BEFORE THE ADDITIONAL FACILITY OF THE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE (ICSID)

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

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

SECOND WITNESS STATEMENT OF LES MACLAREN

24 March 2015

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I, Les MacLaren, declare as follows:

1. In this witness statement I will respond to some of the Claimant's attempts to mischaracterize B.C. energy policies and measures, which were adopted by the B.C. Ministry of Energy, Mines and Natural Gas ("Ministry" or "Ministry of Energy") and B.C. Hydro and Power Authority ("BC Hydro"). I will then turn to the Claimant's allegations concerning the role of the B.C. Utilities Commission ("BCUC") and its regulation of the electricity sector. Finally, I will address the Ministry of Energy's current position concerning the 1991 Ministers' Order for the Celgar pulp mill.

2. 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 reviewed the documents referred to herein for purposes of preparing this witness statement.

A. THE CLAIMANT'S MISLEADING ALLEGATIONS CONCERNING B.C. ENERGY POLICY

3. The Claimant complains about the decisions of BC Hydro and the BCUC, including the exclusivity clause in Celgar's EPA and BCUC Order G-48-09.[1] However, in doing so, the Claimant repeatedly ignores the policy context in which these measures were taken. This policy context is critical to understanding the purpose of these measures and why they are both fair and non-discriminatory. In particular, the Ministry of Energy provided policy direction to BC Hydro to: (1) ensure that BC Hydro became energy self-sufficient by 2016; and (2) engage in long-term resource planning including the procurement of electricity, in a manner that minimized the cost of this new electricity within the broader policy context established by government.

[1] *See e.g.*, Claimant's Memorial, ¶¶ 32 and 35.

1. The Ministry of Energy Required BC Hydro to Achieve Energy Self-Sufficiency by 2016

4. As explained in my first witness statement,[2] the Ministry of Energy's 2007 Energy Plan mandated BC Hydro to achieve self-sufficiency by 2016 and acquire an additional 3,000 gigawatt hours of "insurance" power by 2026.[3]

5. The 2007 Energy Plan provided direction to achieve these ambitious energy objectives in part by issuing an "… expression of interest followed by a call for proposals for electricity" derived from biomass.[4] The 2007 Energy Plan also committed to maintain British Columbia's competitive advantage by maintaining a reliable supply of competitively priced power.[5]

6. BC Hydro was thus required to procure clean or renewable energy through competitive acquisition processes while ensuring that rate increases were kept as low as reasonable. BC Hydro issued a Request for Expressions of Interest ("RFEOI") in March 2007 as a response to this direction and as a prelude to the Phase I Bioenergy Call for Power.[6]

2. BC Hydro Procured Energy through the Bioenergy Call for Power as Part of its Long Term Resource Plan to Achieve Self-Sufficiency

7. The Bioenergy Call for Power effectively created a market for new "green" biomass energy in British Columbia where none previously existed.[7] Following the

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[2] Les MacLaren Statement I, ¶¶ 76-82.

[3] British Columbia Ministry of Energy, Mines and Petroleum Resources, The BC Energy Plan: A Vision for Clean Energy Leadership, February 2007, ("2007 Energy Plan"), p. 9, **R-23**. Self-sufficiency is a planning criterion. In practice, operationally BC Hydro, through Powerex, continued both to import and to export electricity following the 2007 Energy Plan to optimize the BC Hydro system and use that system's capability to earn trade revenue and keep BC Hydro rates lower than they would otherwise be. BC Hydro was required to conduct a series of acquisition processes to purchase the rights to electricity in British Columbia to meet the self-sufficiency requirement because it could no longer plan to rely on the spot market for planning purposes to meet electricity demand.

[4] *Id.*, pp. 17-18, **R-23**.

[5] *Id.*, p. 15, **R-23**.

[6] *See* Jim Scouras Statement I, ¶¶ 36-37.

[7] *See* British Columbia Ministry of Energy, Mines and Petroleum Resources, BC Bioenergy Strategy Growing Our Natural Energy Advantage, 2008, ("2008 Bioenergy Strategy") pp. 8 and 10, **R-24**. Although

RFEOI, the B.C. pulp and paper industry formed the BC Pulp and Paper Task Force ("Task Force"), which prepared a position paper on the sale of bioenergy, which the B.C. Government received on November 22, 2007.[8] The Task Force argued that the B.C. Government should require BC Hydro to purchase all of the incremental self-generation from their pulp mills at the highest price BC Hydro was offering Independent Power Producers. Perhaps more importantly, it suggested that BC Hydro should also purchase all existing (i.e., non-incremental) self-generation at the higher Tier 2 Transmission Service Rate and that pulp mills should be permitted to purchase replacement electricity at embedded cost rates.[9] In my opinion, the reason these pulp mills were interested in selling their existing self-generation was because BC Hydro was pursuing the Bioenergy Call for Power to procure self-generation at attractive "green" prices, and the mills could secure significantly increased cash flow by just continuing to operate their existing generation.

8. In responding to the Task Force's proposals, the B.C. Ministry of Energy decided that it had to strike the right balance between protecting ratepayers by minimizing rate increases, on the one hand, and incentivizing self-generators to produce incremental energy, on the other. BC Hydro's acquisition of new resources through the Bioenergy Call for Power had to be cost-effective. It would make no sense at all to have BC Hydro purchase electricity that pulp mills were already producing for their own business reasons at the time of the Bioenergy Call for Power, because that would not increase the electricity supply available to BC Hydro. There remained a load-resource gap that BC Hydro had to fill. As a result, BC Hydro clearly needed to increase the amount of electricity generation available to it.

Tembec and Howe Sound had been selling biomass electricity, the prices they were receiving were, by 2007, less than or roughly equivalent to the Mid C market price.

[8] Pulp and Paper Task Force, "Position Paper on Electricity Conservation & Generation", **R-28**. David Gandossi, Mercer's Chief Financial Officer, was the chair of the Task Force

[9] *See* BC Hydro, Briefing Note, Customer Self Generation, 24 June 2009, bates 022831-022834, **R-29**. As noted in my first witness statement, analysis conducted by BC Hydro in 2008 indicated that its electricity rates would need to increase by approximately 10 percent for BC Hydro to purchase and replace all existing self-generated electricity produced by companies in the forest products sector.

9. If BC Hydro had been forced by the B.C. Government to purchase all of this existing self-generation at the prices suggested by the Task Force (or the prices negotiated in the Bioenergy Call for Power), the Bioenergy EPAs may well have been rejected by the BCUC as not in the public interest. Moreover, this approach would have run counter to provincial policy because: (1) it would not have increased electricity production in the province; and (2) it would have undermined efforts to ensure rate increases are as low as reasonable. The B.C. Government therefore concluded that only incremental electricity should be eligible for the "green" prices in Bioenergy Call for Power.

3. The Claimant's Assertions Concerning British Columbia's Energy Policies

10. In its Reply, the Claimant continues to rely on the "below load access percentage" or "Arbitrage Percentage"[10] to measure the allegedly unfair treatment BC Hydro accorded to different mills in its various power procurement processes. The Claimant defines its "Arbitrage Percentage" as "the percentage of a pulp mill's electrical load that could be met by self-generation that the pulp mill is permitted to meet with embedded cost utility electricity while it is selling self-generated electricity."[11] It claims that, in order to have treated all mills fairly, the B.C. Government ought to have mandated BC Hydro to procure electricity applying the same "Arbitrage Percentage" for every mill.[12] In my view, this is a simply a variation on what the Task Force proposed in 2007 and the province subsequently rejected.

11. The Claimant's alternative approach would completely undermine the policy objectives of the 2007 Energy Plan, which was to increase the resource portfolio of BC Hydro at cost-effective prices, so as to meet new demand for electricity while ensuring that rate increases are as low as reasonable.

[10] Switlishoff II, ¶ 14.

[11] Switlishoff II, ¶ 13.

[12] *See e.g.*, Claimant's Reply, ¶ 182(1).

12. Mr. Switlishoff asserts that Celgar has an Arbitrage Percentage of 0%. I disagree. The BCUC has in fact determined that Celgar should have full access to FortisBC electricity to enable Celgar to sell as much as 100% of its below-load self-generation. In particular, in its Decision accompanying Order No. G-202-12, the BCUC found that "The entitlement to non-BC Hydro PPA embedded cost power by [Celgar] may be as high as 100 percent of load as nominated by [Celgar]."[13] FortisBC also indicated in this proceeding that it was willing to permit Celgar to nominate 100% of its load for service using the matching methodology it had developed for Celgar.[14] This, of course, meant that Celgar would be able to sell all of its below-load self-generation. No other pulp mill has been accorded a similar right.

13. Mr. Switlishoff compares self-generation at Celgar to self-generation at Howe Sound, which has a much larger load than Celgar due to the fact that it consists of both an NBSK pulp mill and a separate thermomechanical pulp mill.[15] Despite this fundamental difference in mill characteristics, Mr. Switlishoff calculates an Arbitrage Percentage of [redacted] for Howe Sound and compares it to his Arbitrage Percentage for Celgar of 0%, concluding that the difference amounts to discrimination. Thus, in order to avoid discrimination, the Claimant argues that it should have been given a GBL that accords with Howe Sound's Arbitrage Percentage, which I believe would approximate [redacted] GWh/year.[16] However, none of the [redacted] GWh difference between the

[13] 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)*, 27 December 2012, p. 3, **R-265**. As I note in my previous witness statement, ¶113, the Ministry registered as an intervenor and made submissions in the proceeding that gave rise to this Decision and accompanying Order. In that submission, the Ministry emphasized the need for an approach to serve self-generators in FortisBC's service area that protects the interests of FortisBC's other customers. FortisBC Inc. Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11) **R-49**.

[14] 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, pp. 3-4, 15, **R-265**.

[15] [redacted] *See* Canada's Counter-Memorial, ¶ 399 and footnote 767.

[16] Switlishoff I, ¶ 215.

Claimant's current 349 GWh/year GBL and this [redacted] GWh/year GBL would be "new" or "incremental" electricity. It is "existing" electricity that is already self-generated by Celgar. The Claimant thus argues that BC Hydro should have procured from Celgar "existing" electricity that would not have contributed anything to meeting its load resource gap. The Claimant is in effect asking for a subsidy. The Bioenergy Phase I Call for Power was, however, just that - a Call for Power. It was not, as the Claimant assumes, a subsidy program for the pulp and paper industry.

14. The Claimant also argues, through its expert, Dr. Fox-Penner, that it was unfair for BC Hydro to restrict Celgar's ability to sell its below-GBL electricity pursuant to an exclusivity provision in the EPA. Dr. Fox-Penner claims that "[i]f it was important for BC to retain Celgar's below-load power in the Province, then it could have contracted for it, through an LDA or an EPA."[17] There are three problems with this assertion.

15. The first is that it fails to recognize that the exclusivity provision was a necessary element of the EPA. I understand that Jim Scouras addresses this in his second witness statement when he explains how the exclusivity provision ensures that BC Hydro actually receives the electricity it seeks to procure.

16. Second, the province is neutral as to where a purchaser of Celgar's electricity resides. Whether the electricity remains in BC or is exported out the province does not matter. BC Hydro is required to achieve electricity self-sufficiency, but individual generators are not discouraged from engaging in exports to the extent that there are opportunities to do so.

17. Third, and perhaps most importantly, Dr. Fox-Penner is simply incorrect, when he suggests that the Claimant cannot sell its below-GBL electricity to a third party. It is my understanding that the Claimant can export this electricity as long as FortisBC can demonstrate that it is not taking Rate Schedule 3808 energy from BC Hydro to facilitate the Claimant's exports. The BCUC has also approved FortisBC's methodology to permit

[17] Fox-Penner Report, ¶ 112.

the Claimant to engage in these sales.[18] It is my understanding that the BCUC has also commenced proceedings to implement the matching methodology through a rate.[19]

18. The Claimant also continues to assert that it was "likely" that BC Hydro would have purchased its existing self-generation below its GBL if the BCUC had not amended the BC Hydro-Fortis PPA by Order No. G-48-09.[20] There are several reasons why this is not true. First, as noted above, the 2007 Energy Plan's self-sufficiency policy, which was later enacted into law,[21] required BC Hydro to achieve electricity self-sufficiency but did not discourage electricity exports. As a result, it is misleading to suggest that BC Hydro would have purchased Celgar's self-generation rather than see it leave British Columbia.

19. Second, the Ministry of Energy was clear throughout the 2008 Pulp and Paper Self-Generation Working Group process that re-pricing of existing generation would not be supported, and that only incremental or new generation would be acquired. In effect, BC Hydro was policy-barred from acquiring existing self-generation. This policy was also clearly set out in the Bioenergy Phase I Call for Power documentation.[22]

20. Third, it would have been almost impossible for BC Hydro to justify the Celgar EPA to the BCUC if it had to effectively pay twice as much for the same net increase in electricity. The BCUC has in the past rejected a significant EPA on the basis that the

[18] BCUC, Order G-202-12, ¶¶ 2-3 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),* 27 December 2012, pp. 8 and 15, **R-265**.

[19] Letter from Dennis Swanson, Director, Regulatory Affairs to Erica Hamilton, Commission Secretary, *Re: FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Customers (the Application),* 28 March 2013, enclosing: FortisBC Inc. An Application for Stepped and Stand-By Rates for Transmission Customers, 28 March 2013, **R-462**. The BCUC has temporarily suspended these proceedings due to the overlap with another BCUC proceeding concerning FortisBC's self-generation policy. *See* BCUC Order G-107-14, FortisBC Inc. Application for Stepped and Stand-By Rates for Transmission Voltage Customers, 30 July 2014, ¶ 2, **R-463.**

[20] *See e.g.*, Reply, ¶ 36, fn 21.

[21] Special Direction No. 10 to the British Columbia Utilities Commission, BC Reg. 245/2007, **R-446**.

[22] See Bioenergy Phase 1 RFP, s. 14, **R-25;** and BC Hydro, Bioenergy Call for Power (Phase 1) - Addendum 8, s. 8, **R-121**. *See also* Jim Scouras Statement I, ¶¶ 40 and 44.

agreement was not in the public interest.[23] It would almost certainly find that this one was not justifiable because of such a price.

21. Finally, if BC Hydro had purchased this electricity, the Celgar EPA would almost certainly have become the "thin edge of the wedge." The Ministry and BC Hydro would have faced demands from all of the other pulp mills, along with other even larger self-generators such as [redacted] and [redacted][24] to purchase all of their self-generated electricity at Bioenergy EPA prices. Moreover, the B.C. government would have been faced with the economic fallout and the resulting public backlash over a BC Hydro rate increase of more than 10 percent to subsidize pulp mills.[25]

22. Essentially what the Pulp and Paper Task Force was looking for in 2007-2008, and what the Claimant is seeking today, is in my opinion to deliver a subsidy to self-generators at the expense of other customers, with no new generation resulting from their actions. This runs counter to the 2007 Energy Plan to ensure costs to ratepayers are minimized, and that competitive procurement processes result in least cost new supply within the overall policy framework established by government.

B. DR FOX-PENNER DOES NOT APPEAR TO UNDERSTAND THE ROLE OF THE BCUC OR THE FACTUAL CIRCUMSTANCES THAT GAVE RISE TO THE BCUC'S ORDERS

23. Dr. Fox-Penner describes the BCUC as "passive" in implementing policy or otherwise providing guidance with respect to self-generators. He then claims that this alleged failure of the BCUC to regulate left BC Hydro with too much discretion. This discretion according to Dr. Fox-Penner resulted in discrimination by BC Hydro.

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[23] *See e.g.*, BCUC Order G-176-06, *in the Matter of a Filing by British Columbia Hydro and Power Authority of Energy Supply Contracts with Alcan Inc. – LTEPA Amending Agreement – Amended and Restated Long-Term Electricity Purchase Agreement*, 26 December 2006, ¶ 1, and BCUC Order G-176-06, Reasons for Decision, 2 February 2007, pp. 72-73 2, **R-464**.

[24] [redacted]

[25] BC Hydro, Briefing Note, Customer Self Generation, 24 June 2009, bates 022831-022834, **R-29**.

24. Dr. Fox-Penner mischaracterizes the BCUC's role and does not appear to understand the regulatory framework in British Columbia.[26] The Government of British Columbia establishes the overall policy framework through legislation and policy statements such as the 2007 Energy Plan. BC Hydro and other utilities must act within this policy framework in the course of their business activities under the supervision of the BCUC. In the case of procurement by utilities, the onus is on the utilities to seek out least cost supply, and for the BCUC to examine the resulting EPAs under section 71 of the *Utilities Commission Act* ("*UCA*"). The BCUC, however, is only empowered to accept these EPAs or find them unenforceable, in whole or in part, under this provision. It has no authority to dictate the terms of an EPA.

25. In my view, the BCUC's forbearance from establishing hard and fast rules for BC Hydro's acquisition of electricity from self-generators was appropriate given the BCUC's statutory authority, the small number of self-generators involved, and the variability and complexity the Claimant has acknowledged in each self-generator's circumstances.[27] In this context, it is advantageous to operate from general principles that can be applied across the different circumstances of each self-generator.

26. An example of where flexibility under high level principles is entirely appropriate is in determining the amount of self-generation a pulp mill would generate in the absence of a financial incentive. When doing this for the EPA between BC Hydro and Celgar, it would not have been appropriate to consider operating years in advance of the upgrades to Celgar's generator from Project Blue Goose, because Celgar undertook those upgrades in the absence of a utility incentive.

27. The BCUC has neither the responsibility nor the authority to regulate how utilities such as BC Hydro and FortisBC procure electricity. Its role is engaged only after the procurement process, to ensure that the resulting EPAs are cost-effective and otherwise in

[26] Fox-Penner Report, ¶¶ 88-97.

[27] *See e.g.*, Claimant's Reply, footnote 2. ("'Normal' is hardly self-defining, and the conditions under which pulp mills operate and affect generation levels — including pulp prices, wood chip prices, hog fuel prices, utility electricity prices, green energy prices, costs of capital, assets deployed, etc. — all are dynamic and not static.")

the public interest, with a view to ensuring utility rates are fair and reasonable. In fact, the BCUC's past efforts to direct the management of BC Hydro were found by the BC Court of Appeal to exceed the BCUC's statutory authority.[28]

C. THE 1991 MINISTERS' DISPOSITION ORDER

28. Canada has requested that I provide background on Celgar's 1991 Ministers' Disposition Order ("Ministers' Order") and how it came to be raised in this arbitration. I do not have direct knowledge of the events that took place during the review of Celgar's Energy Project Certificate application in 1990, but I have reviewed certain documents relating to that application and the relevant legislation for the purpose of providing some background below. I will also explain the Ministry's understanding of the obligations the Ministers' Order currently imposes on the Claimant's operation of the Celgar pulp mill.

1. The Ministers' Order

29. As Canada explained in its Counter Memorial,[29] the Celgar pulp mill expansion was subject to an extensive joint federal-provincial review of the environmental, social and economic aspects of the project in 1990-1991. This expansion included the installation of a thermal electric turbine, which was subject to a separate Energy Project Review Process pursuant to Part 2 of the *UCA*.[30]

30. Celgar submitted an application for an Energy Project Certificate for this thermal electric plant on October 12, 1990. The Minister of Energy and the Minister of Environment subsequently determined that Celgar's construction and operation of the turbine should be exempt from further review under Part 2 of the *UCA*, subject to certain conditions. These conditions were set out in the Ministers' Order issued on May 23, 1991.

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[28] *British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission)*, 1996 CarswellBC 352, [1996] B.C.W.L.D. 847, **R-465**.

[29] *See* generally, Canada's Counter Memorial, ¶¶ 172-180.

[30] S.B.C. 1980, ch. 60, **R-93**.

31. In 1995, the B.C. Government replaced the Energy Project Review Process under the UCA with the *Environmental Assessment Act* ("1996 *EAA*").[31] It is my understanding that the 1996 *EAA* also transferred the responsibility for enforcing existing Disposition Orders to the B.C. Environmental Assessment Office.[32] In particular, subsection 93(8) provided that:

> A certificate, order, approval or decision that, immediately before June 30, 1995 is in effect under the *Utilities Commission Act*, the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, or the major project review process:
>
> (a) Must be deemed to have been issued under this Act, and
>
> (b) Subject to subsection (9), continues in force until it expires or, under this Act, is suspended or cancelled.

32. The Ministers' Order was an "order" issued pursuant to the *UCA* that was in effect on June 30, 1995. Accordingly, the Ministers' Order was deemed to have been issued under the *EAA* and continued to be in force.

33. The 1996 *EAA* was subsequently replaced by a new version of this statute in 2002. It is my understanding that the *Environmental Assessment Act, 2002* ("2002 EAA") also contained a transitional provision which deemed orders that were in effect under the previous *EAA* to have been issued under the new statute and provided that these orders were to continue in force.[33] Moreover, I understand that section 34(2) of the 2002 *EAA* also provides a means for the Minister of Environment to enforce these Orders through the issuance of subsequent Order.[34] I also understand that the 2002 *EAA* also permits the Minister of Environment to apply pursuant to section 35(1) to B.C. Supreme

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[31] R.S.B.C. 1996, c. 119, **R-94**.

[32] R.S.B.C. 1996, c. 119, s. 69(1), **R-94**. ("If the Minister [of Environment] considers that a person is not complying, or had not complied with an order made under this Act, the Minister may apply to the Supreme Court for either or both of the following: (a) an order directing the person to comply with the order or restraining the person from violating the order; (b) an order directing the directors and officers of the person to cause the person to comply with or to cease violating the order.")

[33] *See* S.B.C. 2002, c. 43, s. 51(8), **R-466**.

[34] *Id.*, s. 34(2) ("If the minister considers that a person is not complying or has not complied with an order under this Act, in this section called the "original order", the minister may (a) order the person to comply with the original order, and (b) specify in the order measures to address the non-compliance and the time within which it must be remedied.")

Court for an Order.[35] The failure to comply with an Order issued pursuant to either section 34(2) or section 35(1) is an offence under section 41[36] which is punishable by fines and, in case of individuals, imprisonment pursuant to section 43 of the 2002 *EAA*.[37] Accordingly, the Ministers' Order is an order under the 2002 *EAA*, and ensuring compliance with and enforcement of this order are now the responsibility of the Environmental Assessment Office.

2. The Ministers' Order Was Identified and Raised in this Proceeding in Response to the Claimant's Allegations

34. After receiving the Claimant's Memorial, B.C. observed that the Claimant had repeatedly asserted that Celgar had never made any representations that it would voluntarily displace its load.[38] The Claimant, however, did not own the Celgar pulp mill when the turbine was installed at the mill in 1993. Moreover, we were aware that the Celgar expansion project was controversial given the pulp mill's poor environmental track record. Therefore when seeking regulatory approvals for the project, it would have made sense for Celgar to have highlighted the benefits that would arise from the project, including any benefits achieved by installing the new turbine.

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[35] *Id.*, s. 35(1). ("(1) If the minister considers that any person or organization is not complying or has not complied with an order made under this Act, the minister may apply to the Supreme Court for either or both of the following: (a) an order directing the person or organization to comply with the order or restraining the person or organization from violating the order; (b) an order directing the directors and officers of the person or organization to cause the person or organization to comply with or to cease violating the order.")

[36] *Id.*, s. 41(2)(b)(ii). ("(2) A person commits an offence who …(b) does not comply with … (ii) an order referred to in section 34 or 35")

[37] *Id.*, s. 43. ("A person who commits any offence under section 41 is liable, (a) in the case of a corporation on a first conviction, to a fine of not more than $100 000 and, on each subsequent conviction, to a fine of not more than $200 000, and (b) in the case of an individual (i) on a first conviction, to a fine of not more than $100 000 or to imprisonment for not more than 6 months or to both, and (ii) on each subsequent conviction, to a fine of not more than $200 000 or to imprisonment for not more than 12 months or to both.")

[38] Claimant's Memorial, ¶ 12 and 575 ("Celgar obtained no such consideration from BC Hydro or any other Provincial instrumentality, and never voluntarily agreed to use its self-generated electricity to displace some or all of its own load."); and *Id.*, ¶ 575 ("Celgar never committed to use its self-generated electricity to meet its own load; nevertheless, BC Hydro and the BCUC did not permit Celgar to access embedded cost utility power at all while selling power.") *See also* Witness Statement of Brian Merwin, ¶ 110 ("Celgar has never signed any load displacement or other agreement in which it has committed to use its self-generation to meet its load.").

35. The Ministry therefore decided to examine archived documents to determine how the previous owners had characterised the benefits of the new turbine in the early 1990s, which included the Ministers' Order and the EPC Application.

36. Although the Claimant suggests that the Ministers' Order should have been raised in earlier BCUC proceedings by the Ministry of Energy, this conclusion does not necessarily follow when the facts are considered in their proper context. First, the Ministry of Energy was no longer responsible for compliance and enforcement of Disposition Orders following the repeal of Part 2 of the *UCA* in 1995. Instead, the Ministers' Order became the responsibility of the Environmental Assessment Office under the *EAA*. To my knowledge, the Environmental Assessment Office does not normally monitor or participate in proceedings before the BCUC.

37. Second, the BCUC proceedings in which the Ministry of Energy initially intervened did not directly concern the Celgar pulp mill's self-generation. BCUC Order G-48-09 was issued in response to BC Hydro's application for an amendment to its 1993 PPA with FortisBC. The Claimant's proposal to engage in sales of its self-generation was not the question the Commission panel had been tasked with deciding in that proceeding.

38. Third, the BCUC proceedings that followed BCUC Order G-48-09 were, broadly speaking, disputes between FortisBC and the Claimant. The Ministry did not consider it necessary to participate in these proceedings as an intervenor, with the exception of the proceeding concerning FortisBC's matching methodology,[39] which focuses only on the design of a rate for Celgar should it wish to sell it self-generation.

39. The Ministry certainly would have preferred if the Ministers' Order had been raised earlier in the BCUC regulatory proceedings as the Claimant may have then adopted a more reasonable position with respect to its efforts to engage in arbitrage to the detriment of BC Hydro ratepayers. It is, however, understandable that it was not as the Environmental Assessment Office was not a participant in these proceedings. Nor did the

[39] This was the proceeding that culminated in Order No. G-202-12.

proceedings directly address whether there were pre-existing restrictions on the self-generation from the Celgar pulp mill. In this respect, I note that the Claimant has recently and strenuously resisted efforts by other interveners to have the EPC Application considered together with the Ministers' Order before the BCUC.[40]

3. The Ministry's Position Concerning the Ministers' Order

40. The Ministry considers the Ministers' Order to remain a valid regulatory order which imposes obligations on Celgar with respect to the operation of its original turbine. The Ministers' Order is quite clear on this point. The first condition indicates that the new generator must be "designed, located, constructed and operated in accordance with: (a) the Application;".

41. Celgar's EPC Application provides, in relevant part, that:

> **The heavy black liquor, which contains the lignin and the spent cooking chemicals from the digester, will be burned in a new recovery boiler.** The recovery boiler will burn the organic material (i.e., lignin) in the heave black liquor and converts the inorganic chemicals primarily to sodium carbonate and sodium sulphide. The inorganic chemicals will be removed as molten smelt. **The heat generated in burning the black liquor will be used to produce steam. The steam, when passed through a turbo-generator, will under normal conditions supply 100 % of the modernized mills' electrical power requirements.**
>
> […]
>
> **It is estimated that the expanded mill will require approximately 50 megawatts of power and will be capable of generating 50 megawatts which will make the mill 100% self-sufficient under normal operating conditions. A tie line to the local utility will be retained.**[41]

[40] BCUC Proceeding to consider FortisBC Inc. Stepped and Stand-by Rates for Transmission Voltage Customers; Exhibit C2-30, online: http://www.bcuc.com/Documents/Proceedings/2014/DOC_42542_C2-30_Celgar-Comments-Ministerial-Order.pdf, **R-467**; *Ibid*. Exhibit C2-32, online: http://www.bcuc.com/Documents/Proceedings/2014/DOC_42620_C2-32_Celgar-Reply-C2-30.pdf, **R-468**; and *Ibid*. Celgar's Reply Submissions dated December 11, 2014, online: http://www.bcuc.com/Documents/Proceedings/2014/DOC_42773_12-11-2014_Celgar-Reply-to-Other-Interveners.pdf, **R-469**.

[41] [Emphasis in Original]

42. The application itself is eighteen pages long, and these passages, which indicate that the purpose of, or justification for, the turbine is to meet the mill's electrical requirements, are the only words in bold font in the entire document.

43. The Claimant has repeatedly suggested that Celgar is not required to operate its turbine in accordance with these passages of the Application as they are not specific enough. This is not accurate. It was common practice at the time of this Application for the Ministry to impose an obligation on an applicant to design and operate its project in accordance with its application.[42] In this case, Celgar indicated very clearly in its formal, written application that it would use its turbine for a specific purpose and, more specifically, that it would use the electricity generated from this turbine to serve the pulp mill's electrical load. Moreover, as Mr. Ostergaard explained in his witness statement,[43] Celgar had been informed that increasing self-generation for load displacement was a policy objective which meant that this commitment was undoubtedly an important consideration in the assessment of the project.

44. The Claimant asserts that this obligation cannot exist in perpetuity.[44] The Ministry agrees with the Claimant's position. The obligation in the Ministers' Order applies to the operation of the original turbine and will expire at the end of the life of this equipment. Moreover, the Claimant can request an amendment to the Ministers' Order. Neither of these limitations are mentioned by the Claimant when it asserts that these conditions are unreasonable because they would remain in force forever.

45. Finally, I note the Claimant's argument that if the Ministers had intended to hold Celgar to its commitments in its application, they would have developed specific

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[42] See e.g., Letter from A.K. MacMillan, Vice-President Environment and Energy, Canfor to Denise Mullen-Dalmer, Director, Power and Projects Branch, Re: Intercon Cogeneration Project – Disposition Order, 7 July 1995, enclosing In the matter of an Application by Canfor Corp. for an Energy Project Certificate Application for the Prince George Wood Residue Cogeneration Project, Disposition Order, 30 June 1995, **R-470**. In the matter of an Application by NW Energy (Williams Lake) Corp. for an Energy Project Certificate to Construct and Operate the Williams Lake Generating Station, Disposition Order, 5 November 1990, p. 1, **R-471**.

[43] Witness Statement of Peter Ostergaard, ¶ 13.

[44] I will not address the Claimant's rather novel argument that conditions in regulations simply disappear if there is a change in external conditions. I am not aware of any instance in a B.C. regulatory context where that is the case.

reporting, monitoring and compliance requirements. In fact, I understand that monitoring and enforcement provisions for these conditions did exist under the UCA in the early 1990s.[45] Just as importantly, I do not believe that an elaborate monitoring regime would have been necessary given the requirement for BCUC approval for sale of the electricity to another party or the requirement for an Energy Removal Certificate for the export of this electricity at that time.[46] To put it another way, the B.C. energy sector was already heavily regulated in the early 1990s and the Ministry would have known if Celgar attempted to do something else with its self-generated electricity.

46. I have also explained how the 2002 *EAA* contains provisions that would allow the Minister of Environment to enforce the Ministers' Order.[47] However, it is my understanding that unlike authorizations to pollute (which expressly permit certain levels of air or water pollution, for example, according to very specific, measurable criteria), in British Columbia an authorization to carry out a project that is justified on the basis that it will be used for a particular purpose does not normally contemplate or require ongoing monitoring of that purpose. If there is a material change in the need for, or use of, the project, it is expected that the proponent will seek an appropriate amendment to the project authorization.

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[45] S.B.C. 1980, chapter 60, ss. 19(3), 124(1)(g) and 124.1, **R-93** and **R-504**.

[46] *Id*., ss. 22, 54-69 **R-93** and section 85.3 which was added to the UCA by S.B.C. 1988, chapter 63.

[47] See S.B.C. 2002, c. 43, ss. 34(2), 35(1) and 42(2)(b)(ii) and 43, **R-466**.

47. I affirm that the information provided above is true and correct.

48. I affirm this witness statement in support of Canada's Rejoinder in the *Mercer International Inc. v. Government of Canada* NAFTA arbitration and for no improper purpose.

AFFIRMED BEFORE ME)
at the City of Victoria,)
in the Province of British Columbia,)
this 24th day of March, 2015.)
)
)
A Commissioner for taking Affidavits for) LES MACLAREN
British Columbia.)
)

Jonathan Eades
Barrister & Solicitor
Ministry of Attorney General
Legal Services Branch
1001 Douglas Street
Victoria BC V8V 1X4