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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**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

**WITNESS STATEMENT OF PETER OSTERGAARD**

I, Peter Ostergaard, declare as follows:

1. I was born on [REDACTED]. I currently reside at [REDACTED].
2. I am currently the principal of Ostergaard Consulting Group, working primarily in the areas of British Columbia energy policy and regulation and utility resource planning.
3. I was Assistant Deputy Minister<sup>1</sup>, Energy Resources Division, of the British Columbia Ministry of Energy, Mines and Petroleum Resources (the “Ministry” or “Ministry of Energy”), a position I held from 1990 to 1996; Assistant Deputy Minister, Energy and Minerals Division,

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<sup>1</sup> I was appointed Acting Assistant Deputy Ministry, Energy Resources Division in June, 1990 and assumed the permanent role in January, 1991.

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Ministry of Employment and Investment in 1996 and 1997; and Assistant Deputy Minister, Electricity and Alternative Energy Division, Ministry of Energy, from 2003 to 2008.

4. I also served as Chair of the British Columbia Utilities Commission (“BCUC”) from 1998 to 2003.

5. In early 1990, I held the position of Manager, Regulated Projects in the Energy Policy Branch of the Ministry of Energy. In that position, I coordinated the review of Energy Project Certificate applications under the *Utilities Commission Act* (“UCA”).<sup>2</sup> I subsequently was appointed Acting Assistant Deputy Minister of the Energy Resources Division of the Ministry of Energy in June 1990. In this acting position I remained involved in the review of applications for Energy Project Certificates.

6. I attach my *curriculum vitae* as Appendix A.

7. In this witness statement, I will briefly explain the Energy Project Review Process that existed under the *UCA* before 1995. I will then discuss the British Columbia Government’s review and disposition of an Application submitted by the Celgar Pulp Company (“Celgar”) in 1990 for an Energy Project Certificate pursuant to section 18 of the *UCA* to construct and operate an expanded thermal electric power plant at its pulp mill in Castlegar, British Columbia.

8. 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.

**A. Energy Project Certificate Review Process**

9. Until it was repealed on June 30, 1995, when the British Columbia *Environmental Assessment Act* came into force<sup>3</sup>, section 17(1) of the *UCA* provided that no person (whether a public utility or not) could construct or operate a “regulated project” except in accordance with an Energy Project Certificate or Energy Operation Certificate issued by the Provincial cabinet under section 21 of the *UCA*, except to the extent authorized under section 19 (1)(c) or a

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<sup>2</sup> S.B.C. 1980, chapter 60, **R-93**.

<sup>3</sup> *Environmental Assessment Act*, R.S.B.C. 1996, chapter 119 (which has subsequently been repealed and replaced by the *Environmental Assessment Act*, S.B.C. 2002, chapter 43). B.C. Reg. 276/95, **R-94**.

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certificate of convenience and necessity. The *UCA* defined the term “regulated project” to include a thermal electric power plant or an addition to a thermal electric power plant of more than 20 MW of capacity.<sup>4</sup>

10. Applications for Energy Project Certificates were to be made to the Minister of Energy, Mines and Petroleum Resources (the “Minister”), who then had the option of:

1. referring the matter to the BCUC for review and recommendations (with the concurrence of the Minister of the Environment);
2. referring it to the BCUC to be reviewed as an application for a Certificate of Public Convenience and Necessity (provided that the application was made by a public utility);
3. ordering that the project is exempt from provisions of the Act (with the concurrence of the Minister of Environment); or
4. refusing to issue an Energy Project Certificate.<sup>5</sup>

11. Most of the applications for Energy Project Certificates were dealt with through the third option, under which the Minister would grant an exemption from section 17(1) of the *UCA*.

12. The Energy Project Certificate applications were normally reviewed by the Energy Project Co-ordinating Committee, which included representatives of the Ministry of Energy and the Ministry of the Environment as well as a member of the BCUC staff. The requirements and procedures for the submission and review of an Application for an Energy Project Certificate are summarised in “A Guide to the Energy Project Review Process” a booklet that was published in 1982 by the Ministry of Energy.<sup>6</sup> The Energy Project Co-ordinating Committee reviewed applications to assess the major socio-economic and environmental effects associated with the proposed energy project. Following the Energy Project Co-ordinating Committee’s review of an Energy Project Certificate application, Ministry of Energy and Ministry of Environment staff would make recommendations to their Ministers on the disposition of the application under section 19(1) of the *UCA*.

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<sup>4</sup> *UCA*, s. 16(f) and (g), **R-93**.

<sup>5</sup> *Ibid.*, s. 19 (1), **R-93**.

<sup>6</sup> B.C. Ministry of Energy, Mines and Petroleum Resources, Guide to the Energy Project Review Process (Queen’s Printer for British Columbia, 1982), **R-95**.

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**B. Celgar's Application for an Energy Project Certificate**

13. In mid-August, 1990, Ministry of Energy staff became aware that Celgar's proposed pulp mill expansion would be subject to the Energy Project Review Process under the *UCA* because the cogeneration facility, with a planned capacity of more than 20 MW,<sup>7</sup> would fall within the definition of a "regulated project". By letter dated August 23, 1990, I notified Celgar that this was the case. In that same letter, I also noted:

The Ministry of Energy and B.C. Hydro have identified pulp mill expansions as a significant component of incremental electricity demand in British Columbia during the 1990s. The Ministry wants to ensure that load displacement (e.g., through conservation, energy efficiency measures, self-generation and cogeneration) is thoroughly explored before utilities are forced to build new generation resources to serve expanded industrial loads. For this reason, the Ministry supports initiatives to increase the energy efficiency and self-sufficiency of Celgar's proposed pulp mill expansion.<sup>8</sup>

14. On October 12, 1990, Celgar filed an Application<sup>9</sup> with the Minister for an Energy Project Certificate in relation to the modernization and expansion of its pulp mill (the "Application").<sup>10</sup> More specifically, the Application sought approval to install and operate a new turbo-generator capable of generating 50 MW of power (the "Project"), to replace the smaller existing turbo-generator at the pulp mill that was generating 2.5 MW.<sup>11</sup>

15. Celgar provided a description of the mill expansion in its Application which indicated that the existing mill required an average of 22 MW of power, and that its existing generator could supply only 2.5 MW of power. The remaining 89% of power requirements were satisfied through purchases from Celgar's utility, West Kootenay Power. Celgar also explained how it intended to operate the new turbo-generator:

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<sup>7</sup> Based on discussions at an August 16, 1990 meeting with Celgar, Ministry staff understood that Celgar proposed to install a turbo-generator (a form of thermal electric generation) with a capacity in the range of 48 MW.

<sup>8</sup> See Letter from myself to Mr. R.C. Wigen, Assistant Project Manager, Celgar Pulp Expansion, dated August 23, 1990, **R-96**.

<sup>9</sup> Celgar's Application was accompanied by an affidavit of the General Manager of Celgar, Robert W. Sweeney, swearing that the information contained in the Application was, to the best of his knowledge, true and accurate.

<sup>10</sup> See Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the *Utilities Commission Act*, Celgar Pulp Company, **R-97**.

<sup>11</sup> *Ibid.*, Section (b), "Chemical Recovery" and Section (c)(i), **R-97**.

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The recovery boiler will burn the organic material (i.e., lignin) in the heavy black liquor and converts [*sic*] 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 mill's 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.**<sup>12</sup> [Emphasis in Original]

16. Celgar's Application was viewed favourably by the Energy Project Co-ordinating Committee for two main reasons.

17. First, Celgar stated that its new turbo-generator would supply 100% of the modernized mill's electrical requirements under normal operating conditions. BC Hydro had just started entering into contracts with independent power producers, and it was clear that prices under these contracts were higher than BC Hydro's average cost of generation, resulting in upward pressure on rates for all customers. BC Hydro and West Kootenay Power had yet to finalize an agreement under which BC Hydro would supply West Kootenay Power with electricity (*i.e.*, the 1993 Power Purchase Agreement), but there was little doubt that BC Hydro would continue to supply some portion of West Kootenay Power's load requirements, meaning load growth in West Kootenay Power's service area could affect BC Hydro's resource needs and, therefore, its rates.<sup>13</sup> Since new or expanding pulp mills were a significant source of utility load growth at that time, the Ministry of Energy was supportive of efforts by pulp mills to displace their utility purchases with their own sources of electricity supply.

18. Second, the air pollution associated with "beehive burners", used to dispose of sawmill waste by incineration, had become unacceptable, and efforts were being made across the

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<sup>12</sup> *Ibid.*, Section (b), "Chemical Recovery" and "Mill Water, Steam, and Power Requirements", **R-97**.

<sup>13</sup> Maintaining competitive rates was an important provincial energy policy at that time. See B.C. Ministry of Energy, Mines and Petroleum Resources, *British Columbia Energy Policy: New Directions for the 1990s* (November, 1990), p. 20, **R-98**.

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Province, with mixed success, to phase out beehive burners. Celgar's intention to use wood residue to generate electricity in the new facility was consistent with provincial policy to find productive uses for wood residue.

19. The Energy Project Co-ordinating Committee's review of the Application was also influenced by the most recent statement of BC energy policy—British Columbia Energy Policy: New Directions for the 1990's (the "1990 Energy Policy").<sup>14</sup> The November 1990 Energy Policy was organized around four themes: Energy Efficiency, Clean Energy, Secure Energy, and Energy for the Economy. Relevant sections of the 1990 Energy Policy concerned "Putting Waste to Work" (e.g., wood waste) and the promotion of cogeneration and load displacement.<sup>15</sup> Celgar's intention to operate its expanded pulp mill so that it would be 100% electricity self-sufficient under normal operating conditions was consistent with the objective in the 1990 Energy Policy of promoting cogeneration and load displacement.

20. I therefore supported the Application and recommended to the Minister that an exemption be granted from sections 19(1)(a) and 17(1) of the *UCA*, conditional on Celgar building and operating the Project in accordance with the detailed description in the Application, including Celgar's statements that the mill would be 100% self-sufficient under normal operating conditions. My colleague, Mr. Doug Dryden, Director of the Environmental Assessment Branch, made a similar recommendation to the Minister of the Environment, since the Project would "provide the pulp mill with near energy self sufficiency" and "environmental impacts due to cogeneration will be reduced to acceptable levels".<sup>16</sup>

21. On May 23, 1991, the Minister, with the concurrence of the Minister of Environment, issued an order pursuant to section 19(1)(c) of the *UCA*, exempting the construction and operation of the Project from sections 19(1)(a) and 17(1) of the *UCA* and ordering that the

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<sup>14</sup> See *Ibid.*, p. 3, **R-98**.

<sup>15</sup> See *Ibid.*, pp. 14, 16-17 and 22, **R-98**.

<sup>16</sup> Ministry of the Environment, BC Environment Briefing Note, Application for Energy Project Certificate for the Celgar Pulp Mill Expansion (May 16, 1991) **R-99**.

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proponent, subject to conditions set out in the order, could proceed with the construction and operation of the project.<sup>17</sup>

22. Among the conditions in the Ministers' Order, was a requirement that Celgar ensure that its new thermal electric power plant was designed, located, constructed and operated in accordance with its Application for an Energy Project Certificate.<sup>18</sup> Celgar had two of its representatives sign the Ministers' Order to confirm that it agreed with all of the conditions.

23. To the best of my knowledge, the Ministers' Order remains in effect and has never been amended or cancelled.

**C. Celgar's Participation in the Major Project Review Process and the federal Environmental Assessment Review Process**

24. At the time of the Application for an Energy Project Certificate, the expansion of the Celgar pulp mill was also subject to a parallel provincial Major Project Review Process and a federal Environmental Assessment and Review Process. In the context of the Major Project Review Process the Steering Committee requested the Ministry of Energy's views on potential energy-related issues with the expansion of the Celgar pulp mill. In response, I provided input in a memorandum that expressed concerns that were similar those found in my letter to Mr. Wigan in August 1990.<sup>19</sup> It is my understanding the Celgar reiterated its intention to be, or be close to, energy self-sufficient in this parallel proceeding.<sup>20</sup>

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25. I have reviewed the documents attached for the purposes of preparing this witness statement. I am a fact witness in this NAFTA arbitration.

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<sup>17</sup> See In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion, Ministers' Order dated May 23, 1991 **R-100**.

<sup>18</sup> See *Ibid.*, section 1(a), **R-100**.

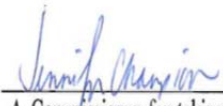
<sup>19</sup> Memorandum from Peter Ostergaard to Frank Blasetti, Proposed Celgar Pulp Mill Expansion (January 15, 1990) p. 1, **R-101**.

<sup>20</sup> See e.g., Celgar Pulp Company, Proposed Modernization of Bleached Softwood Kraft Pulp Mill Castlegar, B.C., Stage II Report, Volume 1, Overview and Environmental Summary (July 1990), pp. 35-36, **R-102**.

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

AFFIRMED BEFORE ME at the City of )  
Victoria, in the Province of British )  
Columbia, this 21<sup>st</sup> day of August, 2014. )

  
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A Commissioner for taking Affidavits for )  
British Columbia. )

JENNIFER C. CHAMPION

  
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Peter Ostergaard )