared to BC Hydro.[33] For example, FortisBC's lower marginal cost of new supply and greater

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[32] FortisBC, Industrial Efficiency Program Evaluation, January 14, 2013, p. 27**, R-214.** These measures were put in place in the context of Celgar's Blue Goose Project, discussed further at Section D.2 below.

[33] See generally, BCUC, Order G-110-12 and Decision in the Matter of An Application by FortisBC Inc. for Approval of 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan, August 15, 2012, pp. 139-140, **R-58**:

> [I]n the Panel's view, BC Hydro and FortisBC are different utilities, operating in different contexts. The Commission Panel is not prepared to direct FortisBC to implement the same DSM programs as BC Hydro, particularly in the industrial sector where the customer base is very different. The Commission Panel also reiterates its view that FortisBC's DSM Program, as advanced, is reasonable.

See also, FortisBC, Final Submission of FortisBC in the Matter of An Application by FortisBC Inc. for Approval of 2012-2013 Revenue Requirements and Review of 2012 Integrated System Plan, April 5, 2012, pp. 210-211, paras. 601-603, **R-215**:

> FortisBC considers programs provided by other utilities, including BC Hydro, when designing programs, but does not necessarily copy them. It would not be appropriate for FortisBC simply to adopt all that other utilities do. […]
>
> In this regard, programs and measure incentives are customized to the specific markets each utility serves. […]

permissible resource options explain, in part, why large Load Displacement Agreements[34] have not been concluded in FortisBC's service area.

28. Despite these differences, FortisBC and BC Hydro, as the two main electric public utilities in the province, routinely hold discussions regarding province-wide DSM program collaboration. During these discussions, BC Hydro has sometimes raised the topic of DSM opportunities for Celgar. In these cases, FortisBC explained its consistent position, namely that, in order for FortisBC to provide additional DSM incentives to Celgar, the load served by FortisBC would need to decrease. FortisBC does not grant incentives to customers who would use the incentives for the purpose of selling more self-generated energy, without reducing a load served by FortisBC. Simply offering incentives without any associated reduction in customer demand would increase FortisBC's utility costs, thus causing further upward pressure on FortisBC's customer rates, all else being equal.

29. FortisBC has also been approached by the B.C. Ministry of Energy and Mines ("Ministry of Energy") regarding the DSM programs offered in the province. For example, at some point in late 2009 or early 2010, Les MacLaren, an Assistant Deputy Minister in the B.C. Ministry of Energy contacted me concerning potential DSM options for Celgar. During that call, I explained to Mr. MacLaren that in order for FortisBC to provide DSM incentives to Celgar, the load served by FortisBC would need to decrease.

30. FortisBC and Celgar have also recently discussed this issue. In particular, Celgar approached FortisBC in February 2014 seeking pre-approval for a chip screening upgrade project in order to receive a rebate through PowerSense. However, FortisBC was unable to proceed with the pre-approval until the BCUC makes a final determination regarding any possible portion of Celgar's load that could be served by FortisBC, instead of being served by Celgar's self-generation. This determination is necessary to ensure that any

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It is reasonable for utilities to offer DSM incentives based on their specific business circumstances.

[34] A Load Displacement Agreement can be concluded between a utility and its customer with a view to reducing the energy demand the utility must serve. It generally involves incentives for a customer to install self-generation facilities or to increase self-supply, thus reducing the customer's purchases of utility electricity on a long term basis.

future PowerSense incentive would actually decrease a load served by FortisBC. At present, Celgar's load is served by its own self-generation.

6. FortisBC Customers with Self-Generation

31. FortisBC's terms and conditions concerning customer owned generation are set out in section 10 of FortisBC's Electric Tariff No. 2.[35] None of the obligations in Tariff No. 2 require FortisBC to acquire any portion a customer's self-generation.

32. FortisBC interacts with each of its three self-generating customers (transmission and distribution) individually. At the transmission level, FortisBC's customers with self-generation are Celgar and Nelson Hydro.[36] As a result of its purchase of the City of Kelowna utility assets,[37] FortisBC now also serves Tolko Industries Ltd.'s sawmill in Kelowna – which is connected at distribution voltage.

33. While it was under no obligation to do so, FortisBC has in the past concluded an agreement with Celgar[38] whereby it would purchase any excess power (at the prevailing Rate Schedule 3808 rate) not sold by the customer to another third party.[39]

34. More recently, whenever prospective self-generators have approached FortisBC, it has offered to purchase their excess output, which is net of their electricity

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[35] FortisBC, Electric Tariff B.C.U.C. No. 2 for Service in the West Kootenay and Okanagan Areas, **R-210.** The provisions of section 10 indicate that:

- a self-generating customer has the right to install, connect and operate electrical generating facilities in parallel with FortisBC's electrical system;
- a self-generating customer has the right to install standby generation facilities to provide electrical service in the event of a disruption of FortisBC's service;
- FortisBC has a right to inspect and approve all interconnected generation; and
- FortisBC may isolate a customer from its system if the customer-owned generation adversely affects FortisBC's electrical system.

[36] Nelson Hydro is the City of Nelson's municipal utility.

[37] This acquisition was completed in 2013 (FortisBC, Corporate Report 2013, p. 5, **R-216)**.

[38] Electricity Supply Brokerage Agreement between FortisBC and Celgar, December 20, 2000, **R-217.**

[39] FortisBC has concluded a similar arrangement (and corresponding purchase price) with Cascade Pacific Corporation, a small Goat River IPP connected at the distribution level, under which it would purchase power generated by this IPP that was not sold elsewhere (*See* Letter Agreement between FortisBC and Cascade Pacific Corporation, January 22, 2001, **R-218**). Neither of these agreements (Celgar and Cascade) is currently in effect.

requirements, at a cost that is equal to either the Mid-C market price or the Rate Schedule 3808 rate, whichever is lower.

7. FortisBC's Transmission Capacity

35. FortisBC maintains 7,000 kilometres of high voltage transmission and distribution lines that interconnect to BC Hydro.[40] FortisBC also has access to transmission capacity to import and export power in and out of its service area through wheeling agreements.

36. Since 1999, FortisBC maintains an Open Access Transmission Tariff ("OATT") which allows IPPs, self-generators and power marketers to purchase available transmission capacity in order to deliver power to external markets.[41] The terms and conditions required for customers to access the FortisBC transmission system are set out in Tariff Supplement No. 7 ("Transmission Access Terms and Conditions").

C. FortisBC's Relationship with BC Hydro

37. The BCUC characterises the relationship between BC Hydro and FortisBC as a "hybrid" relationship, which has elements of both a utility-to-utility relationship and a utility-to-customer relationship.[42]

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[40] FortisBC, 2012 Integrated System Plan, Volume 2, 2012 Long Term Resource Plan (2012 Resource Plan), June 30, 2011, p.13, **R-212.**

[41] The opening of FortisBC's transmission system is further discussed in: BCUC, Order G-27-99 and Decision, in the Matter of an Application by West Kootenay Power Ltd. for Approval of Access Principles, March 10, 1999, pp. 3-6, **R-219,** and BCUC, Order G-28-99 and Decision, in the Matter of an Application by West Kootenay Power Ltd. for Approval of Transmission Access, March 10, 1999, **R-220.**

[42] BCUC, Order G-27-93 and Decision in the Matter of an Application by British Columbia Hydro and Power Authority for Rate Schedule 3808 and Revised Power Purchase Agreement with West Kootenay Power Ltd., April 22, 1993, p 26, **R-13**: "The relationship is […] hybrid, in which WKP is to be treated partly as a customer of BC Hydro and partly as an independent utility. As a customer, WKP has a right to a specified amount of electricity from BC Hydro at the rates extended by BC Hydro to comparable customers."

See also, BCUC, Order G-60-14 in the Matter of British Columbia Hydro and Power Authority Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, May 6, 2014, p. 32, **R-221**: "[T]he relationship between FortisBC and BC Hydro continues to be unique, one that is characterized as a hybrid, in which FortisBC is partly a customer of BC Hydro and partly an independent utility. […] The Panel continues to consider BC Hydro's obligations to serve FortisBC as a customer is limited, and beyond those limits the relationship is to be that of two independent utilities. The Commission recognizes that as an independent utility, FortisBC has the responsibility for its own resource planning at rates reflective of fair market arrangements."

1. The FortisBC-BC Hydro 1993 PPA

38. The 1993 Power Purchase Agreement ("1993 PPA") required BC Hydro to provide FortisBC with energy up to a capacity limit of 200 MW. Below this capacity limit, FortisBC purchased electricity at BC Hydro's embedded-cost rate (referred to as Rate Schedule 3808 energy), similar to the rate charged to BC Hydro's industrial customers. Above this limit, any electricity required by FortisBC would be purchased at rates reflecting fair market arrangements on a utility-to-utility basis. Under the 1993 PPA, BC Hydro was obligated to make reasonable efforts to provide energy that FortisBC required above this limit.

39. The 1993 PPA stipulated that the electricity purchased from BC Hydro was solely for the purposes of supplementing FortisBC's resources to enable it to meet its service area load requirements and was not to be exported or stored. To ensure this condition, FortisBC was prohibited from exporting any electricity out of its service area during any given hour while FortisBC was taking energy requirements from Rate Schedule 3808 for that hour.[43] FortisBC was, however, allowed to export from its own sources of supply when it was not taking energy from BC Hydro.[44]

40. The 1993 PPA was filed with the BCUC in the form of a BC Hydro tariff supplement together with BC Hydro Rate Schedule 3808.[45] It originally had a term of 20 years, expiring on September 30, 2013. The term was extended to June 30, 2014 such that it remained in effect while the BCUC completed its review of the 2014 PPA, the new Rate Schedule 3808 and their related agreements.

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[43] BCUC, Order G-60-14 and Decision, in the Matter of an Application by British Columbia Hydro and Power Authority for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, May 6, 2014, p. 10, **R-221**.

[44] BCUC, Order G-27-93 and Decision in the Matter of an Application by British Columbia Hydro and Power Authority for Rate Schedule 3808 and Revised Power Purchase Agreement with West Kootenay Power Ltd., April 22, 1993, p. 13, **R-13**.

[45] BCUC, Order G-85-93, in the Matter of an Application by British Columbia Hydro and Power Authority and West Kootenay Power Ltd. for Approval of a Power Purchase Agreement, September 30, 1993, **R-222**.

2. The FortisBC-BC Hydro 2014 PPA

41. The 2014 PPA came into effect on July 1, 2014. It differs in several respects from the 1993 PPA. Although the 2014 PPA continues to provide for up to 200 MW of capacity to FortisBC, the associated electricity is subject to a two-tranche pricing structure for energy.[46] The lower tranche continues to be priced at BC Hydro's embedded-cost rate, essentially equivalent to the one BC Hydro charges its transmission customers. However, the second tranche of energy is more expensive as it reflects BC Hydro's long run marginal cost of acquiring new supply. This new rate scheme effectively puts a reduced cap on the energy available to FortisBC at BC Hydro's embedded cost-of-service rate.

42. The 2014 PPA preserves the provision according to which FortisBC is prohibited from scheduling exports of electricity out of its service area during any hour when FortisBC is taking electricity under Rate Schedule 3808. However, due to a parallel Energy Export Agreement between BC Hydro and FortisBC, the 2014 PPA allows FortisBC to export new incremental energy using entitlement capacity attributable to FortisBC's investment in new generation at the Waneta Hydroelectric Expansion Project, while FortisBC is taking electricity under Rate Schedule 3808.[47]

D. FortisBC's Interactions with the Claimant and Celgar

1. The Celgar Pulp Mill Prior to its 2005 Acquisition by the Claimant

43. FortisBC, like its predecessor utilities, serves the Celgar pulp mill in Castlegar, British Columbia. FortisBC maintains sophisticated metering equipment at the Celgar mill, which provides hourly data concerning the pulp mill's electrical load and its amount of self-generation. Historically, Celgar has sought to meet its own load prior to selling its self-generation.

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[46] Otherwise called an "inclining block pricing structure," this new pricing structure applies to energy charges on an annual basis. The pricing structure does not apply to capacity (i.e. demand) charges. Demand is charged on the same basis as it was in the 1993 PPA.

[47] BCUC, Order G-60-14 and Decision, in the Matter of an Application by British Columbia Hydro and Power Authority for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, May 6, 2014, pp. 20-23, **R-221**.

44. Following the expansion of the Celgar pulp mill in 1993 and the construction of a new turbine, the resulting 52 MW installed capacity exceeded the mill's load. The new turbine, however, was often unreliable which meant that FortisBC had to supply Celgar with back-up power pursuant to the terms and conditions of a GSA.[48]

45. Nonetheless, there were times where excess energy was available and sold to FortisBC under the terms of a Brokerage Agreement.[49] [redacted].

46. Until March 10, 1999, when the BCUC issued Orders G-27-99 and G-28-99 confirming the terms and conditions of the opening of FortisBC's transmission system,[50] the Celgar pulp mill did not have access to FortisBC's transmission system. This opening permitted certain large customers, including Celgar, to gain access to FortisBC's transmission system.

47. Overall, prior to the Claimant's acquisition of Celgar, FortisBC served Celgar for any portion of its load that was not met by its self-generation and sometimes purchased Celgar's excess self-generated electricity (i.e., on a net-of-load basis).

48. In order to sell power on a basis other than net of load (namely, selling generation otherwise used to meet load while purchasing replacement electricity to meet this load), a self-generating pulp mill would require FortisBC to perform power accounting transaction in order to effectively deem that there has been a simultaneous buy/sell transaction. This accounting exercise is a financial arrangement and does not actually change the flow of any energy at the pulp mill. The utility replacement energy does not

[48] General Service Power Contract between WKP and Celgar, December 20, 2000, MER00280586, **R-223**.

[49] Electricity Supply Brokerage Agreement between WKP and Celgar, December 20, 2000, MER00280587- MER00280592, **R-217.**

[50] BCUC, Order G-27-99 and Decision, in the Matter of an Application by West Kootenay Power Ltd. for Approval of Access Principles, March 10, 1999, **R-219** and BCUC, Order G-28-99 and Decision, in the Matter of an Application by West Kootenay Power Ltd. for Approval of Transmission Access, March 10, 1999, **R-220.**

actually flow to the mill. As such, it constitutes a "deemed" sale that only exists on paper.

2. The Claimant's Acquisition of the Celgar Pulp Mill and its Exports of Excess Self-Generated Energy

49. The Claimant purchased the Celgar pulp mill in 2005 and was assigned the 2000 General Service Power Contract.[51]

50. However, the Claimant expressed to us that Celgar's Rate Schedule 31 ("flat-rate") service under the General Service Power Contract was too expensive.[52] In the summer of 2006, the Claimant requested that FortisBC provide it with a "time-of-use rate" under Rate Schedule 33 so that it could coordinate any power purchases with the less expensive time periods under this rate.[53]

51. As a result, FortisBC developed a new General Service Power Contract and Electricity Supply Brokerage Agreement for Celgar,[54] setting out the change from Rate Schedule 31 to Rate Schedule 33 service.[55] Contrary to what Mr. Merwin asserts in his witness statement,[56] Celgar failed to execute the 2006 General Service Power Contract and Electricity Supply Brokerage Agreement. This failure would later be the subject of regulatory proceedings before the BCUC and constitute one of the main reasons for which the BCUC cancelled Celgar's access to Rate Schedule 33 service.[57]

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[51] General Assignment Agreement between KPMG Inc., in its capacity as the receiver of all the assets and undertaking of Stone Venepal (Celgar) Pulp Inc. and 0706906 B.C. Ltd., February 14, 2005, p. A-3, MER00282123-MER00282146, and FortisBC, Consent to Assignment re: General Service Power Contract No. 275331, January 14, 2005, **C-223**.

[52] General Service Power Contract, December 20, 2000, MER00280586, s. 5, **R-223.** […]").

[53] Letter from Celgar to FortisBC, July 7, 2006, MER00103880, **R-225.**

[54] General Service Power Contract, October 1st, 2006, MER00279337 and Electricity Supply Brokerage Agreement, October 1st, 2006, at MER00279338- MER00279339, **R-226.**

[55] *Ibid.*, s. 5 […]").

[56] Witness Statement of Brian Merwin (March 28, 2014), ¶ 47.

[57] BCUC, Order G-156-10 and Decision, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, October 19, 2010, p. 67, **R-228.**

52. Upon the Claimant's purchase of Celgar, FortisBC understood that the Claimant's main preoccupation appeared to be making certain investments in the pulp mill to improve its efficiency and its pulp production. It referred to these investments as the "Blue Goose Project." FortisBC further understood, based on its conversations with the Claimant, that these investments would sufficiently improve self-generation to make the pulp mill energy self-sufficient.[58] At Celgar's request,[59] FortisBC, through PowerSense, contributed [redacted] to the Blue Goose Project's effluent cooling system,[60] which reduced Celgar's load.[61]

53. Once the mill's self-generation started to improve in 2006, the Claimant contacted FortisBC to express an interest in exporting its excess self-generation to third parties.[62] On July 11, 2006, FortisBC and Celgar concluded an agreement which allowed the excess generation (i.e. generation that was surplus to Celgar's own load) to be wheeled

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[58] See also, Zellstoff Celgar, *Celgar Latest News, 01-Jan-2010 Green Energy Project Funding*, online: http://web.archive.org/web/20101105154017/http://www.celgar.com/ which mentions how the Blue Goose Project allowed to mill to become a "net" exporter of electricity**, R-229.**

[59] Letter from Brian Merwin to FortisBC, September 12, 2006, p.2, MER00026536- MER00026537, **R-230**:

> A pulp mill's energy balance is complex, Celgar being a newer mill than most in BC already requires less outside electricity purchases than most pulp mills in BC as it was built to newer efficiency standard. We want to continue to improve our mill's efficiency to keep pace with current standards. […] Celgar if located in BC Hydro territory would easily qualify for a funding contribution. What we are planning to do is very much different than the capacity projects […] which BC Hydro had undertaken with our competitors. All of their projects included increasing the burning of biomass wood waste to increase steam production and the addition of generating turbines, where Celgar's project is purely rooted in process efficiency.

See also, Letter from Brian Merwin to FortisBC, October 7, 2006, MER00069301, **R-231** and Email from Celgar to FortisBC, *FortisBC-Celgar Term Sheet Discussions*, December 11, 2007, MER00292768-MER00292770**, R-232**: "The rules agreed with Fortis for our interim exports states that in any hour when we have an export schedule we do not have access to purchase power under our general service […] agreement."

[60] [redacted]

[61] FortisBC, Industrial Efficiency Program Evaluation, January 14, 2013, p. 27, **R-214.**

[62] Email from Celgar to FortisBC, May 3, 2006, MER00280583, **R-233**: [redacted]
Email exchange between Celgar and FortisBC, May 24-30, 2006, MER00066297-MER00066298, **R-234**; Letter from Celgar to FortisBC, July 7, 2006, MER00103881-MER00103882, **R-235**: [redacted]

across the FortisBC transmission system.[63] [redacted]

[redacted]:

[redacted]

[redacted]

54. The subsequent scheduled exports[65] all occurred on a net-of-load basis and the issue of arbitrage of existing generation was not raised during this timeframe.

3. The Claimant's Efforts to Sell Additional Self-Generated Energy

a) The Green Energy Project

55. At some point in early 2007, FortisBC became aware that Celgar was assessing the feasibility of constructing an additional condensing turbine. The addition of this turbine would mean that Celgar's self-generation would far exceed its mill load (provided the load stayed similar after the installation of the new turbine). In that context, FortisBC expected that Celgar would want to sell some of this additional excess self-generation.

56. At Celgar's request, in June 2007, FortisBC entered into a non-binding letter agreement with Celgar to discuss [redacted].[66] [redacted]

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[63] Exports Interim Agreement between Celgar and FortisBC and Umbrella Agreement for Short-Term Firm or Non-Firm Point-To-Point Transmission Service, Signed July 11, 2006, p. 2, MER00103883-MER00103888, **R-236**.

[64] *Ibid.*

[65] See e.g., Email from FortisBC to Celgar, Export Schedules, September 20, 2006, MER00017268, **R-237.**

[66] Letter Agreement between Celgar and FortisBC, June 6 2007, p. 1, MER00279331-MER00279334, **R-238**:

[redacted]

[redacted][67]

b) Celgar's "Arbitrage" Project

57. Around the same time, FortisBC was separately approached by Celgar and the City of Nelson ("Nelson"), the owner and operator of the Nelson Hydro municipal utility,[68] with requests to become full load customers so that they could sell their existing self-generation to market, instead of continuing to use it for self-supply.

58. Celgar, through the Claimant's Director of Strategic & Business Initiatives, Brian Merwin, initially raised the topic through communications with my colleague Don Debienne[69] in June of 2007.[70] [redacted]

[redacted]

[67] Letter from Celgar to FortisBC, July 4, 2007, p. 1, MER00279357-MER00279358, **R-239**: [redacted]

[68] City of Nelson, *Electrical Services*, **R-240.**

[69] Don Debienne was, until his retirement on March 1, 2011, FortisBC's Vice President, Generation.

[70] Email from Celgar to FortisBC, Re: Celgar-Fortis Potential Concept, June 15, 2007, contained in the Email exchange between Celgar and FortisBC, June 15 – September 26, 2007, MER00292771-MER00292772, **R-241.**

[71] Email from FortisBC to Celgar, Re: Celgar-Fortis Potential Concept, June 19, 2007, [redacted], contained in the Email exchange between Celgar and FortisBC, June 15 – September 26, 2007, MER00292771-MER00292772, at MER00292771, **R-241**.

[redacted]."[72] Mr. Debienne simultaneously proceeded to consult our regulatory department, including myself. [redacted][73]

59. Overall, in analysing both Celgar's and Nelson's proposals, we examined the requests from a financial perspective, and first sought to ensure that they would not harm our ratepayers. We also wanted to confirm that we could fulfil these requests within our existing tariffs. None of these considerations appeared to be problematic.

60. We then considered these requests from a larger perspective in order to decide whether we should be involved in supplying power in these circumstances. In that regard, we believed that these requests would result in a dispute with either (1) our customers (i.e., Celgar and Nelson); or (2) our supplier (i.e., BC Hydro under the 1993 PPA). My colleagues and I internally deliberated over which side of this potential dispute FortisBC should be on.

61. On the one hand, we believed that we needed to supply our customers (i.e. Celgar and Nelson) with additional power (or more precisely, to "deem" a supply of additional power)[74] absent a clear restriction preventing us from doing so. Moreover, we estimated that the additional revenue from these sales would provide a benefit to FortisBC's ratepayers in the form of a 2 to 3% rate mitigation. Simply put, FortisBC's ratepayers would obtain a portion of the beneficial margin between FortisBC's cost of acquiring additional energy, namely energy at BC Hydro's Rate Schedule 3808 rate, and the higher

[72] Email from FortisBC to Celgar, Re: Celgar-Fortis Potential Concept, June 19, 2007, [redacted], contained in the Email exchange between Celgar and FortisBC, June 15 – September 26, 2007, MER00292771-MER00292772, at MER00292771, **R-241.**

[73] Email from FortisBC to Celgar, Update, September 26, 2007, contained in the Email exchange between Celgar and FortisBC, June 15 – September 26, 2007, MER00292771-MER00292772, **R-241.**

[74] As I explained at para. 48 above, the customers' proposed arrangement would not operate a change in the flow of any energy at the customer sites or between the customers and the FortisBC system. There would be no actual increase in power deliveries to the sites. As a result, such an increase would only be apparent in new accounting/financial arrangements between FortisBC and the customers.

rate at which FortisBC would sell this energy to Celgar and Nelson. Similarly, the latter two self-generating customers would obtain a portion of the beneficial margin between the rate charged by FortisBC to supply them with energy and the price at which these customers could sell this energy to market.

62. On the other hand, we recognised that the 1993 PPA prohibited FortisBC from arbitraging BC Hydro's Rate Schedule 3808 energy and that supplying this additional energy could effectively result in arbitrage—albeit "indirect arbitrage." Moreover, we were aware that the B.C. Ministry of Energy would likely oppose these agreements from a policy perspective.

63. In this context, our assessment was that there was only a 50% chance that the BCUC would approve these GSAs deeming energy sales to Celgar and Nelson. In particular, we were concerned that the prohibition against arbitrage in the 1993 PPA, taken together with past BCUC Orders G-38-01[75] and G-113-01,[76] might lead the BCUC to reject these agreements.

64. These regulatory risks and our assessment of the likelihood of success were at all times discussed with both Celgar and Nelson.

65. We ultimately concluded, however, that we had no solid basis to allow us to refuse these customer requests and that there was no explicit restriction on supplying this energy to Celgar and Nelson. We believed that, while the text of the 1993 PPA prevented FortisBC from arbitraging BC Hydro energy by exporting it, it did not contain text preventing FortisBC from supplying this energy to third parties who would then export it out of FortisBC service territory. Nonetheless, given the regulatory risks and chances of BCUC rejection of the agreements, when negotiating with its customers, FortisBC ensured that the agreements contained language allowing us to validly back out of them should the BCUC reject them.

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[75] BCUC, Order G-38-01 in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, April 5, 2001, **R-19.**

[76] BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the Utilities Commission Act, November 1, 2001, **R-20.**

66. In this context, FortisBC and Celgar formally entered into negotiations starting in late 2007.[77] As mentioned in a December 19, 2007 email sent by Mr. Debienne, Celgar initially suggested that, due to the risks associated with BC Hydro's potential objection to the agreement and its possible rejection by the BCUC, FortisBC and Celgar might begin their arrangement with a 1 year contract "to let us try this out."[78]

67. The FortisBC-Celgar agreement took quite a bit of time to negotiate and mostly involved a large number of phone calls and some in person meetings. A few emails were exchanged as well, mostly through my colleague Mr. Debienne, regarding the financial aspects of the agreement.[79] While his involvement concentrated on the economic negotiations with Celgar, my participation mostly focused on the regulatory matters associated with the projected agreement.

68. On April 21, 2008, FortisBC and Celgar concluded a non-binding term sheet[80] that described the terms and conditions under which we would be willing to supply Celgar's full mill load so that it could sell some or all of its self-generated energy to one or more third parties. The term sheet provided that many of its terms would form the foundation of a subsequent comprehensive GSA.[81] For example, it provided that energy supplied to Celgar would be based on [redacted].[82] Finally, the term sheet also ensured that FortisBC would only supply this energy in the event that several contractual, regulatory, and economic conditions were met, including:

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[77] FortisBC also held parallel discussions with Nelson at this time.

[78] Email from FortisBC to Celgar, Revised Term Sheet, December 19, 2007, MER0004480, **R-242** and attachment titled "Term Sheet Master_December19_07.doc", MER00044802- MER00044809, **R-243.**

[79] See, for e.g., Email exchange between FortisBC and Celgar, Analysis, March 5, 2008, MER00186438-MER00186439, **R-244** and attached spreadsheet "Celgar Becoming a Full Load Customer, March 3, 3008 Analysis", MER00186540- MER00186551, **R-245.**

[80] Term Sheet, "Partitioning of Celgar's Existing Turbo Generator From Current Celgar Mill Load, Fully Supplying Mill Load From FortisBC And Facilitating The Sale By Celgar Of Its Entire Self-Generated Energy Output to Third Party Buyer Indicative Term Sheet, dated April 21, 2008, MER00042320-MER00042326, **R-246.**

[81] *Ibid.*, s. 8.1**.**

[82] *Ibid.*, s. 1.4**.**

[redacted]

69. In the course of our negotiations, Celgar mentioned that it might try to sell some of its existing and future self-generation to "green power markets" outside of B.C. However, we were not aware of Celgar negotiating either the transmission agreements or the energy sales contracts necessary to do so. We were, however, aware that Celgar intended to enter into BC Hydro's Bio Energy Call for Power Phase 1.

70. As our negotiations with Celgar and Nelson progressed, we decided to contact BCUC staff in June 2008 to brief them on the agreements and explain that the parties would continue to operate within our existing approved tariffs.

71. Our agreement with Nelson was the first to be concluded. As such, we filed with it the BCUC on June 24, 2008.[83]

72. At the time, because our agreement with Nelson involved such a small amount of energy, we did not, despite the regulatory risks outlined above, anticipate that it would draw much attention from BC Hydro or other third parties, such as the Ministry of

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

Energy. In other words, we thought that the Nelson agreement might be immaterial to BC Hydro.

73. On August 21, 2008, FortisBC and Celgar concluded a supply agreement to serve Celgar as a full load customer.[84] The "Power Supply Agreement" also served as the new GSA between the parties, thus replacing the executed 2000 General Service Power Contract and the 2006 General Service Power Contract, which Celgar had yet to sign.[85] Again, given the regulatory risks, the Power Supply Agreement reiterated that FortisBC would only supply this energy, and Celgar would only purchase it, subject to the satisfaction of each of the following conditions:

[redacted]

[redacted];

[redacted].

74. FortisBC filed the Power Supply Agreement with the BCUC on August 26, 2008. However, we subsequently withdrew it after BC Hydro, upon reviewing the Nelson Agreement, brought an Application requesting that the BCUC amend the terms of the 1993 PPA to prohibit FortisBC from purchasing increased electricity under the 1993 PPA

[84] FortisBC-Celgar Power Supply Agreement, August 21, 2008, MER00279313-MER00279327, **R-248.**

[85] Email exchange between FortisBC and Celgar attached to the original copy of the FortisBC-Celgar Power Supply Agreement, dated August 21, 2008, Re: Contract Execution, August 20, 2008, MER00279328-MER00279329, **R-249.**

[86] FortisBC-Celgar Power Supply Agreement, August 21, 2008, MER00279313-MER00279327, s. 15.1, **R-248.**

for the purpose of supporting arbitrage transactions by its self-generating customers.[87] Celgar consented to the withdrawal of the filing of the Power Supply Agreement as this would ensure that it would receive standing as an intervener in the BC Hydro-initiated proceeding concerning the potential arbitraging of Rate Schedule 3808 energy.

75. FortisBC did not consult with BC Hydro prior to negotiating the Celgar and Nelson agreements. These agreements received BC Hydro's full attention as soon as they were filed with the BCUC.

4. The Claimant's Participation in BC Hydro's Application Resulting in BCUC Order G-48-09

76. As mentioned above, on September 16, 2008, BC Hydro filed an application pursuant to subsections 58(1) and 58(2) of the *UCA* to request an amendment to section 2.1 of the 1993 PPA to prohibit FortisBC from using the Rate Schedule 3808 energy it was purchasing under the 1993 PPA, "for the purpose of supporting the export activities of FortisBC's customers."[88] On October 2, 2008, the BCUC established a regulatory timetable for a written public hearing process for the review of the application.[89]

77. BC Hydro argued in its application that section 2.1 of the 1993 PPA should be clarified to prohibit FortisBC from purchasing BC Hydro's Rate Schedule 3808 energy for the purpose of facilitating exports by its self-generating customers. It believed that FortisBC should not be permitted to do indirectly what it was prohibited from doing directly, namely exporting and arbitraging PPA energy. However, BC Hydro did not request any changes to FortisBC's agreements with its customers and limited the application solely to the issue of whether FortisBC should be permitted to increase its take of Rate Schedule 3808 energy "to support the market sales [of its] self-generating

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[87] BC Hydro, Letter Filing Further Comments in the Matter of a Filing by FortisBC of an Umbrella Agreement for Short Term Firm or Non-Firm Point-to-Point Transmission Service (Umbrella Agreement) and a Power Coordination Agreement (PCA), and Applying for an Amendment to the Rate Schedule 3808 Power Purchase Agreement, September 16, 2008, **R-250.**

[88] *Ibid*., p. 4.

[89] BCUC, Order G-148-08, in the Matter of an Application by British Columbia Hydro and Power Authority to Amend Section 2.1 of Rate Schedule 3808 ("RS 3808") Power Purchase Agreement, October 2, 2008, **R-251.**

customers."[90] In other words, BC Hydro argued that because the 1993 PPA directly prohibited FortisBC from arbitraging between the embedded-cost Rate Schedule 3808 price and market prices, it should also prohibit FortisBC from selling Rate Schedule 3808 energy to customers engaged in arbitrage. BC Hydro also argued that allowing FortisBC to facilitate these transactions would have detrimental impacts on its ratepayers:

> If BC Hydro is required to provide incremental energy to FortisBC at embedded cost rates for the purpose of supporting the export activities of FortisBC's customers, BC Hydro and its ratepayers will incur a loss. Provision of the incremental energy would require BC Hydro to either:
>
> - purchase the energy from the market at a price that is almost certainly greater than the sale price to FortisBC (currently 2.952 cents/kWh), or
>
> - use its own generation and lose the opportunity to sell that energy in the market or store it for later use.
>
> Either way, BC Hydro and its ratepayers will suffer a loss. The supply of energy by BC Hydro for exports by FortisBC customers means that BC Hydro incurs an opportunity cost, as it must replace the energy that would otherwise by [*sic*] available to be used for the benefit of its own ratepayers. BC Hydro optimizes market purchases and the heritage resources, including storage, for the benefit of its ratepayers and not to support the energy price arbitrage activities of market participants.[91]

78. Moreover, BC Hydro also argued that this could represent the "thin end of the wedge"[92] and set a precedent which would permit self-generators in BC Hydro's service area to arbitrage embedded-cost energy.[93]

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[90] BCUC, Order G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, May 6, 2009, p. 27, **R-32**; BC Hydro, Letter Filing Further Comments in the Matter of a Filing by FortisBC of an Umbrella Agreement for Short Term Firm or Non-Firm Point-to-Point Transmission Service (Umbrella Agreement) and a Power Coordination Agreement (PCA), and Applying for an Amendment to the Rate Schedule 3808 Power Purchase Agreement, September 16, 2008, p. 5, **R-250.**

[91] BC Hydro, Letter Filing Further Comments in the Matter of a Filing by FortisBC of an Umbrella Agreement for Short Term Firm or Non-Firm Point-to-Point Transmission Service (Umbrella Agreement) and a Power Coordination Agreement (PCA), and Applying for an Amendment to the Rate Schedule 3808 Power Purchase Agreement, September 16, 2008, p. 4, **R-250.**

[92] Email from FortisBC to Celgar, Re: Letter to the BCUC, July 10, 2008, MER00292757- MER00292758, **R-274**.

[93] BCUC, Order G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, May 6, 2009, p. 2, **R-32.**

79. In these proceedings, we stated that we would be unable to determine whether, or to what extent, the energy deemed to be supplied to Celgar and Nelson would contain Rate Schedule 3808 energy, while they were deemed to export their existing self-generation. As such, we recognized that these transactions may result in the arbitrage by FortisBC customers of a portion of Rate Schedule 3808 energy, and, specifically, that increasing our purchases under the 1993 PPA may be necessary to replace the energy sold by our self-generating customers.[94]

80. However, we submitted that the Celgar and Nelson agreements would provide a benefit to FortisBC ratepayers,[95] while having almost no impact on BC Hydro ratepayers:

> BC Hydro has great flexibility in the timing of acquiring any replacement energy due to the fact that replacement capacity is not required. FortisBC expects that this flexibility will allow BC Hydro to largely, if not completely, mitigate any energy price risk.[96]

81. Moreover, we argued that supplying us with Rate Schedule 3808 energy was an obligation BC Hydro voluntarily consented to in concluding the 1993 PPA;[97] and that BC Hydro should, as it would do regarding any customer's load increase, recover the costs of supplying FortisBC with added energy through customer rate increases.[98]

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[94] See e.g., FortisBC, Responses to BCUC Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, pp. 4, 11, **R-252**; and FortisBC, Letter to the BCUC responding to BCUC Information Requests dated July 18, 2008 re Filing by FortisBC of Short-Term Firm or Short Term Non-Firm Service and the Power Coordination Agreement with the City of Nelson, August 14, 2008, p. 2, **R-254**.

[95] FortisBC, Letter to the BCUC responding to BCUC Information Requests dated July 18, 2008 re Filing by FortisBC of Short-Term Firm or Short Term Non-Firm Service and the Power Coordination Agreement with the City of Nelson, August 14, 2008, p. 4, **R-254**; FortisBC, Responses to BC Hydro Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 8, **R-253.**

[96] FortisBC, Responses to BCUC Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 5, **R-252.**

[97] *Ibid.*, p. 6. See also, FortisBC, Letter to the BCUC responding to BCUC Information Requests dated July 18, 2008 re Filing by FortisBC of Short-Term Firm or Short Term Non-Firm Service and the Power Coordination Agreement with the City of Nelson, August 14, 2008, p. 3, **R-254.**

[98] FortisBC, Responses to BC Hydro Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 6, **R-253.**: "Instead, FortisBC assumes BC Hydro pools those costs, as it does for all its other customers with increasing load consumption, and recovers those costs through general rate increases."

Finally, we argued that the language of the 1993 PPA prohibiting exports by FortisBC did not address the agreements we were currently contemplating with our customers.[99]

82. BC Hydro responded to these arguments by filing evidence that suggested that these agreements could harm its ratepayers by increasing BC Hydro's costs by approximately $16.7 million per year.[100] Ultimately, regarding said harm to BC Hydro's ratepayers, we stated that:

> despite the fact that BC Hydro will have a large amount of flexibility in the timing of the transactions to replace any incremental energy, it is possible that more than $45/MWh will be paid. If BC Hydro must pay more than $45/MWh [to provide FortisBC with the increased embedded-cost energy it seeks to meet the requests of its customers], then FortisBC assumes there would be a risk of the increased costs flowing through to the BC Hydro ratepayer.[101]

83. On May 6, 2009, the BCUC issued its decision on BC Hydro's application in BCUC Order G-48-09. As a starting point for its analysis, the BCUC reviewed the existing prohibition found in section 2.1 of the 1993 PPA.[102] It also considered its previous regulatory decisions[103] in BCUC Order G-38-01,[104] G-17-02[105] and G-113-01.[106]

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[99] FortisBC, Responses to BCUC Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 12, **R252**: "Nelson's export of its self generated electricity does not equate to FortisBC exporting."

[100] BC Hydro, Final Argument, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, January 16, 2009, p. 19, paras. 50-51, **R-255**; and BC Hydro, Letter Filing Further Comments in the Matter of a Filing by FortisBC of an Umbrella Agreement for Short Term Firm or Non-Firm Point-to-Point Transmission Service (Umbrella Agreement) and a Power Coordination Agreement (PCA), and Applying for an Amendment to the Rate Schedule 3808 Power Purchase Agreement, September 16, 2008, p. 4, **R-250.**

[101] FortisBC, Responses to BCUC Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 5, **R-252.**

[102] BCUC, Order G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, May 6, 2009, pp. 2-3, **R-32.**

[103] *Ibid*., pp. 12-16.

[104] BCUC, Order G-38-01 in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, April 5, 2001, **R-19.**

[105] BCUC, Order G-17-02 in the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability, March 14, 2002, **R-256.**

[106] BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the Utilities Commission Act, November 1, 2001, **R-20**.

These were the regulatory decisions that, in our discussions with Celgar and Nelson, we had previously explained were potentially problematic for the agreements we intended to conclude. The BCUC also observed that this application could be viewed as having precedential value for self-generation in British Columbia.[107] Finally, the BCUC noted that BC Hydro had raised a "short-term" issue as BC Hydro and FortisBC were in the process of negotiating a new power purchase agreement to replace the 1993 PPA which would expire on September 13, 2013.[108]

84. The BCUC recognized that in 1993, when the initial agreement was negotiated, the parties could not have foreseen that anyone other than FortisBC could simultaneously purchase Rate Schedule 3808 power while selling electricity to market.[109] Notably, "open access" to transmission facilities by customers was only made possible years later.[110] It was further acknowledged that, whether simultaneous sales were operated by FortisBC customers with generating facilities or by the generating utility itself, BC Hydro would incur the same costs in acquiring the resources necessary to provide the incremental electricity at the fixed low Rate Schedule 3808 rate.[111] These costs would in turn flow through BC Hydro's customers in the form of rate increases.[112]

85. The BCUC ultimately concluded that permitting FortisBC to facilitate arbitrage of PPA power by its customers (i.e., Celgar and Nelson) would be "unjust and unreasonable" and contrary to the "public interest."[113] In doing so, it indicated that

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[107] BCUC, Order G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, May 6, 2009, p. 8, **R-32.**

[108] *Ibid*., p. 10.

[109] *Ibid*., p. 20.

[110] *Ibid*., p. 20.

[111] *Ibid*., pp. 23-34, 27.

[112] FortisBC, Responses to BCUC Information Request No. 3, in the in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, December 31, 2008, p. 5, **R-253.**

[113] BCUC, Order G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, May 6, 2009, p. 22, **R-32.**

BCUC staff estimated harm to BC Hydro ratepayers of approximately $12.3 million per annum.[114]

86. Moreover, the BCUC explained that FortisBC's self-generators were nevertheless able to export excess electricity, i.e. energy that is not needed by the self-generator's load at any given moment, while FortisBC was accessing power from BC Hydro under Rate Schedule 3808.[115] The BCUC then found that:

> The Commission Panel believes that in any short-term resolution of the policy issue addressed in the proceeding, there must be some definition for each self-generator of the historical baseline load served, or in the alternative, some means of monitoring, on a dynamic basis, excess self-generation net-of-load.[116]

87. The BCUC decision reflects that the BCUC viewed the excess or "net-of-load" sales by a self-generator as an alternative to entering into an agreement with its utility enabling it to sell self-generation in accordance with a defined historical baseline load (e.g., a "GBL"). With respect to Celgar and Nelson, the BCUC specified that it had "insufficient evidence" available to it on which to make such a baseline determination.[117] Finally, the BCUC indicated that the treatment of new or incremental generation capacity must be determined on a "case-by-case basis."[118]

88. By Order G-48-09, the BCUC thus allowed BC Hydro's amendment to section 2.1 of the 1993 PPA, agreeing with BC Hydro that "the new use of PPA power by FortisBC renders the current PPA, and specifically section 2.1 of it, unjust [and] unreasonable because it allows certain [Fortis BC] customers to unfairly profit from embedded cost utility service to the detriment of all other customers."[119] This, in our view, effectively meant that FortisBC was restricted from purchasing Rate Schedule 3808

[114] *Ibid*., p. 27. The BCUC concluded that the principles of BCUC Order G-38-01 should apply in these circumstances to protect BC Hydro's ratepayers from harm.

[115] *Ibid*., pp. 28-29. The BCUC also used the expression "net-of-load on a dynamic basis (i.e., an hourly basis)" to describe this reality.

[116] *Ibid*., p. 29 (emphasis added).

[117] *Ibid*., p. 30.

[118] *Ibid*., p. 30.

[119] *Ibid*., p. 23.

power when customers it supplied with PPA power were simultaneously selling their existing self-generation.

89. FortisBC withdrew from the Celgar and Nelson agreements following this decision.

90. From this point forward, Celgar has been contesting the principles contained in BCUC Order G-48-09; mainly by opposing FortisBC's positions in nearly every major regulatory application we file with the BCUC, some of which I discuss in greater detail in the following section of this statement.

E. BCUC Regulatory Proceedings

1. Proceedings Involving Tolko Industries Ltd. (Kelowna) and its City of Kelowna Municipal Utility

a) BCUC Order G-113-01

91. Located in Kelowna, B.C., Tolko Industries Ltd. ("Tolko"), is a sawmill with self-generation capacity. It was formerly named Riverside Forest Products. Until 2013, Tolko was served by the City of Kelowna's municipal utility, who was in turn a FortisBC customer.

92. In 1998-1999, Tolko's predecessor entered into discussions with the City of Kelowna and WKP (FortisBC's predecessor), regarding Tolko's plans to increase its mill's generation capacity above its historical capacity of about 2 MW in order to export all electric energy generation above 2 MW through agreements with energy marketers or external buyers.[120] Tolko subsequently (i) added a second turbine generator to its mill, thus increasing its generation capacity,[121] (ii) entered into a Letter Agreement with the

[120] BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the Utilities Commission Act, November 1, 2001, p. 1, **R-20.** BCUC, Order G-198-11 and Decision, in the Matter of An Application by Tolko Industries Ltd. – Kelowna Decision for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01, December 2, 2011, p. 2, **R-257.**

[121] BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the Utilities Commission Act, November 1, 2001, p. 1, **R-258.**

City of Kelowna for the sale of incremental power,[122] and (iii) applied to the BCUC for exemptions from certain provisions of the *UCA* in respect of the production, purchase and sale of this incremental self-generation (which had not historically been dedicated to serving its load).[123]

93. In the ensuing regulatory proceeding culminating in Order G-113-01, the BCUC found that:

> the exclusion of the first 2 MW of generation each hour from the definition of Incremental Power and the relatively constant production level associated with the generators will protect WKP and its customers from arbitrage with respect to the initial 2 MW or other impacts. The Commission is satisfied that an Order exempting Riverside from certain sections of the Act subject to certain conditions properly conserves the public convenience and interest.[124]

94. As a result, Tolko, whose load was higher than 2 MW, was able to enter into export agreements for any generation above this 2 MW baseline. Proceeding with exports would in turn entail using an accounting arrangement with its utility to "deem" the sales.

b) BCUC Order G-198-11

95. In the years following BCUC Order G-113-01, Tolko ultimately chose to use its incremental generation above the 2 MW baseline for self-supply. It thus never committed it to marketers or external buyers for export. Instead of pursuing this option and operating an accounting mechanism with its utility "deeming" below-load incremental sales, Tolko only effected "actual" sales of excess (i.e.. above-load) electricity.

96. In early 2011, Tolko approached us with a plan to sell its incremental self-generation.[125] In light of the BCUC's findings in Order G-48-09, we refused to enter into an agreement enabling Tolko's exports of self-generation above 2 MW but below Tolko's

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[122] BCUC, Order G-198-11 and Decision, in the Matter of An Application by Tolko Industries Ltd. – Kelowna Decision for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01, December 2, 2011, p. 1, **R-257.**

[123] BCUC, Order G-113-01, in the Matter of an Application by Riverside Forest Products Limited for an Exemption from Certain Provisions of the Utilities Commission Act, November 1, 2001, p. 1, **R-20.**

[124] *Ibid.*, pp. 1-2 (emphasis added).

[125] It was our understanding that, at the time, Tolko had also been involved in sales discussions with BC Hydro.

load, without prior regulatory approval. Accordingly, we requested that Tolko seek reaffirmation of BCUC Order G-113-01.

97. On March 2, 2011, Tolko brought an application requesting that the BCUC reaffirm its ability to sell incremental energy above the 2 MW baseline.[126] First, Tolko argued that it received service from the City of Kelowna and that this utility was not a party to the FortisBC-BC Hydro 1993 PPA. As such, Tolko's utility was not bound by the export limitations found in section 2.1 of the 1993 PPA, as amended by BCUC Order G-48-09. Second, none of the interveners (including BC Hydro, FortisBC and Celgar) claimed that sales above this baseline would harm ratepayers or opposed Tolko's application for the reaffirmation of its 2 MW baseline.[127]

98. On the basis of these two points, the BCUC reaffirmed Tolko's GBL in Order G-198-11. Despite this Order, Tolko ultimately did not enter into any agreement providing for the (deemed) sale of its incremental generation.

c) BCUC Order G-191-13

99. At approximately the same time, FortisBC became interested in purchasing the City of Kelowna's municipal utility assets. On November 13, 2012, FortisBC applied to the BCUC for approval of this proposed purchase.[128] On December 17, 2012, Celgar seized this proceeding to advance its positions regarding BCUC Order G-48-09, both on

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[126] Tolko, Application for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in Each Hour Per Order G-113-01 (December 1, 2011), March 2, 2011, pp. 1-2, **R-258**:

> Tolko is currently engaged in discussions to sell power in excess of the first 2MW at Kelowna with multiple parties. Some of these parties have expressed concern about such a transaction in light of BCUC order G-48-09 and the resulting changes to section 2.1 of the RS#3808 PPA between BC Hydro and FortisBC. […] Tolko is requesting that Commission reaffirm its ability to sell power generation in excess of the first 2 MW of generation in each hour as outlined in G-113-01.

[127] BCUC, Order G-198-11 and Decision, in the Matter of An Application by Tolko Industries Ltd. – Kelowna Decision for Reaffirmation of its Ability to Sell Power Generation in Excess of the First 2 MW of Generation in each hour as per Order G-113-01, December 2, 2001, p. 2, **R-257**: "no Intervener opposed the historical GBL of 2 MW."

[128] Pursuant to ss. 45 and 46 of the *UCA*, FortisBC applied for a Certificate of Public Convenience and Necessity for the extension to its distribution system that would result from the purchase of the City of Kelowna's distribution system.

its own behalf and through its role as leader of the (now five member) "Industrial Customers Group" ("ICG"):[129]

> Celgar seeks intervener status in this proceeding to ensure that issues related to 3808 purchases by FortisBC from BC Hydro are fully considered. Celgar will also participate in this proceeding as a member of the ICG to address rate related issues.[130]

100. Celgar noted that if the transaction was approved by the BCUC, Tolko would become a direct customer of FortisBC rather than a customer of the City of Kelowna. Celgar also sought to include issues related to the potential terms of FortisBC's future service agreement, including rates, baselines, terms of service, etc., with Tolko within the scope of the proceeding.[131]

101. The BCUC, observing that this issue would only arise if the transaction proceeded, indicated that it would address it, if applicable, in a second phase. It ultimately restricted the (otherwise far-reaching) second phase to what it determined to be Celgar's main claim, namely discrimination concerning the amount of power that a self-generator can sell while purchasing energy from FortisBC.[132]

102. As a result of its decision to approve our purchase plan, the BCUC subsequently initiated this second phase.[133] The BCUC characterized the issue as: "whether the GBL which was given to Tolko by the Commission when Tolko was a customer of the City of

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[129] ICG's current members are Celgar, Atco Wood Products Ltd., International Forest Products Limited, Kalesnikoff Lumber Co. Ltd., and Porcupine Wood Products.

[130] Celgar, Letter to the BCUC Requesting Intervener Status in the Matter of an Application by FortisBC for a Certificate of Public Convenience and Necessity (CPCN) for the Purchase of the Utility Assets of the City of Kelowna, December 7, 2012, **R-259.**

[131] BCUC Order C-4-13, FortisBC Inc. Application for a Certificate of Public Convenience and Necessity for the Purchase of Utility Assets of the City of Kelowna (March 26, 2013), pp. 18-19, **R-260.**

[132] BCUC, Order G-191-13 and Decision, in the Matter of an Application by FortisBC for a Certificate of Public Convenience and Necessity for the Purchase of the Utility Assets of the City of Kelowna - Phase 2, November 22, 2013, p. 15, **R-261.**

[133] *Ibid.*, p. 3.

Kelowna places it on a different footing than Celgar, now that both self-generators are customers of FortisBC."[134] It determined that:

> Given the Panel's conclusion that the ability to sell self-generation on a 'net of load' basis is not equivalent to the ability to sell self-generation pursuant to a GBL which is less than load, from the perspective of the customer, the Panel finds that once Celgar and Tolko became customers of the same utility, they were, as two self-generating customers, under substantially similar circumstances and conditions. The Panel further finds that FortisBC offering service on different bases to these two customers will constitute a situation of "undue discrimination, preference, prejudice or disadvantage" in respect of this service, within the meaning of section 59(4)(b) of the Act.[135]

103. The BCUC thus revoked Tolko's 2 MW GBL, but noted that this revocation was without prejudice to the ability of FortisBC to manage its load and to negotiate agreements which result in similar treatment of all its self-generating customers, whether such treatment is by way of GBLs or any other means to prevent arbitrage in fact.[136]

104. The BCUC further expressed its expectation that FortisBC would try to negotiate and implement longer term agreements with its self-generating customers that balance the interests of FortisBC and its customers.[137]

2. Proceedings Pertaining to FortisBC's Rate Design and Rates for Self-Generating Customers

a) BCUC Order G-156-10

105. On October 30, 2009, a few months after the BCUC issued its G-48-09 Order amending the 1993 PPA, FortisBC filed its 2009 Rate Design and Cost of Service Analysis ("COSA") application with the BCUC, pursuant to sections 58 and 61 of the *UCA*. As explained by the BCUC, such applications enable the setting of just and reasonable rates for each different class of customers:

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[134] *Ibid*., p. 15.

[135] *Ibid*., p. 21.

[136] *Ibid*., p. 22.

[137] *Ibid*., p. 22.

> [t]he cornerstone of fair rate setting is the comparison of revenues collected from each class of customer with the cost of providing service to them. The COSA is a means of equitably allocating the revenue requirement of the utility to the various customer classes and takes account of cost-causal factors of specific customer classes. The revenue-to-cost (R/C) ratio becomes an important measure used to assess the fairness of rates established for each customer class.[138]

106. In turn, these ratios allow utilities to assess whether certain customer classes are subsidizing others, or are being subsidized, which would be the case if, for example, the amount of revenue collected from a customer class is wholly insufficient to recover the costs of serving that class.[139] The very nature of these proceedings and their possible consequence on rates means that all customers, including Celgar, have an interest in participating.

107. However, Celgar used FortisBC's rate design proceeding to pursue its demand for the BCUC "to establish a GBL in order that it may sell self-generated power that exceeds such baseline, while purchasing energy from FortisBC."[140] At the time, Celgar was confronted with the fact that its revenue-to-cost ratio was 23.5%, meaning that FortisBC was collecting only a quarter of what it expended to serve Celgar, and that the latter was therefore being extensively subsidized by other classes of customers.[141]

108. Celgar thus took the position that the BCUC should reconsider its decision in BCUC Order G-48-09 regarding the protection against arbitrage offered by the 1993 PPA, and determine a "FortisBC-Celgar GBL" as it could impact Celgar's revenue-to-cost ratio. In doing so, it made several claims:

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[138] BCUC, Order G-156-10 and Decision in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, October 19, 2010, p. 1, **R-228** (emphasis added).

[139] *Ibid.*, pp. 12, 17.

[140] BCUC, Order G-35-10 and Decision in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, March 3, 2010, p. 1, **R-262**.

[141] *Ibid.*, p. 1.

- Celgar initially claimed that it was entitled to a GBL of "1.5 MW based on the average annual output of the mill's original generator, installed in 1961 and decommissioned in 1993, between the years 1991-1992."[142]

- As noted by the BCUC, this position shifted later in the proceeding when Celgar argued that it was actually entitled to a GBL of 0 MW.[143]

- Celgar also alleged that "only it, and not the Commission, can relieve FortisBC of the obligation to serve and that the establishment of a FortisBC GBL by Celgar determines that portion of its load that FortisBC is not obligated to serve."[144]

109. Doing so, according to Celgar, would improve Celgar's revenue-to-cost ratio by increasing FortisBC's revenues stemming from Celgar's "deemed" purchases of FortisBC's energy. However, as observed by the BCUC, Celgar was essentially requesting us to do exactly what the BCUC had found to be impermissible under the amended 1993 PPA, namely to increase our purchases of BC Hydro's embedded cost energy for the purpose of facilitating arbitrage by our self-generating customers:

> The Commission Panel is of the view that the Commission's determination at page 31 of Order G-48-09 is clear, and sets out to prevent exactly what Celgar is proposing to do.
>
> It is clear […] that the effect of Celgar's proposal that it be allowed to purchase the full mill load at embedded rates from FortisBC will require FortisBC to purchase an additional $8.9 million from BC Hydro under RS 3808 at embedded (heritage) rates. While FortisBC might be indifferent financially to this proposal, it is clear that BC Hydro and its ratepayers would not be indifferent as it would oblige BC Hydro to pay incremental prices for the power or lose export opportunities. The Commission Panel considers that this would not be in the public interest.[145]

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[142] BCUC, Order G-156-10 and Decision in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, October 19, 2010, p. 104, **R-228**.

[143] *Ibid.*, p. 104.

[144] *Ibid.*, p. 94.

[145] *Ibid.*, pp. 102-103.

110. The BCUC also considered Celgar's argument that FortisBC had an obligation to serve its full load without regard to other considerations such as the effect on other customers. The BCUC rejected this contention, stating that there is no "unconditional obligation on a utility to provide service to all persons at embedded costs."[146]

111. The BCUC declined to set a GBL between Celgar and FortisBC, emphasising instead that "[t]he parties are at liberty to establish their own GBL and, should they desire, incorporate it into a general service agreement and submit it to the Commission for approval."[147] In light of the export restrictions in the 1993 PPA as amended by G-48-09, the BCUC further suggested that it would consider approval of an agreement to serve a portion of Celgar's load if FortisBC could source some or all of the electricity to serve Celgar from resources other BC Hydro's Rate Schedule 3808 energy.[148]

112. Finally, as part of its review of FortisBC's rate design and cost-of-service data, the BCUC directed that Celgar be moved back to Rate Schedule 31's flat rate from Rate Schedule 33's time-of-use rate.[149] First, the BCUC took note of the fact that, despite Rate Schedule 33 requiring a written agreement between customer and utility, Celgar had never executed the 2006 GSA it had negotiated with FortisBC while being transferred to Rate Schedule 33.[150] Second, it noted that Celgar did not meet the requirement of the time-of-use rate, which "was intended to prevent under-recovery of costs [and called for] a revenue to cost ratio within the range of reasonableness."[151]

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[146] *Ibid*., p. 113 (emphasis in original)

[147] *Ibid*., p. 115.

[148] *Ibid*, p. 115.

[149] *Ibid*, p. 67: "The Commission Panel finds that under the current circumstances Celgar is ineligible to take service under RS 33 and directs FortisBC to provide Celgar service under RS 31 effective January 2, 2011."

[150] *Ibid*., p. 16.

[151] *Ibid*., p. 15-16. In that regard, the BCUC remarked that "Counsel for Celgar describe[d] his client's load factor as 'terrible'."

b) BCUC Order G-3-11

113. On December 3, 2010, Celgar applied for a reconsideration of BCUC Order G-156-10.[152] This request for reconsideration was denied by BCUC Order G-3-11 in early 2011.[153] In denying the request, the BCUC explained that:

> The Commission Panel at a number of places in the decision left the door open to FortisBC and to Celgar to negotiate a new service agreement. At p. 115 it stated:
>
> > "The parties are at liberty to establish their own GBL and, should they desire, to incorporate it into a general service agreement and submit it to the Commission for approval. […]
> >
> > Should FortisBC propose to provide Celgar with some or all of the mill load from non-RS 3808 sources, the parties remain at liberty to negotiate terms and conditions and submit them to the Commission for approval."
>
> The reason why the Commission Panel took the approach of inviting FortisBC to negotiate with Celgar and bring an agreement to the Commission for approval was to encourage FortisBC to address the issue and to involve its other customers in a regulatory process.[154]

114. The BCUC thus reiterated its invitation for Celgar to negotiate with us an agreement which the BCUC could then review under the *UCA* and its general regulatory principles. The reasons for our inability to reach such an arrangement on reasonable terms with Celgar are discussed in Section F below.

c) BCUC Order G-188-11

115. Less than two months after the BCUC invited Celgar and FortisBC to engage in negotiations, Celgar brought a complaint before the BCUC alleging FortisBC's failure to

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[152] BCUC, Order G-3-11, in the Matter of an Application by Zellstoff Celgar Limited Partnership for Reconsideration of Commission Order G-156-10 and the Reasons for Decision regarding the FortisBC Inc. 2009 Rate Design and Cost of Service and Analysis Application, January 12, 2011, p. 1, **R-263**.

[153] *Ibid*., p. 2.

[154] *Ibid*., p. 10.

agree on a GSA.[155] Specifically, Celgar submitted "that without a GSA in place (as suggested by the Commission Panel in Order G-156-10 and Order G-3-11) addressing the issues raised by Celgar, the service to be provided by FortisBC to Celgar […] is unreasonable, inadequate and unreasonably discriminatory."[156]

116. Celgar essentially used this March 25, 2011 complaint, brought pursuant to section 25 of the *UCA*,[157] to reintroduce matters previously considered by the BCUC, namely: (1) BCUC Order G-156-10 that shifted Celgar from Rate Schedule 33 (*i.e.*, FortisBC's time-of-use rate) to Rate Schedule 31 (i.e., FortisBC's flat rate for industrial customers);[158] (2) BCUC Order G-48-09 and Celgar's request for a GBL;[159] and (3) whether FortisBC had an obligation to serve Celgar with FortisBC's own embedded cost energy (*i.e.*, excluding BC Hydro's Rate Schedule 3808 energy) and whether doing so could cause harm to FortisBC ratepayers.[160]

117. The BCUC generally rejected Celgar's complaint concerning its decision to assign it to Rate Schedule 31.[161] However, the BCUC recognised that FortisBC and Celgar were in the midst of negotiating a GSA, which could result in a different rate for Celgar. The BCUC therefore directed that FortisBC:

> bill Celgar in accordance with RS 31 on an interim and refundable basis beginning March 31, 2011, the date when the Complaint was filed, and ending when the Commission approves the new rate for Celgar that excludes

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[155] Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, p. 1, **R-264**.

[156] *Ibid.*, p. 21.

[157] BCUC, Order G-188-11 and Decision, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, November 14, 2011, p 1, **R-275**

[158] *Ibid.*, p. 1.

[159] *Ibid.*, p. 1.

[160] *Ibid.*, p. 1.

[161] *Ibid.*, pp. 11, 18 ("In view of the foregoing, the Commission Panel determines that there is no pre-existing agreement in effect which modifies the billings to Celgar under RS 31 after January 2, 2011"), 14 ("Accordingly, the Commission Panel determines RS31 is valid for Celgar, even in the absence of a signed, written agreement between Celgar and FortisBC"), and 18 ("The Commission Panel therefore determines that FortisBC's invoicing of Celgar for services delivered since January 2, 2011 is appropriate.").

> PPA Power from its resource stack, and/or an Agreement forwarded by the parties. Any differences between the interim rate and that ultimately approved by the Commission are subject to refund/recovery, with interest at the average prime rate of FortisBC's principal bank for its most recent year.[162]

118. In this respect, I note that Mr. Merwin fails to mention the refundable nature of our billing under Rate Schedule 31 when he discusses this "'interim rate', subject to adjustment" in his witness statement.[163]

119. Regarding its desire for a "FortisBC GBL," Celgar reiterated its demand that the BCUC impose a GBL of 1.5 MW.[164] Its application also put forth new GBLs of 15.4 MW and 11.6 MW.[165] In assessing these requests, the BCUC explained that a GBL is not a necessary component of a GSA and reaffirmed its determination that "the issue of whether to incorporate such a GBL into a GSA [is] up to the parties."[166]

120. As a result, the BCUC came to the following conclusion:

> the Commission denies Celgar's Complaint and does not establish a GSA and accompanying brokerage agreement between Celgar and FortisBC. […] The Commission Panel finds that the FortisBC service to Celgar has not been "unreasonable, unsafe, inadequate, or unreasonably discriminatory", nor is RS 31 as it applies to Celgar "unjust, unreasonable, insufficient, unduly discriminatory or in contravention of [the] Act, in regulations or any other law."[167]

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[162] *Ibid*., p. 18 (emphasis added).

[163] Witness Statement of Brian Merwin (March 28, 2014), para. 133.

[164] BCUC, Order G-188-11 and Decision, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, November 14, 2011, p 4, **R-275**: "a generation baseline (a "GBL") of 1.5 MW or such other level as may be established in accordance with applicable regulatory parameters delineating self-supply obligations […]."

[165] Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, p. 3, **R-264**.

[166] BCUC, Order G-188-11 and Decision, Zellstoff Celgar Limited Partnership Complaint Regarding the Failure of FortisBC Inc. and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, November 14, 2011, p 28, **R-275**.

[167] *Ibid*., p. 51 (emphasis added).

121. Despite this conclusion, the BCUC explored the further issues raised by Celgar concerning G-48-09. In that regard, it took note of the amended restriction on FortisBC's access to BC Hydro power under the 1993 PPA. However, the BCUC also suggested that this restriction did "not preclude FortisBC from establishing its own principles regarding the supply of non-BC Hydro PPA Power in its resource stack when establishing GBLs with its customers."[168]

122. As we had explained during these proceedings, we were "not averse to a GBL per se, [as long as the] application of the GBL concept does not jeopardize the interests of other FortisBC customers."[169] The BCUC agreed with our position on this point and rejected Celgar's claim that other ratepayers would not be harmed by Celgar increasing its purchases of FortisBC's energy:

> the Commission Panel agrees with FortisBC that the establishment of a GBL should not shift the market risk of sourcing power from alternative sources from a self-generator to the other customers of a utility.[170]

123. In light of these findings, the BCUC explored the prospect of us devising ways (i) to separate BC Hydro power from our own resources, (ii) in order to be able to supply this power to self-generators who were simultaneously selling their existing generation to market, (iii) while ensuring that any such supply would not harm our ratepayers, (iv) through the development of "new rates"[171] and (v) the elaboration of guidelines enabling us to determine appropriate levels of self-generation that could be sold by self-generators and replaced by our energy.

124. As a result, the BCUC directed us to undertake the development of new rates, methodologies, and guidelines in response to Celgar's new assertion that we could provide it with non-BC Hydro embedded-cost electricity, such as:

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[168] *Ibid*., p. 28.

[169] *Ibid*., p. 27 (citing FortisBC Final Submission, para. 53).

[170] *Ibid*., p. 28.

[171] *Ibid*., p. 41 ("When these new rate structures [two-tiered] are in effect, the Commission Panel expects that Celgar will be paying its full and fair share of the cost to serve its load. In these circumstances it is reasonable to assume that Celgar will be making a positive contribution as long as the incremental impact on the cost of the FortisBC's resource stack is less than the Celgar contribution towards the system costs.")

- Develop a rate for Celgar and other self-generators by May 31, 2012 based on FortisBC's Rate Schedule 31which excludes BC Hydro's Rate Schedule 3808 energy from its generating resources;

- Establish a methodology for notionally matching sales to Celgar in service of its load when Celgar is selling power, to FortisBC's energy supplied from its own generating resources (excluding Rate Schedule 3808 energy) for submission to the BCUC by March 31, 2012;

- Consult with all classes of customer and develop guidelines, for submission to and approval by the BCUC, for the level of non-PPA embedded cost power to which eligible self-generation customers should be entitled; and

- Design a stepped transmission rate and also a standby rate to address Celgar's circumstances by May 31, 2012.[172]

125. Ultimately, FortisBC expended considerable time and resources attempting to comply with these directives which were made in response to Celgar's arguments before the BCUC. I am therefore surprised that Mr. Merwin claims that these directives were somehow punitive in establishing a "Made-for-Celgar" rate."[173]

d) BCUC Order G-202-12

126. On April 13, 2012, FortisBC filed its proposed guidelines for establishing a self-generator's entitlement to FortisBC's embedded cost power (excluding BC Hydro's Rate Schedule 3808 energy) with the BCUC.[174] The guidelines dealt with two main issues, namely (1) the level of FortisBC embedded cost energy a self-generator was entitled to use to supply its load; and (2) FortisBC's methodology for acquiring non-BC Hydro PPA energy and matching that to the load of a self-generator.

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[172] *Ibid*., pp. 50-51.

[173] Witness Statement of Brian Merwin (March 28, 2014), para. 134.

[174] BCUC, Order G-202-12 and Decision, in the Matter of FortisBC Inc, Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), December 27, 2012, p. 1, **R-265**.

127. Our proposed guidelines permitted an eligible self-generating customer (e.g., Celgar) to nominate up to 100 % of its expected load to be served through FortisBC's non-PPA power. This aspect of the guidelines received Celgar's support.[175]

128. We also explained that we intended to protect other FortisBC ratepayers from harm through the rate design process. Celgar disagreed and essentially argued that FortisBC had no long-term obligation to protect its other ratepayers from harm when it designed these new rates.[176]

129. The BCUC ultimately agreed with our proposal, together with our suggestion to protect our other ratepayers through appropriate rate design:

> The Commission panel accepts that the issue of arbitrage is appropriately addressed in the stepped transmission rate design that FortisBC is directed to file by March 31, 2013. The Commission Panel directs that this rate design must accord with the Fair Treatment provision of the APA [i.e., the Access Principles Application] which, in the Commission Panel's view, prevents against self-generators arbitraging the [non-BC Hydro embedded cost power] to the detriment of other FortisBC ratepayers.[177]

130. The BCUC thus effectively dismissed Celgar's assertions that it should be able to arbitrage FortisBC's embedded cost energy in a manner that harmed our other ratepayers.[178]

131. Our proposed guidelines also established a methodology for acquiring non- BC Hydro PPA energy and matching that to the load a self-generator chooses to meet with energy from FortisBC. Our proposal was to notionally match the amount of energy nominated by the self-generating customer with a block purchase of energy from either our own surplus power or the market, thus ensuring that no increased Rate Schedule 3808

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[175] *Ibid*. pp. 3-7.

[176] *Ibid*., pp. 7-8.

[177] *Ibid*., p. 8 (emphasis added).

[178] *Ibid*., p. 10. The BCUC also explained that "[f]or clarity, the potential for arbitrage discussed in [Order G-188-11] was in the context of the self-generator finding an arrangement where it can arbitrage power while FortisBC still preserves the benefit of its resource stack for all of its customers, or in other words, while FortisBC still applies the Fair Treatment principle."

purchases would be used to facilitate exports by our customers.[179] Celgar objected to this proposal to source the matching power from market, proposing instead a methodology which would have led to increased purchases of BC Hydro embedded-cost power under the 1993 PPA.[180]

132. The BCUC approved our matching methodology and directed us to proceed with designing a stepped and standby rate that would protect other customers from arbitrage (to be filed by March 31, 2013).[181] It further held that:

> In the Commission Panel's view, GBLs, net-of-load, and now entitlement with appropriate rate design are all mechanisms the Commission can use to satisfy its regulatory principle that self-generators should not arbitrage power to the detriment of other ratepayers. Different mechanisms are appropriate in this case because of the different relationships (utility-to-customer or utility-to-utility) and the different service characteristics of the utilities, namely the Heritage Contract for BC Hydro and the APA for FortisBC.[182]

133. I recall that, as an alternative to the notional matching with appropriate rate design methodology, FortisBC filed a GBL calculation for Celgar employing BC Hydro's GBL methodology.[183] Based on a detailed review of our data concerning Celgar's historical self-generation, we established a 41 MW GBL:

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[179] *Ibid*., p. 12 ("FortisBC suggests that this is the only method that provides certainty that no PPA power is notionally included in sales to the Eligible Customer.")

[180] *Ibid*. pp. 13-14.

[181] *Ibid*., p. 15 ("The Commission Panel approves the Matching Methodology proposed by FortisBC, namely that 100 percent of the customer nomination would be matched from alternate sources for ensuring that no BC Hydro PPA power is notionally included in sales to a self-generating customer.")

[182] *Ibid*., p. 11 (emphasis added).

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

> [FortisBC] believes there is sufficient information on record to arrive at a GBL for Celgar […]. What follows then is the basic determination of a GBL for Celgar. Considering the Celgar situation, [FortisBC] would examine the most recent years of operation prior to the adding of the new generation in 2010. Prior to the 2010 addition Celgar last added generation in 1994 and completed upgrades to the mill that increased energy efficiency and production in 2006. Until the most recent significant upgrade, Celgar's generation was fully consumed by its industrial process. Only since that time has any meaningful amount of incremental generation been readily available for export.

> FortisBC believes that a GBL of approximately 41 MW is appropriate for Celgar based on historical generation and energy consumption. Such a GBL would ensure that generation that was previously used by Celgar to serve load would continue to do so, and would thereby mitigate arbitrage of FortisBC embedded cost power. Generation that is incremental to this historical level would be available to the customer for export.[184]

134. The BCUC observed however that "GBLs exist between BC Hydro and its self-generating customers because they have been able to reach agreement on GBLs. FortisBC and Celgar have been unable to reach such an agreement, notwithstanding the repeated encouragement by the Commission to do so."[185] As such, it found that "[t]here is currently no basis upon which the Commission is able to force such an agreement or dictate what a GBL should be."[186]

e) BCUC Order G-12-14

135. On March 28, 2013, FortisBC complied with the directives in BCUC Orders G-188-11 and G-202-12 and filed an application for approval of, *inter alia*, the following:

- A rate for Celgar and other self-generators based on FortisBC's Rate Schedule 31, but excluding BC Hydro PPA power from its resource stack (for use with the notional matching methodology);
- A two-tier stepped transmission rate to support conservation objectives; and
- A standby rate to address Celgar's circumstances (since it is generally self-sufficient and requires utility service only occasionally).

> […] Prior to 2007 mill load exceeded generation in all years. Celgar was able to make power sales to FortisBC in hours when generation exceeded load. Numbers in the table are inclusive of sales from/to FortisBC. Prior to 2010, Celgar used its generation almost exclusively in service of its load.

[184] *Ibid*., p. 25.

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

[186] *Ibid*.

136. However, pursuant to Order G-12-14, the BCUC suspended its review of the rate applicable to the supply of non-PPA power to self-generators until it made a final determination on the new BC Hydro-FortisBC PPA proceeding (the 2014 PPA).[187] The BCUC considered that certain issues in the new PPA proceeding (including the restrictions placed on FortisBC's use of BC Hydro's embedded-cost power) overlapped with our proposal for a non-PPA rate (i.e. a "Non-Embedded Cost Power (NECP) Rider which incorporates the Entitlement Guidelines and the Matching Methodology into a rate").[188]

f) BCUC Order G-67-14

137. The BCUC's decision regarding our new stepped-rate and standby rates was ultimately issued on May 26, 2014, after the BCUC's decision on the new PPA.[189] In Order G-67-14, the BCUC reviewed our proposed stepped rate and agreed with us that "there is no 'problem' at this time given that three of the four affected customers did not indicate any desire for the Stepped Rate, nor did any indicate that such a rate structure would in fact result in positive behavioural changes on their part."[190] Of our four affected customers, Celgar was the only one requesting this rate, despite the BCUC's finding that "there is a lack of evidence as to whether the introduction of stepped rates will result in a net improvement in efficiency of customer investment and operational decisions in BC."[191] Because stepped-rates are meant to induce customers to conserve electricity, evidence to that effect is essential.[192]

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[187] BCUC, Order G-12-14 and Decision, in the Matter of an Application by FortisBC for Stepped and Stand-By Rates for Transmission Voltage Customers, February 3, 2014, p. 2, **R-267**.

[188] *Ibid*., p. 2.

[189] BCUC Order G-60-14 regarding the new PPA is discussed in Section E.3.a) below

[190] BCUC, Order G-67-14 and Decision, in the Matter of an Application by FortisBC for Approval of Stepped and Stand-By Rates for Transmission (Voltage) Customers, May 26, 2014, p. (i), **R-211**.

[191] *Ibid*., p. 15.

[192] In its Order G-67-14, the BCUC also declined to approve our proposed standby rate and directed us to file a revised rate incorporating its findings (*Ibid*., p. 59). On June 26, 2014, we filed our standby rate Compliance Filing as directed by Order G-67-14. On June 30, 2014, by Order G-81-14, the BCUC issued a regulatory timetable to review our compliance filing (BCUC, Order G-81-14, in the Matter Matter of an Application by FortisBC for Approval of Stepped and Stand-By Rates for Transmission (Voltage) Customers, June 30, 2014, **R-268**).

138. The BCUC further recalled how its review of our proposed non-PPA rate (also called the "NECP Rate Rider")[193] was suspended pursuant to Order G-12-14 until the BCUC made a final determination on the new PPA proceeding.[194] Its decision on the 2014 PPA was issued by way of Order G-60-14 on May 6, 2014. As discussed below, this decision, *inter alia*, called on us to initiate a consultation process regarding self-generation in our service territory and to file a resultant Self-Generation Policy application with the BCUC by December 31, 2014 that establishes high level principles.[195] The 2014 PPA proceedings also resulted in more flexibility being introduced in the section of the PPA restricting our use of Rate Schedule 3808 energy. It further directed BC Hydro to hold concurrent consultations and file resulting guidelines concerning this restriction by November 1, 2014.[196] Considering these directives relating to self-generation and access to PPA power, the BCUC announced that it would be "issuing a letter requesting submissions from the parties on how to proceed with FortisBC's request for approval for the NECP Rate Rider [i.e. the rate for non-PPA power]."[197]

139. On June 30, 2014, the BCUC issued said letter requesting further submissions on several issues pertaining to its review the NECP Rate Rider.[198] One of these issues concerned the potential impact of the NECP Rate Rider on the retroactive billing issues related to Celgar.[199] The BCUC indicated that "[a]fter reviewing the submissions, [it] will

[193] BCUC, Order G-67-14 and Decision, in the Matter of an Application by FortisBC for Approval of Stepped and Stand-By Rates for Transmission (Voltage) Customers, May 26, 2014, p. 64, **R-268.**

[194] *Ibid*, p. 64 ("In the Application, FortisBC filed for approval for the Non-Embedded Cost Power (NECP) Rate Rider which is a provision for charging self-generating customers that intend to sell any portion of its generation that is not in excess of load.")

[195] *Ibid*., p. 64.

[196] *Ibid*., p. 64.

[197] *Ibid*., p. 65.

[198] BCUC, Letter to FortisBC and Registered Interveners, in the Matter of an Application for Stepped and Stand-By Rates for Transmission Customers, June 30, 2014, **R-269**.

[199] *Ibid*, p. 2.

issue an order making a determination on how best to proceed with its review of the NECP Rate Rider."[200]

3. Proceedings Concerning the 2014 BC Hydro-FortisBC PPA

a) BCUC Order G-60-14

140. As discussed earlier in this statement,[201] the 1993 PPA was amended at the request of BC Hydro in 2009 and was later replaced by the 2014 PPA. The 2014 PPA, like all agreements pertaining to rates,[202] was filed for approval with the BCUC.

141. During this proceeding, one of the issues examined at length by the BCUC was the further restriction put on FortisBC by way of Order G-48-09. Amended section 2.1 prohibited FortisBC from purchasing Rate Schedule 3808 electricity to sell to a customer who was simultaneously selling self-generated electricity which was not in excess of its load. In re-examining this amendment, the BCUC recalled that the additional restriction was meant to protect BC Hydro's ratepayers against arbitrage of Rate Schedule 3808 electricity[203] and was only approved for the remaining term of the 1993 PPA.[204] As a result, the BCUC addressed "whether BC Hydro ratepayers still required the additional protection afforded in section 2.5 [formerly 2.1] of the New PPA when consideration was given to the terms of the New PPA." [205]

142. BC Hydro, FortisBC, and most interveners argued that the restriction was still necessary. Celgar disagreed.

143. With our support, BC Hydro suggested an amendment adding further flexibility to the restriction, stipulating that:

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[200] *Ibid*., p. 2.

[201] See Section D.4 on BCUC Order G-48-09 and Section C on the FortisBC/BC Hydro PPA.

[202] Pursuant to sections 58 to 61 of the *UCA.*

[203] BCUC, Order G-60-14 in the Matter of British Columbia Hydro and Power Authority Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, May 6, 2014, p. 79, **R-221**.

[204] *Ibid*., p. 12.

[205] *Ibid*., p. 93.

(a) Electricity taken under this Agreement: […]

> (ii) shall not be sold to any FortisBC customer with self-generation facilities, or used by FortisBC to serve any such customer's load, when such customer is selling self-generated Electricity unless a portion of the customer's load equal to or greater than the customer-specific baseline is being served by Electricity that is not Electricity taken under this Agreement, where such customer specific baseline is as determined in accordance with Commission-approved guidelines and in consultation with the customer;[206]

144. In the BCUC's view, the additional restriction itself was no longer necessary, as the new terms of the 2014 PPA minimized the risks posed to BC Hydro's ratepayers from arbitrage of Rate Schedule 3808 electricity by self-generators. However, the BCUC deemed its removal premature, as it deemed our self-generation policies not sufficiently developed.[207]

145. In this context, the BCUC accepted BC Hydro's proposal in principle, but directed it to initiate a consultation process that will result in an application for the New PPA Section 2.5 Guidelines by November 1, 2014. Once the Guidelines are approved by the BCUC, they would be added to the 2014 PPA as an appendix.[208] Simultaneously, the BCUC directed us to initiate a concurrent consultation process that will result in a Self-Generation Policy application with the BCUC by December 31, 2014, establishing high level principles for its service territory.[209] We are currently preparing the consultations and expect them to begin in September 2014.

b) BCUC Order G-93-14

146. On June 4, 2014, Celgar filed an Application for Reconsideration of Order G-60-14 on the basis that the additional amendments to section 2.5 were proposed after the regulatory process was closed and despite what it believes are BCUC findings that

[206] *Ibid*., p. 106.

[207] *Ibid*., p. 98-99.

[208] *Ibid*., p. 109.

[209] *Ibid*., pp. 103-104.

contradict its conclusion.[210] On July 10, 2014, by Order G- 93-14, the BCUC rejected Celgar's claims of error and denied its application for reconsideration.[211]

F. Negotiations between FortisBC and Celgar

147. In recent years, despite our efforts, FortisBC and Celgar have been unable to reach agreement on the terms of a General Service Agreement. Several issues remain outstanding, including what Celgar would refer to as "an appropriate level of GBL," the application of a potential NECP rate rider, and the allowable level of self-generating customers power sales.

148. For example, on January 12, 2010, Mr. Merwin sent my colleague, Mr. Dan Egolf, an email[212] and lengthy memo[213] [redacted],[214] [redacted]:

[redacted].

[210] Celgar, Application by Zellstoff Celgar Limited Partnership for Reconsideration of British Columbia Utilities Commission Decision and Order G-60-14, June 4, 2014.

[211] BCUC, Order G-93-14 and Decision in the Matter of an Application by Zellstoff Celgar Limited Partnership for Reconsideration of Order G-60-14 Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, July 10, 2014, **R-271**.

[212] Email from Celgar to FortisBC, "Celgar's General Service Agreement" January 12, 2010, **R-272**.

[213] Memo from Celgar to FortisBC, "Setting a Generator Base Line for Celgar" January 12, 2010, p. 9, **R-273** [redacted].

[214] *Ibid.*, p. 5.

[215] Email from Celgar to FortisBC, "Celgar's General Service Agreement" January 12, 2010, **R-272.**

149. A significant stumbling block in our negotiations with Celgar has been the latter's insistence on proposing terms that would have either (i) placed FortisBC in violation of its amended 1993 PPA with BC Hydro, or would have (ii) resulted in our other ratepayers disproportionately bearing the bulk of the costs incurred by Celgar's proposals.

G. Conclusion

150. Throughout our negotiations and general interactions with Celgar, we have strived to treat Celgar fairly, while staying consistent in our focus on the protection of our ratepayers – especially from the potential rate impacts of Celgar's proposals.

151. The "regulatory quagmire"[216] that Mr. Merwin complains of is largely of Celgar's own making, due to the positions it has taken before the BCUC, as well as during negotiations. While we remain willing to work with Celgar to reach a satisfactory agreement for all parties affected, it is impossible to conclude such an agreement when Celgar insists that it is entitled to a historical baseline as low as 1.5 MW based on the performance of a turbine that was replaced by the mill's previous owners more than 20 years ago. As mentioned above, FortisBC has calculated a GBL for Celgar using BC Hydro's methodology – a methodology that Celgar has purported to support[217] – and believes 41 MW to be an appropriate baseline.

152. Celgar has also adopted a practice of intervening in any FortisBC regulatory process that might provide an opportunity for it to advance its ambition of arbitraging its self-generated energy at the expense of BC Hydro or FortisBC ratepayers. This regulatory practice by Celgar (i.e., multiple interventions and repeated attempts to expand the scope

[216] Merwin Witness Statement, para. 134.

[217] See, for e.g., Celgar, Complaint by Zellstoff Celgar Limited Partnership Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC's Application of Rate Schedule 31 Demand Charges, March 25, 2011, p. 5, **R-264**: "Celgar supports the approach taken by BC Hydro - that GBLs are not to be determined by any set formula" and BCUC, Order G-60-14 in the Matter of British Columbia Hydro and Power Authority Application for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817, May 6, 2014, p. 67, **R-221**: "Celgar points out that BC Hydro is asking the Commission to expressly permit the application of the GBL approach to regulating self-generating customers in both service areas. Celgar supports the concept in principle and notes that no party opposes the use of GBL methodology for regulating self-generators in FortisBC service territory (Celgar Final Submission, pp. 10–11, para. 17)."

of BCUC proceedings)[218] is costing FortisBC ratepayers a rate increase equivalent to 1.5 % every year.[219] For FortisBC, these costs not only include representation before the BCUC, they also include part of the BCUC's costs and the interveners' costs, such as Celgar's.

* * *

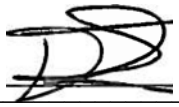
153. I confirm the above to be true to the best of my knowledge and belief.

154. I swear this witness statement in support of Canada's Counter Memorial in the *Mercer International Inc. v. Government of Canada* NAFTA arbitration and for no other improper purpose.

[218] For example, in the proceedings concerning FortisBC's Kelowna acquisition, the BCUC granted, at Celgar's insistence, full document disclosure to Celgar. This was unprecedented in litigation before the BCUC.

[219] FortisBC's annual revenue being $320 million, $3.2 million in BCUC proceeding costs result in a 1% rate increase.

SWORN BEFORE ME)
at the City of Kelowna,)
in the Province of British Columbia)



This 22nd day of August, 2014) Dennis Swanson

A Commissioner for Taking Affidavits
in and for the Province of British Columbia

Monic Pratch
Barrister & Solicitor