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Before the

ADDITIONAL FACILITY OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mercer International Inc.,

Claimant,

v.

Government of Canada,

Respondent.

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

WITNESS STATEMENT OF ROBERT FRIESEN

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I, Robert Friesen, hereby declare as follows:

I. INTRODUCTION

1. I have focused the entirety of my professional career on energy marketing, trading and electrical utility operations. I am currently the Director of Rainbow Energy Marketing Corporation, an energy trading company, with an office located in Regina, Saskatchewan. Prior to assuming my current position at Rainbow Energy, from 2001 to 2010, I filled a number of positions, including the Head of Trading and Director of Electricity at NorthPoint Energy Solutions, Inc., an electrical energy marketing and trading company in Regina, Saskatchewan. Before my work at NorthPoint Energy, from 1995 to 2000, I was an Energy Trading Supervisor at SaskPower, the principal electric utility in Saskatchewan and the parent company of NorthPoint Energy. My education and professional experience is summarized in my résumé, attached to this statement as Annex A. My date of birth is [REDACTED], and I reside at [REDACTED].

II. EXPERIENCE AT NORTHPOINT ENERGY

2. During the ten years I served at NorthPoint Energy, from the very moment of the company's creation until my retirement in June of 2010, I was responsible for managing power trading relationships with utilities and independent power producers (including kraft pulp mills) to provide, among other things, the economic sale of their energy on the spot and forward markets. The role of the Trading Floor Manager had many titles as the company grew, but in its final form it was the Director of Energy Trading. Energy trading inside an electric utility is a complex world. The Energy Trading group needed to constantly be aware and fill the needs of the utility while looking for opportunities in other markets. As a small Energy Trading company in Saskatchewan, we traded power in 5 of the 10 Canadian provinces and many of the states of the United States.

3. While at NorthPoint, I oversaw numerous power brokerage agreements, one of which was the 2006 brokerage agreement with Zelstoff Celgar (“Celgar”).

III. NORTHPOINT - CELGAR MARKETING SERVICES AGREEMENT

4. Around 2006, I first began discussing the energy brokerage services that NorthPoint could potentially provide to Celgar with respect to selling Celgar’s electricity on the spot market. At the time, I understood that Celgar had been told that none of its surplus generation could be exported, because there were no transmission paths that would support an export of Celgar’s power outside of the FortisBC system. Contrary to this information, I informed Celgar that transmission of its electricity outside of the FortisBC system was indeed possible and that NorthPoint could assist Celgar in selling its electricity.

5. Our talks with Celgar ultimately led to the signing in July 2006 of a Marketing Services Agreement, providing that NorthPoint would [REDACTED]
[REDACTED]].¹

6. I was responsible for managing the Celgar Marketing Services Agreement, and as such I would ensure that our staff would execute the terms of the contract as they were defined. I was always on the lookout for new sales opportunities for Celgar’s self-generated electricity. I have read a redacted version of Brian Merwin’s Witness Statement, and I agree with his description of the pricing terms, day-to-day operation and economic results of the NorthPoint-Celgar Marketing Services Agreement.²

¹ See C-213, Marketing Services Agreement between Celgar and NorthPoint Energy Solutions Inc. (12 July 2006) Whereas Clauses, Art. 1.1(j).

² See Witness Statement of Brian Merwin ¶¶ 51-53 (“The pricing terms in our contract with NorthPoint were based on [REDACTED]
[REDACTED]”).

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quoting Celgar in the summer of 2008 were based on forward market pricing for electricity sales [REDACTED]³

³ See Witness Statement of Brian Merwin ¶¶ 83, 143-148 (“By the summer of 2008, Mid-C power contract prices were very robust, and NorthPoint was advising us that we could enter into [REDACTED] for our existing generation. Our intention at the time was to execute one of these contracts in July/August 2008. FortisBC had been indicating this would be possible, even without the executed PSA, and was willing to engage in a trial period while the contract was being finalized. This was put on hold when BC Hydro took its action leading to the G-48-09 decision. . . .

Alberta Power Market. Alberta is a volatile market that has presented a number of valuable spot market opportunities for us. In mid-2006, Celgar began gathering direct market knowledge by participating in the market through its electricity sales with its power broker, NorthPoint. Limited transmission access into Alberta decreased the appeal of exporting there, although we learned from NorthPoint that opportunities to secure long term transmission access did arise occasionally. NorthPoint itself had secured a long-term block of transmission into Alberta from BC. Nonetheless, in 2007/08 we did not consider this type of one-off transmission availability as an ideal option, given the steady access to the market we would require to successfully sell both our existing generation and the new generation from our power projects.

Northwestern United States Market. In 2007/08, the market in the Northwestern United States had become much more stable since its peak in 2001 and 2002, and has remained robust. During 2007 and 2008, we gathered information about this market, not only by looking at Mid-C prices, but also by reviewing BC Hydro reports on utilities, such as Puget Sound Energy, which were entering into contracts at similar pricing to what BC Hydro was paying for biomass energy. We had learned from our earlier power trading through NorthPoint that there was almost always spot transmission available for our energy exports to the Northwest. Based on BC Hydro’s projected shortfall of power, it seemed clear that BC Hydro would be net importing, rather than predominantly exporting electricity. In such a scenario, where the BC Hydro lines have power flowing into BC, transmission always is available to schedule power exports in the opposite direction, out of BC.

Given the ease of transmission access, and its competitive pricing, exporting to the Northwestern US market was our second choice. We planned to pursue opportunities in that market if we were unable to secure a long-term contract with BC Hydro for the sale of our self-generation. This was our plan for our existing generation as well as our Green Energy Project.

Although we were primarily interested in the markets in BC, Alberta, and the Northwestern United States, other markets still could affect the demand and price for our electricity. In Alberta, the supply of electricity from Saskatchewan influenced that market. The US Mid-C market might also be influenced by the prices for power in adjacent markets, as a number of producers sell into many regional markets, which creates a ripple effect throughout the various power markets.

In Celgar’s case, its power trader, NorthPoint, was registered in many markets, including California. This would allow Celgar to sell into California if the market price was high enough to cover losses and transmission costs. An increase in prices in California, in turn, could influence other markets by drawing power from the Pacific Northwest, leading to increased prices at the Mid-C trading hub. Thus, pricing in BC is never truly separate from other markets. From time to time, when shortages occurred in BC, our power trader would transact with Powerex and FortisBC on an hourly basis, selling our power at Mid-C and even higher prices depending on demand and the constraints that existed in the BC system at that time.

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9. I understand that in the arbitration proceeding, Canada has called into question whether transmission access would have been available for sales of Celgar's self-generated electricity outside of British Columbia and whether Celgar would have been able to enter into electricity sales contracts that would have been economically efficient.⁴ I disagree with Canada's position, and can confirm that the [[REDACTED]] for destinations in [[REDACTED]] I had identified in 2008 for Celgar's self-generated electricity were very real electricity sales

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Present Market Price Deterioration. More recently, regional wholesale energy prices have declined and demand for clean energy in BC has dropped. The market for biomass-based green electricity has changed significantly, to the point that it is unlikely that Celgar could today enter into long-term contracts to sell its self-generated electricity at the price BC Hydro was paying between 2008 and 2010 for long-term electricity sales."

⁴ See Counter-Memorial ¶¶ 507-508 ("Claimant proffers no evidence that it had any customers for its electricity; of the amount of electricity any customers would have purchased; of the terms of any contracts it might be able to enter into; that it could have obtained the required permit from the National Energy Board to export electricity; or that it would have been able to obtain transmission access to deliver its electricity at economical rates. Even if the Claimant could make such sales, it has not provided evidence that it would be able to contract at a price that would make it economically efficient for the Claimant to sell its output rather than self-supply; that is, that the price at which a third-party would be willing to purchase from the Claimant would exceed the cost to the Claimant of buying the replacement electricity from FortisBC."); Expert Report of M. Rosenzweig ¶¶ 122 -123 (Additionally, there is a suggestion in Mr. Kaczmarek's report that even if BCH was unwilling to contract for all of Celgar's energy output at firm energy prices, Celgar could have sold its below GBL energy to a third party had it not been restricted from doing so. This suggestion is also highly speculative and unlikely. Celgar has provided no evidence that either it is able to contract transmission capacity to transport power out of the province, or that it would have been able to find a buyer for its output. Since Celgar realistically cannot make such third-party sales, it cannot be harmed financially under this hypothetical. In any case, Claimant has not provided evidence that it would be able to contract at a price that would make it economically efficient for Celgar to sell its output rather than self-supply . . . "); Expert Report of M. Rosenzweig n 181 ("I have been informed that firm transmission access out of BC is 100% subscribed and has been 100% subscribed for several years. With firm access to outside markets not feasible, Celgar realistically would have to choose between two unattractive options: making sales out of BC on a non-firm or ad hoc basis, or making firm sales but paying significant penalties when it could not secure transmission. In practice, it likely would not be economical for Celgar to make exports at all in Mr. Kaczmarek's But-For Scenario, much less be able to make the sales at the high prices he assumes.")

opportunities, with transmission access that would have allowed for both Celgar and NorthPoint to profit.⁵

10. Energy could be, and was, delivered to the U.S. border (the transmission start point would be the KI interconnection point between the FortisBC and BC Hydro electrical systems, and the end point would be BPA (Bonneville Power Administration), at the U.S.-British Columbia border). As a general matter, transmission costs to the US Border worked out to about [REDACTED], and transmission loss rates were approximately [REDACTED] in British Columbia. We would generally assume that transmission costs and losses would total about [REDACTED], but at certain times, transmission costs and losses could total as little as [REDACTED].

11. When selling electricity to the US, the US counterpart typically would [REDACTED].⁶ I note that Mr. Rosenzweig in his expert report states, “I have been informed that firm transmission access out of BC is 100% subscribed and has been 100% subscribed for several years.” Mr. Rosenzweig has been misinformed. From the time I began working with Celgar to broker its electricity sales until present day, there has always been firm transmission access available out of British Columbia for periods of up to twelve months. In 2008, Celgar would have been able to contract a sales price of approximately [REDACTED].

⁵ I note that Canada questions whether Celgar “could have obtained the required permit from the National Energy Board to export electricity.” *See* Counter-Memorial ¶507. To the extent that Celgar arranged for its electricity sales through NorthPoint, no such permitting was required, as NorthPoint has a national permit to engage in electricity exports from BC.

⁶ Many US purchasers of electricity have their own firm transmission access; those that do not are subject to transmission rates that are relatively much less costly than those in British Columbia.

[REDACTED]

[REDACTED]]]

12. I understand that Canada also claims that Mercer has provided no evidence that “it could have obtained the required permit from the National Energy Board to export electricity.”⁷

Canada’s claim is inapt in the context of electricity exports that Celgar executes through NorthPoint, as NorthPoint would take possession of Celgar’s electricity at the KI interface, and NorthPoint possessed the necessary National Energy Board and British Columbia permits to engage in electricity exports from British Columbia. Therefore, Celgar would not be required to obtain a separate electricity export permits for electricity sales made via NorthPoint.

IV. NOTIONAL ENERGY PURCHASES AND THE OASIS SYSTEM

13. I understand that Canada has described Celgar’s plan to sell its below-load self-generated electricity as “notional.”⁸ This is correct, insofar as one understands that the entire deregulated electricity market in North America is based upon the notional delivery and purchase of electricity. All of the electricity that Celgar generates is accounted for by a metering system. This metering system assures that Celgar only sells the electricity that Celgar generates (and not the electricity Celgar purchases from its utility). The physical reality of electricity generation and distribution is that electrons flow in the path of least resistance; electrons generated by any given entity do not necessarily flow to the entity that purchases the electrons.

⁷ Counter-Memorial ¶ 507.

⁸ See Counter-Memorial ¶ 2 (“None of the Claimant’s ‘self-generated’ electricity would actually change hands in these transactions. Rather, the Claimant intended to ‘notionally’ purchase as much electricity from FortisBC as was normally self-generated at the Celgar pulp mill.” It would then pretend that this electricity was its own ‘self-generated’ electricity so that it could sell it at a higher price. In reality, the Claimant’s self-generated electricity would continue to serve its pulp mill--as it always had. This arbitrage of electricity was a simple accounting transaction.”).

14. Therefore, in the case of Celgar, the electrons that its turbines generate will flow to the Celgar pulp mill first. Any electricity generated in excess of the pulp mill's load will likely flow to the Interfor sawmill that is within close physical proximity to Celgar and located on the same transmission line. Assuming that Celgar has an agreement with FortisBC to sell it all of the electricity in excess of the mill's load, from a physical point of view (i.e., the physical direction in which the electrons flow), the surplus generation that Celgar sells to FortisBC would predominantly flow to the Interfor sawmill; it would not flow to FortisBC, the entity actually purchasing the electricity. Interfor does not purchase the electricity that it receives from Celgar; FortisBC does. But FortisBC then notionally sells it to Interfor at its regulated rates. The whole system is based on notional sales.

15. Simply put, the ultimate purchaser of a given power producer's electricity is often times only notionally purchasing that producer's electricity. The electricity the purchaser actually receives may be the electrons generated by another producer. The sale of electricity outside of the FortisBC system or outside of British Columbia is similarly notional. Once NorthPoint began arranging for the sale of Celgar's electricity, NorthPoint would schedule electricity flows (using the ETag or NERC Tag system) so that customers in the US and Alberta would be able to purchase Celgar's self-generated power. Of course, the customers in the US and Alberta never actually receive the electricity that Celgar generates; they are delivered electrons generated by the power producers within closest proximity. The metering system assures that Celgar only sells the electricity that it generates, and there is a separate system for rectifying any discrepancies between the electricity sold and the electricity that registers on the meter as being generated by Celgar. This is the manner in which electricity is purchased in the deregulated

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electricity market in North America or the Open Access Same-Time Information System (OASIS).

The information furnished above is faithful and true in its entirety and was developed on the basis of my best knowledge and memory. In formulating this testimony, I referenced the documents cited above, which were furnished to me by counsel for Mercer; I did not use any documents or records or documents from my former employer, NorthPoint, in the formulation of this testimony.

In Regina, Saskatchewan, on the 1st day of December, 2014.

Robert Friesen