



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER G-191-13**

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**IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473**

and

**An Application by FortisBC Inc.
for a Certificate of Public Convenience and Necessity
for the Purchase of the Utility Assets of the City of Kelowna
Phase 2**

BEFORE: D.M. Morton, Panel Chair/Commissioner
A.A. Rhodes, Commissioner November 22, 2013
B.A. Magnan, Commissioner

O R D E R

WHEREAS:

- A. On November 13, 2012, FortisBC Inc. (FortisBC) filed an application with the British Columbia Utilities Commission (Commission) pursuant to sections 45 and 46 of the *Utilities Commission Act* (Act) for a Certificate of Public Convenience and Necessity (CPCN), for an extension of its distribution system resulting from its purchase of the electricity distribution assets of the City of Kelowna (Transaction), and further sought an order pursuant to sections 59 and 60 of the Act to include the impact of the Transaction in its revenue requirements (Original Application);
- B. The Commission determined on Day 1 of the Oral Hearing for the Original Application that it considered potential rate discrimination issues to be within the scope of the proceeding and subject to a second Phase process;
- C. By Order C-4-13 dated March 1, 2013, the Commission approved FortisBC's Original Application subject to certain conditions;
- D. On April 18, 2013, the Commission issued a letter to FortisBC, potential interveners and interested parties, informing these parties that a Phase 2 process would take place to address issues of potential rate discrimination arising from Tolko Industries Ltd. (Tolko) now becoming a direct customer of FortisBC (Phase 2 Proceeding). It was also determined that FortisBC would remain as the Applicant for the Phase 2 Proceeding;

- E. The following Interveners registered to participate in the Phase 2 Proceeding: Tolko, Zellstoff Celgar Limited Partnership (Celgar), British Columbia Hydro and Power Authority (BC Hydro), B.C. Sustainable Energy Association (BCSEA), British Columbia Pensioners' and Seniors' Organization *et al.* (BCPSO), and Norman Gabana;
- F. By Order G-68-13 dated May 2, 2013, the Commission established a Regulatory Timetable for the Phase 2 Proceeding. The Regulatory Timetable provided for the filing of Intervener Evidence and one round of Information Requests (IRs), with further process to be determined at a later date. The Regulatory Timetable required Celgar to first file its evidence regarding its claim of rate discrimination;
- G. Celgar filed its evidence on May 21, 2013;
- H. FortisBC, Tolko and BC Hydro filed evidence on June 3, 2013. IRs were issued and responded to, other than where objection was taken, by July 3, 2013;
- I. By letter dated July 9, 2013, Celgar requested that the Commission direct BC Hydro to respond to certain unanswered IRs relating to BC Hydro's Generation Baseline (GBL) methodology and the consistent application of same;
- J. The Commission held a Procedural Conference on July 24, 2013, in Vancouver to address procedural matters, including the Celgar request for responses to unanswered IRs in the context of the scope of the Phase 2 Proceeding. The Commission made an oral determination on the scope of the Phase 2 Proceeding at the Procedural Conference. BC Hydro and Celgar indicated that they expected to be in a position to resolve their differences on the unanswered IRs in light of the determination on the scope of the Phase 2 Proceeding;
- K. By Order G-111-13 dated July 25, 2013 the Commission, among other things, confirmed its oral ruling on the scope of the Phase 2 Proceeding and directed that the Phase 2 Proceeding be heard through a written hearing process;
- L. By Order G-118-13 dated August 7, 2013, the Commission established a Final Regulatory Timetable for the Phase 2 Proceeding;
- M. By Order G-120-13 dated August 12, 2013, the Commission issued an Amended Final Regulatory Timetable for the Phase 2 Proceeding;
- N. Celgar filed its Final Submission on September 5, 2013. FortisBC, Tolko, BC Hydro, BCSEA and BCPSO filed their Final Submissions on September 12, 2013, and Celgar filed its Reply Submission on September 19, 2013;
- O. The Commission has considered the evidence and submissions of the parties in the Phase 2 Proceeding.

NOW THEREFORE for the reasons set out in the Decision attached as Appendix A to this Order, the Commission orders that:

1. Order G-198-11, which varied Order G-113-01 to require Tolko to establish a priority sequence for potential purchasers of Tolko power, is revoked. Order G-113-01 is varied as follows:
 - (i) Tolko's exemption from the Act, other than section 99, for sales of Incremental Power, (defined as all electric energy generation above 2 MW each hour), and the corresponding exemption for non-public utility purchasers of that Incremental Power from section 71 of the Act are revoked.
 - (ii) Directive 1 of Order G-113-01 is varied to read:
 1. Pursuant to section 88(3) of the Act, the Commission exempts Tolko from the provisions of the Act other than section 99, in respect of the production and sale of net of load power.
 - (iii) Directive 2 of Order G-113-01 is varied to read:
 2. Pursuant to section 88(3) of the Act, the Commission exempts the purchaser of net of load power (the Purchaser) from section 71 of the Act in respect of the purchase of net of load power if the Purchaser is not a public utility as defined by the Act.
 - (iv) Directive 3 of Order G-113-01 is revoked and the following substituted:
 3. For the purposes of this Order, net of load power means power in excess of load at any time, or power net of load on a dynamic basis.
 - (v) Directive 4 of Order G-113-01 is varied to read:
 4. This Order is subject to the following conditions:
 - (i) Tolko will install and maintain electrical metering to the satisfaction of FortisBC;
 - (ii) The Commission may, pursuant to section 99 of the Act, reconsider, vary or rescind this Order; and
 - (iii) This Order shall be effective as of November 22, 2013.
2. FortisBC is to commence serving Tolko under Rate Schedule 30 as of the date of this Order.
3. FortisBC must file copies of any energy supply contract(s) it may make with Tolko for any purchases of Tolko energy. FortisBC may continue to purchase energy from Tolko at a rate equivalent to its Wholesale Rate Schedule 40 on a net of load basis for a period of 90 days from the date of this Order.

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4. The cap of \$0.5 million set in Order C-4-13 for recovery of FortisBC's closing, regulatory process and legal costs is not applicable to the Phase 2 Proceeding. FortisBC is approved to separately recover the regulatory costs associated with the Phase 2 Proceeding. FortisBC is to establish a similar non-rate base deferral account attracting interest at FortisBC's approved short-term interest rate to capture the regulatory costs of the Phase 2 Proceeding. FortisBC is to apply for disposition of the Phase 2 deferral account as part its 2014-2018 Multi-Year Performance Based Ratemaking Revenue Requirements Application.

DATED at the City of Vancouver, in the Province of British Columbia, this 22nd day of November 2013.

BY ORDER

Original signed by:

D.M. Morton
Commissioner



IN THE MATTER OF

FORTISBC INC.

**APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR THE PURCHASE OF UTILITY ASSETS FOR THE CITY OF KELOWNA**

PHASE 2

REASONS FOR DECISION

November 22, 2013

Before:

**D.M. Morton, Commissioner/Panel Chair
A.A. Rhodes, Commissioner
B.A. Magnan, Commissioner**

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EXECUTIVE SUMMARY

This Decision relates to Phase 2 of the November 13, 2012 FortisBC Inc. (FortisBC) application to the British Columbia Utilities Commission for a Certificate of Public Convenience and Necessity for its proposed purchase of the electricity distribution assets of the City of Kelowna (the Proceeding).

One of the issues which arose during the course of Phase 1 was whether the purchase, which would cause customers of the City of Kelowna to become customers of FortisBC, would result in rate discrimination for certain industrial customers with self-generation capability. In particular, Zellstoff Celgar Limited Partnership (Celgar), an existing customer of FortisBC with self-generation capability, argued that its treatment would be different and less beneficial than that afforded to Tolko Industries Ltd. (Tolko), a customer of the City of Kelowna with self-generation capacity, if the purchase took place.

The Commission deferred the issue until it was determined whether the purchase would actually proceed. Following completion of the purchase, the Commission held the second phase of the Proceeding to address the issue of rate discrimination alleged by Celgar.

Celgar argues that rate discrimination will occur because Tolko had been granted the equivalent of a Generator Baseline (GBL) by the Commission in 2001, (which was reaffirmed in 2011), whereas Celgar has no GBL. Celgar further argues that Tolko's GBL provides Tolko with the opportunity to sell self-generation which, absent the GBL, would have to be used to serve its own load, an opportunity not available to Celgar, which is only able to sell its self-generation on a net of load basis. However, Tolko has never made use of its GBL, and has only sold its self-generation on a net of load basis. Tolko further indicated that it has no immediate plans to sell generation other than on a net of load basis.

Following a review of the history of GBLs, which are often used to modify a utility's obligation to serve, the Commission Panel finds that selling self-generation on the basis of a GBL which is less than load, is not equivalent to selling self-generation on a net of load basis. The Commission Panel notes that any argument for equivalence of the two concepts is based on the notion of arbitrage. The Commission finds that the concept of arbitrage, which was developed in conjunction with GBLs, as occurring when a self-generator increased its power purchases from the utility in order to sell additional self-generation, raising prices for other customers, may need to be revisited and/or relaxed.

The Commission Panel notes that there are many new opportunities for economic development in the province, any number of which are likely to increase the electrical load in the province, resulting in rate increases. In this context, self-generators would appear to be being treated less favourably than other potential customers.

In the Commission Panel's view, true arbitrage can only occur where a self-generating customer purchases more energy than is required to serve its actual load at any moment in time, as would be the case for any customer. However, the competing interest of a utility in serving a predictable load is an additional factor to be considered.

The Commission Panel finds that a GBL, representing in its most basic form the load a self-generator is required to serve, should be tied to an agreement with the utility. Tolko's GBL was granted when Tolko was a customer of the City of Kelowna, and that fact was specifically referenced by the Commission at the time it reaffirmed Tolko's GBL. The Commission Panel notes that Celgar does not have a GBL, nor do any other FortisBC customers.

The Panel finds that a utility offering one self-generating customer service on the basis of a GBL which is less than load and offering another self-generating customer service on a net of load basis will create a situation of "undue discrimination, preference, prejudice or disadvantage in respect of a rate or service," within the meaning of section 59(4)(b) of the *Utilities Commission Act*. The Panel further finds that, with the removal of the intermediary of the City of Kelowna, Tolko and Celgar, as two self-generating customers of the same utility, will be offered service "under substantially similar circumstances and conditions" within the meaning of section 59(4)(c). This result is contrary to section 59(2)(b) of the *Utilities Commission Act*, which states: "[a] public utility must not... extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description."

As a result, Order G-113-01 is varied so as to revoke the exemption from the provisions of the *Utilities Commission Act* other than section 99 (Part 2 is no longer relevant as it was repealed in 2003), provided to Tolko for sales of Incremental Power, defined as "all electricity generation above 2 MW each hour." The corresponding exemption for non-public utility purchasers of that Incremental Power from section 71 of the *Utilities Commission Act* is also revoked. Order G-113-01 is further varied so as to maintain the exemptions for Tolko and any non-public utility purchasers of Tolko power, for power generated by Tolko on a net of load basis only and to recognize that the City of Kelowna is also no longer a possible purchaser of Tolko power. Order G-198-11, which establishes a priority sequence for potential purchasers of Tolko's Incremental Power, is revoked.

The revocation is without prejudice to the ability of FortisBC to negotiate agreements which would result in a similar treatment being afforded to all of its self-generating customers, whether such treatment is by way of GBLs or any other means to prevent true arbitrage in fact. The Commission leaves it to FortisBC to agree with its self-generation customers on the load it will serve.

1 INTRODUCTION

On November 13, 2012, FortisBC Inc. (FortisBC) applied to the British Columbia Utilities Commission (Commission) for, among other things, a Certificate of Public Convenience and Necessity (CPCN) to allow it to extend its electricity distribution system by purchasing the electricity distribution assets of the City of Kelowna.

Zellstoff Celgar Limited Partnership (Celgar), a self-generating customer of FortisBC intervened in the Proceeding. Celgar took the position that if the proposed purchase took place, Tolko Industries Ltd. (Tolko), a self-generating customer of the City of Kelowna and also an Intervener in the Proceeding, would then become a direct customer of FortisBC, and the treatment that had been afforded Tolko as a customer of the City of Kelowna, if continued, would be potentially different than the treatment afforded to Celgar as an existing direct customer of FortisBC, creating a situation of rate discrimination.

The Commission determined that issues relating to rate discrimination were within the scope of the Proceeding but deferred such issues to a second phase, if the proposed purchase in fact took place.

By Order C-4-13 dated March 1, 2013, with Reasons to follow, the Commission approved the purchase, subject to certain conditions. Order C-4-13 required FortisBC to confirm its acceptance of the conditions through a compliance filing by March 31, 2013.

The Commission issued its Reasons for Decision on March 26, 2013. FortisBC confirmed its acceptance of the conditions and its intention to proceed with the purchase on March 29, 2013.

By letter dated April 18, 2013 (Exhibit A-13), the Commission advised FortisBC, potential Interveners and Interested Parties that a Phase 2 process would take place to address issues of potential rate discrimination arising from Tolko becoming a direct customer of FortisBC.

By Order G-68-13 dated May 2, 2013 (Exhibit A-14), the Commission established a Regulatory Timetable for the Phase 2 review.

By Order G-108-13 dated July 16, 2013 (Exhibit A-20), the Commission established a Procedural Conference to take place on July 24, 2013 to address, among other matters, the scope of Phase 2. The Procedural Conference took place as scheduled.

By Order G-111-13 dated July 25, 2013 (Exhibit A-21), the Commission restricted the scope of Phase 2 “to Celgar’s claim of discrimination as it relates to the amount of power that a self-generator can sell while purchasing energy from FortisBC, and whether any restrictions placed on this amount of power are applied in a non-discriminatory manner among FortisBC’s self-generating customers, namely Tolko and Celgar.”

1.1 Application

As this is the second phase of a single proceeding, FortisBC continues to be considered the Applicant. However, as Phase 2 was initiated as a result of a claim of rate discrimination made by Celgar, Celgar was ordered to file its argument first and was given the right of reply.

1.2 This Decision

GBLs were developed in response to several competing interests. One is the obligation of a utility to serve its customers. In particular, given a rate structure where the marginal cost of energy is higher than the average cost, there arises a notion of entitlement of all customers to their fair share of cheaper “embedded cost” energy. Another interest is that of a utility to have a predictable customer load, for its system planning purposes. When a customer is also a self-generator, there is a potential for the load the utility must serve to fluctuate, depending on the amount of energy the self-generating customer uses to serve its own load, and the amount it sells. Thus, the utility and its customer may agree on a baseline amount of load that the utility is obliged to provide.

This discrimination claim arises in the FortisBC service area. Prior to the acquisition of the utility assets – and customers – of the City of Kelowna, FortisBC had no self-generating customers with which it had negotiated a GBL. Celgar, a FortisBC customer, sells electricity on a net of load basis only. Former City of Kelowna self-generating customer Tolko had a Commission-approved GBL. At issue is whether, following the asset purchase and the acquisition of this customer and its associated GBL, Celgar will be subject to undue discrimination.

FortisBC is a customer of BC Hydro under Rate Schedule 3808, the Power Purchase Agreement between BC Hydro and FortisBC. Accordingly, FortisBC may have certain obligations under this agreement that constrain or restrict a GBL agreement it enters into with its own customers. Celgar has previously attempted to establish a GBL with FortisBC and has sought Commission assistance in this regard.

This Decision provides a historical background which the reader may find useful or even necessary in order to further understand these circumstances of the discrimination claim. In particular, various Commission orders, relating to the interplay between GBL methodologies, RS 3808, Tolko’s GBL and Celgar’s attempt to establish a GBL, are reviewed.

2 BACKGROUND

2.1 Industrial Self-Generating Customers of BC Hydro – Origin of Generator Baselines

2.1.1 Order G-38-01

In 2001, in a climate of high export electricity market prices, BC Hydro sought guidance from the Commission in respect of its duty to serve its self-generating industrial customers which were seeking to sell their self-generation into the market and increase their purchases of low cost power from BC Hydro to run their operations.

By Order G-38-01¹, the Commission directed BC Hydro to “allow [its Transmission Service] Rate Schedule 1821 [industrial] customers with idle self-generation capability to sell excess self-generated electricity, provided the self-generating customers do not arbitrage between embedded cost utility service and market prices”. The Commission explained that: “BC Hydro is not required to supply any **increased** embedded cost of service² to a RS 1821 customer selling its self-generation output to market” [emphasis added]. The Commission went on to

¹ *In the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*; Order G-38-01, April 5, 2001.

² Embedded cost of service power is the weighted average cost of existing sources of power in a utility’s resource stack.

confirm that it expected BC Hydro to: “make every effort to agree on a customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator.”

The Commission also limited the duration of the program to approximately one year, given the unique circumstances existing at the time, and noted that the program was “without prejudice to the resolution of long term rights of self-generators to take their generation to the market.” It held that the program might be continued beyond one year if conditions warranted and directed BC Hydro to file a “full report on the program...by March 1, 2002.”

Thus, the requirement for Generator Baselines, or GBLs, for BC Hydro’s self-generating customers which sought to sell into the export market was confirmed. Further, the notion of arbitrage, as used in relation to GBLs, was in fact the preservation of the status quo, such that BC Hydro’s obligation to serve was limited to the load served at a particular time, and self-generators were required to continue to serve that portion of their own load which they had served in the past.

2.1.2 Order G-17-02

In its March 1, 2002 compliance report to the Commission, BC Hydro noted that little experience had been gained from the program established by Order G-38-01 to govern BC Hydro’s obligation to serve its RS 1821 customers with idle generation capacity when they were selling their self-generation into the market. Thus, no further conclusions could be drawn. BC Hydro also noted that the program defined by Order G-38-01 was established when there was a serious energy shortage in western North America and was therefore designed to encourage self-generators with idle capacity to generate and sell electricity, although not to the prejudice of BC Hydro and its customers. BC Hydro submitted that, although market conditions had changed since then, those changes should not “alter the essential principle embodied in ...the Order [G-38-01]: that RS 1821 customers should not be allowed to arbitrage between the low embedded cost rates of BC Hydro and market prices.”

By Order G-17-02³, the Commission directed BC Hydro to continue to allow its Rate Schedule 1821 customers with idle self-generation capability to sell excess self-generated electricity, provided they did not arbitrage between embedded-cost utility service and market prices. The Commission further ordered that the conditions established in Order G-38-01 to prevent such arbitrage were to “remain in effect until the Commission determines that future circumstances no longer justify the existence of such a program.”

³ *In the Matter of British Columbia Hydro and Power Authority Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability*; Order G-17-02, March 14, 2002.

2.2 BC Hydro and FortisBC – Rate Schedule 3808 Power Purchase Agreement

2.2.1 Order G-48-09

The notion of arbitrage, developed in the context of Order G-38-01, continued. In 2009, BC Hydro applied to the Commission for an amendment to its Rate Schedule 3808 Power Purchase Agreement with FortisBC to prevent self-generating customers of FortisBC from selling their self-generation into the market, while simultaneously purchasing energy from FortisBC which was sourced from its RS 3808 Power Purchase Agreement with BC Hydro. The Commission approved the requested amendment by Order G-48-09⁴.

The Commission also grappled with how to determine the status quo, to allow self-generators to continue to sell power in excess of the status quo. Recognizing that there may be circumstances where a self-generating customer wished to reduce its domestic production in order to increase its sales of electricity to market, the Commission defined excess power as power “net of load on a dynamic basis”. The Commission determined that “...self-generators, as owners of the generation facilities, should have the flexibility to reduce domestic load as they see fit in the commercial circumstances at hand in order to optimize the export of self-generated power.” It concluded that: “[w]hat will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market.” The practical effect of this Decision was to require FortisBC customers to service 100 percent of their load from self-generation, prior to engaging in export sales, to the extent that their load would otherwise be served indirectly by BC Hydro under the RS 3808 PPA (RS 3808 PPA Decision, pp. 28-29). The Commission did not, however, purport to rule on the treatment of “new or incremental generation capacity added by a self-generator,” preferring instead to leave that issue to future Panels to be dealt with “on a case by case basis” (RS 3808 PPA Decision, p. 30).

2.3 Tolko – A City of Kelowna Customer

2.3.1 Origin of Tolko’s 2 MW GBL - Order G-113-01

Tolko Industries Ltd., formerly Riverside Forest Products Limited (Riverside), was, prior to the purchase of the electricity distribution assets of the City of Kelowna by FortisBC, a direct customer of the City of Kelowna. As the City of Kelowna purchased power from FortisBC for resale to its customers, Tolko was also an indirect customer of FortisBC. Tolko owned and operated a lumber stud mill, plywood facility and log processing facility in Kelowna. It met its load requirements in part through self-generation from a hog fuel fired generator, and in part from power purchases from the City of Kelowna, pursuant to its Rate Schedule 223.

Tolko’s evidence is that in 1999, Tolko (then Riverside) entered into discussions with FortisBC’s predecessor, West Kootenay Power, and the City of Kelowna with a view to increasing its self-generation capacity beyond its historical capacity of about 2 MW, to enable it to export electricity. Tolko completed modifications to its power plant, which involved, among other things, adding a second steam turbine generator and auxiliary equipment, in May of 2000. These modifications increased Tolko’s self-generation capacity. (Exhibit C1-8, p. 2, Exhibit C1-13, Tolko Response to Celgar IR 1.1.2)

⁴ *In the Matter of British Columbia Hydro and Power Authority Application to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement*; Decision and Order G-48-09, May 6, 2009 (RS 3808 PPA Decision).

On May 29, 2001, Tolko (then Riverside) applied to the Commission for an exemption from certain provisions of the *Utilities Commission Act* (Act)⁵ to allow it to produce and sell “Incremental Power” (defined as all electric energy generation above 2 MW each hour) to various parties, and to sell power not in excess of 2 MW, but not required by Tolko’s operations, to the City of Kelowna, without being considered to be a public utility and subject to regulation as such.

By Order G-113-01 dated October 25, 2001⁶, as approved by the Lieutenant Governor in Council on October 18, 2001, the Commission approved Tolko’s application, finding 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 [West Kootenay Power] and its customers from arbitrage with respect to the initial 2 MW or other impacts.” The Commission further exempted purchasers of the Incremental Power from section 71 of the Act (which relates to the filing of energy supply contracts) provided they were not public utilities as defined by the Act (Order G-113-01, Exhibit C1-8, pp. 1-2).

Tolko currently has generation capacity of 8 MW. Based on present operations, its site load is 3.5 MW, as it has shut down a plywood plant (Exhibit C1-8, p. 3).

2.3.2 Tolko’s 2011 Application for Reaffirmation of 2 MW GBL – Order G-198-11

Following the Commission’s May, 2009 RS 3808 PPA Decision, by letter dated March 2, 2011, Tolko applied to the Commission for reaffirmation of its ability to sell self-generated energy in excess of the first 2 MW each hour of self-generation. Tolko advised that its request was made as a result of discussions it was having with potential customers for its “excess” generation, above its 2 MW GBL (Reaffirmation Proceeding). Tolko advised that some potential customers had expressed concern that Tolko’s increased sales might have the effect of causing FortisBC, as supplier to the City of Kelowna, to increase its purchases of BC Hydro power, and therefore result in arbitrage, contrary to the RS 3808 PPA. Tolko specifically noted in its application that it was a customer of the City of Kelowna and not a customer of FortisBC, and also took the position that Order G-113-01, which established what was, in essence, a 2 MW GBL, specifically provided that the 2 MW GBL protected West Kootenay Power (now FortisBC) and its customers from arbitrage.

BC Hydro, FortisBC and Celgar all actively intervened in Tolko’s application.

Tolko submitted that its predecessor, Riverside, encouraged by tremendous opportunities in the market for electricity which had arisen in the period from 1998 to 2001, “moved simultaneously to construct additional generation and to obtain Commission approval.” Tolko argued that government policy at the time encouraged self-generators who wished to construct incremental generating capacity for resale into the export market to do so. Tolko took the position that if the Commission were to reverse its earlier [2001] ruling ten years later, it could “only have a detrimental impact on the BCUC’s reputation and the willingness of parties to rely upon BCUC decisions in making investment decisions” (Tolko Submissions, Reaffirmation Proceeding, p. 2).

⁵ RSBC 1996, c. 473.

⁶ *In the Matter of an Application by Riverside Forest Products Ltd. for an Exemption from Certain Provisions of the Utilities Commission Act*; Order G-113-01, October 25, 2001.

Tolko further argued that the Commission conducted a thorough review of Riverside's 2001 application to sell self-generation above 2 MW wherein it canvassed "all relevant issues and affected parties" prior to issuing its decision in Order G-113-01 [which confirmed Tolko's historical capacity of "about 2 MW"]. (Tolko Submissions, Reaffirmation Proceeding, p. 7)

Tolko also noted that its 2001 application had been supported by West Kootenay Power, including [qualified] support for the 2 MW GBL. It further observed that West Kootenay Power had written to the Commission advising that:

"West Kootenay Power ("WKP") supports the application, is supportive of Riverside's entry into the unregulated generation market, and does not feel there will be an adverse impact on WKP's customer subject to the following:

Riverside is seeking a "base" of 2 MW. Based on the evidence presented..., WKP would normally suggest that a base of greater than 2MW would be appropriate. WKP believes that the base should be set at the level of generation available when the intent to increase output was formed, subject to normalization for strike, shutdowns, etc. The base should also therefore be based on shorter period than four years: we would suggest two years as appropriate. However, WKP is cognizant of the protracted discussions with Riverside as they have described, and even in prior years. For that reason, in this instance we do not object to the 2 MW base."

(Tolko Submissions, Reaffirmation Proceeding, pp. 5-6; italics and emphasis in original)

In its submission in the Reaffirmation Proceeding, BC Hydro advised that it did not disagree with the Commission's 2001 decision to issue Order G-113-01, granting Tolko a 2 MW GBL, noting that the Commission specifically addressed the issue of arbitrage, in the context of the circumstances existing at that time. However, BC Hydro did disagree with Tolko's position that nothing had changed since 2001, other than a reduction in Tolko's sawmill load. BC Hydro noted that since 2001, Tolko had only sold self-generation to the City of Kelowna on a net of load basis, and had first used its self-generation to displace its own site load. BC Hydro suggested that the actual use from 2001 to 2011, as compared to the expected use in 2001, upon which Order G-113-01 was based, amounted to a change in circumstances, which could warrant a review of Tolko's GBL by whatever utility was asked to supply increased energy to Tolko to replace the energy which Tolko exported. BC Hydro submitted that this was "not an issue for BC Hydro so long as BC Hydro is not impacted by a Tolko request to purchase increased energy." It continued: "[b]ased on this assumption, BC Hydro takes no position on whether BCUC Order No. G-113-01 should continue to be valid nor is BC Hydro requesting that the BCUC reconsider or rescind Order No. G-113-01." (BC Hydro Submissions, Reaffirmation Proceeding, p. 2)

BC Hydro went on to explain that the only GBLs which matter to it, in relation to energy purchase decisions, are those that it determines in the context of an Energy Purchase Agreement (EPA). It confirmed its view that affirmation of Tolko's 2 MW GBL would not impact any GBL that BC Hydro might set for Tolko for the purposes of an EPA, and that, in fact, its own GBL setting process was independent of the outcome of the Application. (BC Hydro Submissions, Reaffirmation Proceeding, p. 3)

BC Hydro also took the position that the intent of the RS 3808 PPA Decision, which prevented FortisBC from reselling energy purchased from BC Hydro pursuant to the PPA to any FortisBC customer selling self-generated electricity not in excess of its own load, (as discussed above) was broader, and would extend to Tolko, a customer of the City of Kelowna, which was in turn, a customer of FortisBC. BC Hydro therefore concluded that, to the extent that Tolko's sale of power above its 2 MW GBL involved increased purchases of energy from the

City of Kelowna to serve load that it had previously served through self-generation, and those purchases were ultimately sourced from the RS 3808 PPA, BC Hydro's energy requirements would increase, [which would presumably, in its view, amount to arbitrage]. BC Hydro took the position that the risk of arbitrage would be eliminated if Tolko's increased energy purchases were sourced from non-BC Hydro resources, or if Tolko only sold self-generation in excess of its current load. (BC Hydro Submissions, Reaffirmation Proceeding, p. 3)

BC Hydro advised, in summary, that it took no position on Tolko's application provided that the reaffirmation requested did not:

- (i) enable Tolko to arbitrage between the PPA embedded cost of service and market prices;
- (ii) impact BC Hydro's GBL determinations and process; or
- (iii) assume BC Hydro will change its decision-making process in relation to energy purchases.

BC Hydro concluded by emphasizing its position that: "a GBL determination in [the Reaffirmation Proceeding] does not set a precedent for BC Hydro's GBL determinations for its customers nor for its contractual GBLs in EPAs". (BC Hydro Submissions, Reaffirmation Proceeding, pp. 3-4)

FortisBC expressed concern with "the uncertainty that pervades the regulatory environment in which self-generating customers must operate", which it attributed to differing interpretations of the rules relating to self-generators. (FortisBC Submissions, Reaffirmation Proceeding, p. 1)

FortisBC argued that Tolko had taken appropriate precautions to reduce as much uncertainty as practicable by: consulting with West Kootenay Power regarding how it could increase its generation capacity above its historical capacity of approximately 2 MW in order to sell such generation into the market before constructing the additional facilities, and by obtaining Commission approval of a GBL and Cabinet approval generally. FortisBC characterized the situation in terms of Tolko having "sought and received confirmation that generation above its 2 MW historical level was incremental and available for export."

FortisBC noted, however, that uncertainty remained regarding compliance with the Commission's direction in Order G-48-09 that: "[w]hat will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market" (RS 3808 PPA Decision, p. 29).

FortisBC expressed concern regarding "the potential for these export activities to negatively impact other customers." It submitted that it had taken a risk-averse approach so as not to jeopardize its position vis a vis continued access to RS 3808 PPA power from BC Hydro (FortisBC Submissions, Reaffirmation Proceeding, p. 2).

FortisBC commented that the issue in Tolko's case was "further complicated by the fact that its mill lies within the City of Kelowna's service area, removing by one more degree the connection between the final customer and the source of embedded cost power, whether FortisBC or BC Hydro resources". (FortisBC Submissions, Reaffirmation Proceeding, p. 3)

FortisBC attempted to encapsulate the concern which precipitated the rulings relating to arbitrage by self generators as follows: "[t]he arbitrage of utility supplied power solely for the purpose of increasing the profit of a utility customer, and potentially causing an increase in costs to customers generally, should not be permitted."

FortisBC submitted that concepts such as that of a GBL should not be applied without considering whether they in fact address the concern respecting the arbitrage of utility supplied power as set out in the quotation above. FortisBC submitted that "...the term GBL in and of itself seems to lend nothing to the analysis of "base load" or "historical consumption." FortisBC suggested that it was unable to take a position on whether Tolko's activities should be permitted to continue unchanged until it had received assurance from the Commission that:

- A GBL, customer base load, or customer load to be self-supplied, once set, was a static number, above which all generation would be available for export;
- The determination of a GBL, customer base load etc. would be done in a consistent manner for all customers;
- Once determined and approved by the Commission, the GBL, customer base load etc. would be considered as an effective means to prevent arbitrage; and
- If FortisBC were to supply power to a self-generating customer in accordance with the GBL, customer base load etc., which power was ultimately used to serve load while that customer was exporting power, FortisBC's access to its RS 3808 PPA power from BC Hydro would not be adversely affected.

(FortisBC Submissions, Reaffirmation Proceeding, pp. 3-4)

Celgar supported Tolko's application. It argued that the Commission should conclude that the "net of load on a dynamic basis" criteria established by the RS 3808 PPA Decision applies to all self-generating customers of FortisBC, whether direct or indirect. It further argued that a GBL was an alternative to the "net of load on a dynamic basis" criteria, and should be available to both Tolko and Celgar. Alternatively, Celgar submitted that if a GBL was not considered to be an alternative to "net of load on a dynamic basis," available to all self-generating customers of FortisBC, whether direct or indirect, then the Commission should deny Tolko's application (Tolko Application for Reaffirmation of 2 MW GBL, Celgar Submissions, pp. 1-2 and 4). Celgar further noted that from the time Tolko completed construction of its additional generation in May, 2000, which was prior to its application for and receipt of a 2 MW GBL in 2001, until the time of its Application for Reaffirmation of its 2 MW GBL (in March of 2011), Tolko had only used the additional generation to serve its own mill load. Given this history, Celgar questioned whether Tolko's additional generation from 2000 could continue to be characterized as "incremental" (Celgar Submissions, Reaffirmation Proceeding, p. 5).

In its Reply Submission, Tolko emphasized that Order G-113-01 granting its GBL "...was made at a time when the Commission and the Government were aware of the benefits of encouraging incremental generation and the dangers of allowing the export of historic generation serving historic load." It argued that its GBL protected the public at the time it was granted, and continued to do so. Tolko agreed that, if it began exporting the "incremental generation" above its 2 MW GBL that it had been using to serve its site load for the past decade, then it would have to increase its purchases from the City of Kelowna, but argued that result was consistent with the expectation at the time the 2 MW GBL was awarded. Tolko further argued that BC Hydro had in fact benefited from the decade where Tolko served its own load, and, to the extent that BC Hydro did not accept the 2 MW GBL, BC Hydro would, in effect, be expropriating the benefit of Tolko's investment in incremental generation for the purpose of export. (Tolko Reply, Reaffirmation Proceeding, pp. 2-3)

On December 1, 2011, the Commission issued Order G-198-11 with Reasons for Decision in the Reaffirmation Proceeding.⁷ The Commission held that Tolko would continue to be able to sell power generation in excess of its first 2 MW of generation each hour, as outlined in Order G-113-01. In doing so, the Commission concurred with Tolko that it was not a direct customer of FortisBC and therefore found that the Power Purchase Agreement as between BC Hydro and FortisBC at the embedded rates in RS 3808 did not apply to Tolko. It also stated: “[a]s no intervener opposed the historical GBL of 2 MW, the Commission Panel also accepts the historical GBL of 2 MW is sufficient to continue to prevent harm to FortisBC and its customers from arbitrage.” However, the Commission did vary Order G-113-01 to prioritize potential purchasers of Tolko’s excess generation, such that excess generation was to be made available first to the City of Kelowna, for use within its service area, then to FortisBC, for use outside the City of Kelowna but otherwise within its service area, next to others, including BC Hydro and Powerex for export outside the City of Kelowna and FortisBC service areas, and finally to Powerex, brokers or others for export outside the province. (Reaffirmation Decision, p. 2)

2.4 Celgar – a FortisBC Customer

Celgar is a long-standing industrial customer of FortisBC. Celgar has the ability to generate electricity and is therefore referred to as a self-generator. Celgar operates a Northern Bleached Softwood Kraft (NBSK) pulp mill which has two turbine generators with a total rated capacity of 100 MW. It can use its generation to serve its own load, of approximately 44 MW, augmented by purchases from FortisBC. (Exhibit C5-14, Celgar Response to BCUC IR 1.4.1; Exhibit C5-13, Celgar Response to Tolko IR 1.1.4)

Celgar’s current owner, Mercer International Inc., purchased the mill, which had been operating in receivership for a number of years, in 2005. Mercer invested money in the mill to increase its generation capability and reliability with a view to increasing revenues through the sale of its self-generated electricity (Exhibit C5-14, Celgar response to BCUC IR 1.4.1).

2.5 Order G-188-11 Celgar Complaint

On March 25, 2011, Celgar filed a Complaint with the Commission. In its Complaint, Celgar sought, among other things, the Commission’s assistance in establishing a General Service Agreement (GSA) between itself and FortisBC. Celgar’s requested GSA included, among other things, a GBL “of 1.5 MW or such other level as may be established” to delineate its self-supply obligation. It also sought service at a rate based upon rolled-in costs, that would apply at all times, including when it was selling power above its GBL, and which would be applicable to all FortisBC ratepayers.

⁷ *In the Matter of An Application by Tolko Industries Ltd. – Kelowna Division 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; Order G-198-11, December 1, 2011 (Reaffirmation Decision).*

By Order G-188-11 dated November 14, 2011⁸, the Commission dismissed Celgar's Complaint. The Commission held that a GBL was not a necessary component of a GSA and reiterated its earlier determination that it was up to the parties to decide whether to incorporate a GBL into their GSA. It did note, however, the restriction on FortisBC's access to BC Hydro RS 3808 PPA Power, but 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" (Celgar Complaint Decision, p. 28).

The Commission confirmed that: "[t]he conditions regarding FortisBC's access to BC Hydro PPA Power are clear: FortisBC will be unable to buy BC Hydro PPA Power for sale to Celgar when Celgar is exporting power" (emphasis in original). The Commission noted that Celgar had proposed a methodology for ensuring that any additional load served by FortisBC following the establishment of a GBL for Celgar was notionally matched to purchases from other suppliers than BC Hydro. FortisBC reportedly agreed that such a methodology could be implemented provided its access to BC Hydro RS 3808 PPA Power was not jeopardized. The Commission therefore directed "FortisBC to establish a methodology for notionally matching sales to Celgar in service of its load when Celgar is selling power, to FortisBC's supply of energy from its resource stack of non-BC Hydro PPA Power, and submit it...to the Commission for approval." (Celgar Complaint Decision, pp. 31-32; Order G-188-11, Directive 6)

The Commission also considered the concept of a utility's obligation to serve. It referred to the "Access Principles" developed in 1998 to 1999 to encourage the development of competition in the generation market by providing access for "Eligible Customers" to the West Kootenay Power (now FortisBC) transmission system as possibly being relevant to the Utility's duty to provide service at embedded cost rates. The Commission noted a key principle from the 1999 Access Principles Application, approved by Order G-27-99⁹, as being: "For customers who remain with Utility supply, the exit, partial exit or re-entry of Eligible Customers must, at a minimum, make them no worse off than if Eligible Customers had always remained with the Utility." The Commission also noted that FortisBC's obligation to serve included "the obligation to serve at embedded cost rates any new load entering its service territory, any additional load attributable to its existing customers, and returning Eligible Customers, under the Re-entry Provisions." [The Re-entry Provisions provided a time period for the Utility to adjust its supply so as to be in a position to provide service at embedded cost rates.] (Celgar Complaint Decision, pp. 34-35)

The Commission confirmed that: "[t]he mere status of being a customer that self-generates should not preclude FortisBC from its obligation to serve that customer. Nor does it automatically exempt such customers from accessing some amount of non-PPA embedded cost power," concluding that "[i]t would be fair that Celgar receive fair treatment within the FortisBC service area vis-a-vis other industrial customers." It noted, however, that self-generators which sold power into the market did have the potential to negatively impact other FortisBC customers as the Utility would need to purchase additional supply to serve the self-generator. Therefore, the Commission also directed FortisBC, among other things, to consult with all of its customer classes to determine guidelines respecting the level of entitlement of eligible self-generating customers to non-BC Hydro RS 3808 PPA embedded cost power. (Celgar Complaint Decision, p. 38; Order G-188-11, Directive 8)

⁸ *In the Matter of 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*; Decision and Order G-188-11; November 14, 2011 (Celgar Complaint Decision).

⁹ *In the Matter of An Application by West Kootenay Power Ltd. for Approval of Access Principles*; Order G-27-99, March 10, 1999.

2.5.1 Order G-202-12 Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology

Accordingly, on April 13, 2012 FortisBC submitted its Compliance Filing containing a proposed Matching Methodology and Guidelines for establishing a Self-Generator's entitlement to Non-BC Hydro PPA embedded cost power.

The Matching Methodology and Guidelines for establishing the entitlement of a self-generator to non-BC Hydro embedded cost power were approved in principle by Commission Order G-202-12 and accompanying Decision dated December 27, 2012.¹⁰ FortisBC was also directed to file an Application for a Stepped Transmission Rate and Stand-by Rate (Stepped and Stand-by Rate Application) by March 31, 2013 (Order G-202-12, Directive 5). The Stepped and Stand-by Rate Application was filed on March 28, 2013. It seeks, among other things, approval of a "Non-Embedded Cost Power" (NECP) Rider, to recover the incremental cost of purchases of non-BC Hydro PPA power used to provide service to self-generating transmission customers which are selling power not in excess of load.

3 DISCRIMINATION CLAIM

3.1 Basis of Discrimination Claim

As noted earlier, by Order G-111-13 the Commission restricted the scope of Phase 2: "to Celgar's claim of discrimination as it relates to the amount of power that a self-generator can sell while purchasing energy from FortisBC, and whether any restrictions placed on this amount of power are applied in a non-discriminatory manner among FortisBC's self-generating customers, namely Tolko and Celgar."

Celgar submits that service to Tolko based on levels exceeding a GBL, and not exceeding load requirements will be discriminatory to Celgar (Celgar Final Submission, p. 15).

By section 59(2)(b) of the Act: "[a] public utility must not... extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description."

In a nutshell, the issue is whether the GBL which was given to Tolko by the Commission when Tolko was a customer of the City of Kelowna places it on a different footing than Celgar, now that both self-generators are customers of FortisBC. It is common ground that Celgar does not have a GBL in respect of its service with FortisBC.

3.2 The Nature of a GBL

The notion of what constitutes a GBL tends to vary according to the use to which the GBL is being put. A GBL is, in its most basic form, a number. For example, BC Hydro employs both contracted and non-contracted GBLs where a contracted GBL is an agreed-upon number, and a non-contracted GBL is determined by formula.

¹⁰ *In the Matter of A Filing by FortisBC Inc. Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11) Decision and Order G-202-12, December 27, 2012 (Matching Methodology Decision).*

BC Hydro takes the position that a “GBL is simply a baseline amount of electricity generation, which by itself has no value.” However, BC Hydro recognizes that a GBL may have value in the context of a rate, an EPA [Energy Purchase Agreement] or an exemption (Exhibit C6-6, BC Hydro Response to BCUC IR 1.7.3).

In the Panel’s view, in essence, a GBL is the number which represents the amount of load a self-generating customer must serve from its self-generation.

When the Commission reaffirmed Tolko’s GBL, it held that Tolko would continue to be able “to sell power generation in excess of its first 2 MW of generation each hour, as outlined in Order G-113-01.” In doing so, the Commission concurred with Tolko that it was not a direct customer of FortisBC and therefore found that the Power Purchase Agreement as between BC Hydro and FortisBC at the embedded rates in RS 3808, which could otherwise prohibit FortisBC from selling RS 3808 power to a self-generating customer, did not apply to Tolko. (Reaffirmation Decision, p. 2)

Tolko’s current site load is approximately 3.5 MW. Its maximum generation capacity is 8 MW, although due to constraints on the availability of economic fuel, the site generates, on average, 4.4 MW (Exhibit C-1-8, Tolko Evidence, p. 3). Tolko’s 2 MW GBL would arguably therefore allow it to sell 1.5 MW of power which would otherwise be used to service its site load. BC Hydro takes the position that FortisBC would not be able to increase its purchases of RS 3808 PPA power to serve Tolko’s increased load, but would have to supply power from other sources (Exhibit C6-6 BC Hydro Response to BCUC IR 1.8.3).

To date, Tolko has never sought to make use of its GBL, and has only sold energy on a net of load basis (Exhibit C1-8, Evidence of Tolko, p. 3). Tolko is also currently engaged in discussions with BC Hydro to sell power into its Standing Offer Program. Tolko’s GBL for that purpose “will be greater than 2 MW” (Exhibit C1-12, Tolko Response to BCUC IR 1.8).

3.3 BC Hydro RS 3808 PPA with FortisBC

FortisBC submits that the first issue to be determined is whether potential service to Tolko based on a 2 MW GBL would place FortisBC in non-compliance with its RS 3808 PPA with BC Hydro. (FortisBC Final Submissions, p. 2)

As noted earlier, the RS 3808 PPA between BC Hydro and FortisBC was amended by Commission Order G-48-09 in 2009 to include a provision prohibiting FortisBC from selling BC Hydro power to its self-generating customers who were simultaneously selling power, other than “net of load on a dynamic basis.”

Celgar submits that the Commission must decide whether the Tolko GBL satisfies the “net of load on a dynamic basis” criteria established by Order G-48-09 and submits that “a GBL is inconsistent with the net of load criteria.” It therefore takes the position that allowing Tolko to receive service based on levels exceeding a GBL but not exceeding load will be discriminatory to Celgar (Celgar Submission, pp. 13, 15).

FortisBC takes the position that Tolko’s 2 MW GBL would allow FortisBC to serve any load of Tolko in excess of 2 MW, and that there would be no impediment to sourcing that increased supply from BC Hydro under the RS 3808 PPA, as the “GBL is the amount that protects customers from negative consequences of power sales activities” (Exhibit B-26, FortisBC Response to BCUC IR 1.8.1, 1.8.2).

In other words, it is FortisBC's position that Tolko's 2 MW GBL satisfies the "net of load on a dynamic basis" criteria, as it represents an alternate method to prevent arbitrage (Exhibit B-30, FortisBC Response to Celgar IR 1.4.4).

Tolko agrees with FortisBC, arguing that its 2 MW GBL reflects a factual Commission determination regarding the existence of incremental generation above 2 MW and its GBL therefore protects other utility customers from arbitrage (Tolko Final Submissions, p. 6).

BC Hydro does not agree that Tolko's 2 MW GBL, as reaffirmed by Order G-198-11, would allow FortisBC to sell power to Tolko while Tolko is selling power not in excess of its load and remain in compliance with the RS 3808 PPA, either directly or indirectly. BC Hydro takes the position that Order G-198-11 did not direct BC Hydro to further amend the RS 3808 PPA to make an exception for Tolko, but that rather, the Commission noted that Tolko was not a FortisBC customer, such that the RS 3808 PPA did not apply (Exhibit C6-6, BC Hydro Response to BCUC IRs 1.5.1, 1.5.2).

The BC Sustainable Energy Association (BCSEA) argues that the legal effect of Tolko's 2 MW GBL is either beyond the scope of the proceeding, and/or a moot point. BCSEA notes that Tolko has never used the 2 MW GBL and has expressed no plans to do so, such that, in the context of Tolko receiving service from FortisBC, the 2 MW GBL "is an argument, not an entitlement." BCSEA suggests that the Commission need not address the issue until such time as Tolko seeks Commission approval to sell self-generation on the basis of the 2 MW GBL (BCSEA Final Submission, p. 6).

The BC Seniors' and Pensioners' Organization et al. (BCPSO) agrees that the question of whether Tolko is entitled to sell self-generated electricity in excess of its 2 MW GBL while simultaneously purchasing electricity from FortisBC, without placing FortisBC in non-compliance with its RS 3808 PPA with BC Hydro, needs to be resolved before a determination of whether a situation of rate discrimination exists as between Tolko and Celgar can be made. The BCPSO notes that, should the Commission decide that Tolko cannot maintain its 2 MW GBL as a direct customer of FortisBC, there could be no basis for a claim of rate discrimination (BCPSO Final Submission, p. 4).

The BCPSO also notes in part, however, that Tolko is currently only selling power to FortisBC on a net of load basis and will have a GBL which is greater than 2 MW for any sales it may make into BC Hydro's Standing Offer Program. BCPSO further notes that the current PPA as between BC Hydro and FortisBC is due to expire on September 30, 2013. [An Application for approval of a new PPA as between BC Hydro and FortisBC was filed with the Commission on May 24, 2013.] BCPSO is of the view that the rules relating to sales of energy by self-generating customers of FortisBC are likely to change such that, in its submission, the only useful purpose that may be served by this Panel making a determination on the use of Tolko's 2 MW GBL in terms of FortisBC's compliance with the existing RS 3808 PPA is to provide a context for Celgar's claim of rate discrimination (BCPSO Final Submission, pp. 5-7).

Commission Determination

The Commission Panel is of the view that, although the issue of whether FortisBC could supply energy to Tolko while Tolko is simultaneously selling energy not in excess of its load, based on its 2 MW GBL, and remain in compliance with the RS 3808 PPA may have relevance to the Proceeding, given its determinations as set out below, resolution of this issue is not required.

3.4 Tolko's GBL

FortisBC suggests that a further issue which arises is whether providing service to Tolko in accordance with its Commission-approved GBL would result in discrimination, given that Celgar does not have a GBL.

Alternatively, if FortisBC cannot serve Tolko on the basis of its GBL, then it suggests that options available for service to Tolko are:

- (a) To continue to serve Tolko on a net of load basis;
- (b) To serve Tolko based on a matching methodology;
- (c) To serve Tolko while incorporating some purchases by FortisBC of Tolko generation based on its 2 MW GBL.

(FortisBC Final Submissions, pp. 2-3)

Commission Determination

Net of Load vs. GBL

Firstly, in the Panel's view, a GBL which is less than a customer's load, other things equal, is not equivalent to the concept of net of load on a dynamic basis. The concept of net of load on a dynamic basis does not envision sales of energy which could be used to serve load at any time.

It is only when the concept of arbitrage is introduced that the argument concerning the equivalence of the two concepts has any relevance.

The history relating to GBLs outlined above indicates that GBLs came into being as a means to preserve a status quo of self-generation, such that the load which BC Hydro had the duty to serve would not increase as a result of self-generators increasing sales of their energy, rather than using it to serve their own load. If such sales occurred and BC Hydro's other ratepayers were required to pay more than they otherwise would have been required to pay, either because BC Hydro's more lucrative export sales were reduced, or because it was required to find additional supply at increased cost, arbitrage was considered to result.

The concept of preserving the status quo for the utility necessarily includes a temporal aspect. Thus, it has been accepted that incremental generation put in place by a self-generator after the time period relevant to the status quo being preserved would be fully available for export sales. Such incremental generation would not increase the load the utility was required to serve at the particular point in time which was used as the reference point. Hence, arbitrage, as the concept was developed, would not occur, even if some load continued to be consistently served by the utility at the same time the self-generator was selling the incremental energy.

Similarly, increases in load from the expansion of production of a self-generator would be eligible for service from the utility, as incremental load as this would also not affect the status quo.

Competing Interests

GBLs address the potentially competing interests of a utility's obligation to serve and its need to accurately forecast the load it must serve. In the Panel's view, the history relating to GBLs in BC Hydro's service territory is consistent with the existence of these competing interests which the Commission has attempted to recognize and balance over the years. An electric utility needs to be in a position to serve what it forecasts to be its

maximum or peak load at any given time. Planning horizons are necessarily long, particularly where increased generation is required and must be constructed. The capital outlays involved with supplying additional capacity are significant. A variety of methods may be employed by a utility in its attempt to manage peak loads as well as loads generally to match its supply obligations. For example, to the extent that self-generators supply their own loads, the load the utility must serve is reduced by the equivalent amount. Self-generators with “excess” generation, also offer an alternate source of supply for the utility. Hence a utility may enter energy supply agreements and/or load displacement agreements with its self-generating customers. It may also take other measures such as offering interruptible or non-firm service to certain customers, or assisting customers to use less energy to accomplish the same task. It may also use variable pricing to attempt to shift loads from periods of high demand to lower demand. Government policy has supported these measures, many of which are ingrained in legislation.

The Access Principles discussed earlier further highlight the need for a utility to be in a position to predict and manage its load. On the other hand, a utility has an obligation to extend service to customers within its service territory.

Section 28 of the Act states in part:

“28(1) On being requested by an owner or occupier of the premises to do so, a public utility must supply its service to premises that are located within 200 meters of its supply line or any lesser distance that the commission prescribes suitable for that purpose.

...

(3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.”

It was this obligation of BC Hydro to serve its self-generating customers which was modified by Order G-38-01 in 2001, initially on a temporary basis, given the unique circumstances which existed at the time.

Tolko's Situation

In the circumstances of this case, as noted above, by Order G-113-01 the Commission awarded a 2 MW GBL to Tolko (then Riverside). The 2 MW GBL was based on what Riverside presented as incremental generation over what it had generated several years earlier. In essence, the GBL recognized that at one point in time [being the mid to late 1990s] Riverside had generated approximately 2 MW on average to serve its own load.

In the Panel's view, it is of some significance that Order G-113-01 specifically preserves, as a condition of the Order, the Commission's power to reconsider, vary or rescind the Order pursuant to section 99 of the Act. It is also significant that the Commission found “... the exclusion of the first 2 MW of generation each hour from the definition of Incremental Power [i.e. all electric energy generation above that amount each hour] and the relatively constant production level associated with the generators will protect [West Kootenay Power] and its customers from arbitrage **with respect to the initial 2 MW** or other impacts” [emphasis added]. In the Panel's view, the emphasized comments referencing the initial 2 MW of generation as not being subject to arbitrage concerns do not apply to any other generation above the 2 MW baseline. All generation which is beneath a GBL is, by the very concept of a GBL, used to serve own load when required and thus, not available for sale such that, by any definition of arbitrage in use in the regulatory arena, concerns as to arbitrage could not arise for such generation.

In any event, in the Panel's view, the effect of the determination in Order G-113-01 was to recognize that Riverside had, at an earlier time, being in the mid to late 1990s, used 2 MW on average to serve its own load.

When Tolko's GBL was reaffirmed in 2011, the Commission Panel and Tolko itself made specific reference to the fact that Tolko was a customer of Kelowna and not FortisBC, such that the amendment to the RS 3808 PPA which precipitated Tolko's application for reaffirmation would not apply to Tolko. As noted above, the Commission stated in its Reasons for Decision: "[t]he Commission Panel concurs with Tolko that ***it is not a direct customer of FortisBC***. Therefore, the Commission Panel finds that the amended section 2.1 of the 1993 PPA between BC Hydro and FortisBC as well as its Rate Schedule 3808 does [sic] not apply to Tolko. ***As no Intervener opposed the historical GBL of 2 MW, the Commission Panel also accepts the historical GBL of 2 MW*** is sufficient to continue to prevent harm to FortisBC and its customers from arbitrage" (Reaffirmation Decision, p. 2) [emphasis added].

In the Panel's view, the notion of a GBL, representing in its most basic form, the load a self-generator must serve, should be tied to an agreement with the utility.

In this case, as a consequence of FortisBC's purchase of the assets of the City of Kelowna, Tolko is now a direct customer of FortisBC. Although FortisBC has apparently repeatedly indicated that it does not object to the concept of a GBL, it remains a fact that Celgar and FortisBC have been unable to agree on a mutually acceptable GBL (Exhibit B-24, FortisBC Evidentiary Submission, pp. 2-3). Further, Celgar notes FortisBC's submissions in the Celgar Complaint proceeding where FortisBC stated: "[t]he inclusion of a GBL in a contract has no precedent for FortisBC, no other FortisBC customer has a GBL and is not part of FortisBC's policy treatment of self-generators within its service territory" (Celgar Final Submission, p. 24).

The Commission Panel is not inclined to impose the use of a GBL on FortisBC, particularly in circumstances, as here, where the Panel finds that the concepts of net of load and GBL are not equivalent and, also as here, where one self-generating customer (Celgar) does not have a GBL which is less than load and another (Tolko) arguably has one.

In the Panel's view this situation now constitutes one where FortisBC will be extending a form of agreement, a rule or a facility or privilege (being a GBL which is less than load) to one customer (Tolko), which is not regularly and uniformly extended to all persons under substantially similar circumstances and conditions (all self-generating customers) for service of the same description, contrary to section 59(2) of the Act.

The Panel notes Tolko's argument that Celgar and Tolko are not similarly situated and its further position that the potentially different treatment of the two self-generators is justified and explained by their different circumstances. The Panel further notes Tolko's submission that its GBL is based on incremental generation which was built for the purpose of exporting additional energy, consistent with government policy at the time whereas Celgar's generation was constructed to serve site load and it is now attempting to repurpose that generation. Tolko submits that sale of its incremental generation will not shift any [unexpected] costs to other customers and thereby prevents potential arbitrage, whereas Celgar is seeking to shift additional costs onto other customers, creating a situation of potential arbitrage. (Tolko Final Submissions, pp. 5-6 and 13)

Celgar submits that the factual circumstances relating to the investment in generation made by Tolko and Celgar are not as distinguishable as claimed by Tolko. Celgar notes in particular that Tolko's investment decision was made prior to its GBL application and that its GBL is based on incremental generation from several years earlier, which had always been used to meet mill load requirements, and continues to be used for that purpose to this

day. Celgar submits that its circumstances are not dissimilar and that if the Tolko approach were used to determine a GBL for Celgar, Celgar's GBL would be 1.5 MW based on its historical generation in 1993. (Celgar Reply Submission, pp. 9-10)

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.

The Panel finds that, Tolko's argument that its situation is dissimilar to that of Celgar is premised upon its argument respecting incremental generation in the context of the historical concept of arbitrage, which, in the Panel's view, is difficult to justify in current times, and may need to be revisited and/or relaxed, as discussed further below.

It follows that the exemptions from the Act granted to Tolko and to purchasers of power from Tolko by Order G -113-01 and as varied by Order G-198-11, with respect to the 2 MW GBL must be revoked.

As a result, Order G-113-01 is varied as of the date of the Order issued concurrently with this Decision, so as to revoke the exemption from the provisions of the *Utilities Commission Act* other than section 99 (Part 2 was repealed in 2003), provided to Tolko for sales of Incremental Power, defined as "all electricity generation above 2 MW each hour." The corresponding exemption for non-public utility purchasers of that Incremental Power from section 71 of the Act is also revoked. Order G-113-01 is further varied so as to maintain the exemptions from the Act (other than section 99) for Tolko and any non-public utility purchasers (from section 71 of the Act) of Tolko power generated in excess of its load only and to recognize that the City of Kelowna is also no longer a possible purchaser of Tolko power.

As Tolko is currently engaged in discussions with BC Hydro to sell power into BC Hydro's Standing Offer Program, Order G-198-11, which varied Order G-113-01, to establish a priority sequence for potential purchasers of Tolko power, is revoked in its entirety.

Tolko argues that the Commission should be loathe to reverse its earlier determinations awarding Tolko a 2 MW GBL and that revoking Tolko's GBL would be tantamount to expropriating some of the benefits of Tolko's investment. It further argues that: "[c]ustomers make substantial investments based on Commission determinations, and the prospect that decisions may be reversed based on a change in policy, after funds are deployed, will chill investment in BC's sector." (Tolko Final Submissions, p. 10)

The Commission Panel accepts that it should not lightly reverse earlier rulings. However, the Commission is not required to follow its own decisions. Section 75 of the Act provides: "[t]he commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions."

In this case, as noted above, the Panel finds that the ability to sell self-generation on a net of load basis and the ability to sell self-generation pursuant to a GBL are not equivalent in terms of the treatment of a utility's customer. The Panel further finds that Celgar and Tolko, now both self-generating customers of the same utility which are seeking to sell some or all of their self-generation, are in "substantially similar circumstances and conditions." The Panel finds that the most practical solution to this impasse is to revoke Tolko's GBL.

The Panel is influenced by the fact that when Riverside (now Tolko) originally invested in additional self-generation (in 2000), it did so in advance of applying to the Commission for a GBL (in 2001). Thus, the original investment decision predated and was not premised on a Commission determination. Further, the reaffirmation of Tolko's GBL in 2011 was not relied on by Tolko as a basis for increased investment in additional self-generation.

The Panel also notes that Tolko has consistently used its generation to serve all or a portion of its own load and has never attempted to make use of its GBL, selling only on a net of load basis, as market conditions have been such that generation for export has been uneconomic (Exhibit C1-13, Tolko Response to Celgar IRs 1.1.2, 1.1.6). This situation has persisted for well over a decade. Thus, Tolko's investment in additional generation has provided a benefit in that it has allowed Tolko to pursue more economic options for its energy costs. To the extent that a greater benefit has not been realized, this is due to market conditions.

Tolko also takes the position that it does not expect to sell power to other parties on a basis other than net of load in the near future, "given the current price environment." (Tolko Final Submissions, p. 5) This fact supports the Panel's further view that there is no additional existing or immediate potential benefit subject to being expropriated at this time.

The revocation of Tolko's 2 MW GBL is without prejudice to the ability of FortisBC to negotiate agreements which result in similar treatment of all its self-generating customers, whether such treatment be by way of GBLs or any other means to prevent arbitrage in fact, as well as to allow FortisBC to manage its load. In this regard, in the Panel's view, the concept of arbitrage, developed as it was in a period where unique circumstances existed, may need to be revisited and/or relaxed. The Panel notes that there are currently a large number of opportunities for economic development in the Province, many of which involve very large projects, the supply of power to which will undoubtedly raise rates, at least to some extent, for all electricity customers of whatever utility supplies the increased energy. In this context, self-generators would appear to be being treated less favourably than other potential customers.

In this Panel's view, true arbitrage in fact can only occur where a customer purchases more energy than is required to service its load at any moment in time. It is only at that moment when energy purchased will necessarily be used for the purpose of resale and not for the purpose of servicing load. This would be true for any customer, including self-generators.

The Commission Panel also notes, however, the competing concerns relating to a utility's need to supply energy for a predictable load. In this regard, the Panel leaves it open to FortisBC and its self-generating customers to agree on the load FortisBC will serve. In this Panel's view, that load would be somewhere between zero, where the self-generator serves its entire load, up to the amount of the actual load, at any given time.

The Panel considers the revocation of Tolko's 2 MW GBL to be a preliminary measure which is necessary to place Tolko and Celgar on an equal footing, now that they are both customers of FortisBC and it is necessary to set rates. The Panel fully expects that FortisBC will proceed to make efforts to negotiate and implement longer term agreements with its self-generating customers which will serve to balance the interests of FortisBC and its customers.

4 OTHER ISSUES

4.1 Rate Schedule for Tolko

FortisBC is currently billing Tolko on a rate that is equivalent to the City of Kelowna's Rate 223 on an interim basis. FortisBC will also purchase any unscheduled deliveries of energy from Tolko at a rate which is equivalent to FortisBC's Wholesale Rate Schedule 40, on a net of load basis. This treatment is consistent with the treatment Tolko was afforded by the City of Kelowna. (Exhibit B-22)

FortisBC has asked that Tolko be placed on its Rate Schedule 30, effective March 31, 2013, which is the same effective date as that applicable to other former customers of the City of Kelowna (Exhibit B-26, BCUC IR 1.1.1).

Tolko, on the other hand, prefers to be billed under FortisBC's Rate Schedule 30, commencing on the date of the Order confirming its transfer to Rate Schedule 30, "for administrative purposes" (Exhibit C1-12, BCUC IR 1.1.1).

Commission Determination

The Commission Panel is of the view that, absent other more compelling considerations, the transition to a new rate schedule should be as administratively simple for Tolko as possible. **Accordingly, the Panel directs FortisBC to commence serving Tolko under its Rate Schedule 30 as of the date of the Order issued concurrently with these Reasons for Decision.**

4.2 Purchase of Tolko Energy by FortisBC

As noted, FortisBC has indicated that it will purchase unscheduled energy deliveries from Tolko at a rate equivalent to its Wholesale Rate Schedule 40, on a net of load basis, which is consistent with the treatment afforded to Tolko by the City of Kelowna.

Commission Determination

Commission Order G-113-01, which granted Tolko a 2 MW GBL in the first instance, also exempted any purchaser of Tolko generation (above Tolko's GBL), other than a public utility, from filing an energy supply contract, as required by section 71 of the Act. The City of Kelowna, as a municipality, was not a public utility in respect of the services it provided, according to the definition of public utility in section 1 of the Act. FortisBC is a public utility, so the exemption provided by Order G-113-01, as varied by Commission Order G-198-11, would not apply to it.

Section 71(1) states, in part:

“ Subject to subsection (1.1) [which relates to natural gas and is therefore not relevant], a person who ... enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
- (b) provide to the commission any information which it considers necessary to determine whether the contract is in the public interest.”

The Commission Panel therefore directs FortisBC to file copies of any energy supply contract(s) it may make with Tolko for any purchases of Tolko energy. FortisBC may continue to purchase energy from Tolko at a rate equivalent to its Wholesale Rate Schedule 40 on a net of load basis for a period of 90 days from the date of the Order issued concurrently with these Reasons.

4.3 Phase 2 Proceeding Costs

By Directive 8 of Order C-4-13, the Commission directed FortisBC to establish a non-rate base deferral account to capture closing, regulatory process, and legal costs up to a maximum of \$0.50 Million, in accordance with FortisBC's estimate. The Commission further directed that FortisBC was to seek disposition of this deferral account in its 2014 Revenue Requirements Application.

FortisBC has requested that the limit placed on the cost of the Proceeding that can be recovered from ratepayers by Order C-4-13 be lifted, or determined to be inapplicable to Phase 2, in order to allow for recovery of the additional costs associated with the additional Phase 2 process related to rate discrimination that was not contemplated at the time FortisBC made its original estimate.

Commission Determination

The Panel agrees and determines that the non-rate base deferral account established for Phase 1, with a cap of \$0.5 million is inapplicable to Phase 2 regulatory expenses. **The Panel directs FortisBC to establish a similar non-rate base deferral account attracting interest at FortisBC's approved short-term interest rate to capture the regulatory costs of the Phase 2 hearing. The Panel further directs FortisBC to apply for disposition of the Phase 2 deferral account in its 2014-2018 Multi-Year Performance Based Rate-making Revenue Requirements Application.**