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May 8, 2020

Mr. Patrick Wruck
Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Mr. Wruck:

**RE: Project No. 1598969
British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
Electricity Purchase Agreement (EPA) Renewals – Sechelt Creek Hydro,
Brown Lake Hydro, and Walden North Hydro**

BC Hydro writes to provide its reply to intervener submissions further to the BCUC letter dated April 6, 2020 (Exhibit A-22) seeking submissions on whether the Forbearance Agreement¹ should be submitted for filing to the BCUC, pursuant to section 71 of the *Utilities Commission Act (UCA)*, and why.

BC Hydro provided its submission on April 17, 2020 (Exhibit B-23) confirming that the Forbearance Agreement need not be filed with the BCUC under section 71 the *UCA* and reiterating evidence that was provided throughout the proceeding in response to questions related to this matter. BC Hydro's submission is summarized as follows:

“...BC Hydro confirms that no energy is being sold to BC Hydro pursuant to the Forbearance Agreement. All energy being sold to BC Hydro continues to be sold exclusively under the original Walden North Electricity Purchase Agreement dated August 18, 1990.

Further, as BC Hydro has noted, a forbearance agreement is a common, stand-alone commercial arrangement whereby one party agrees to forbear from exercising a right under a contract for a period of time without amending the underlying contract. Therefore, this is also not an amendment to an energy supply contract.

¹ The Forbearance Agreement is provided on a confidential basis in Appendix I of the Application, and discussed in section 6.2 of the Application and related IR responses in the proceeding.

As a result, BC Hydro confirms its submission that the Forbearance Agreement need not be filed with the BCUC under section 71 the UCA.”

BC Hydro also confirms that

- The Forbearance Agreement provides a financial benefit to BC Hydro and its ratepayers,
- BC Hydro does not incur any costs pursuant to the Forbearance Agreement, and
- The costs BC Hydro is incurring pursuant to the Walden North EPA (whether or not the Forbearance Agreement is in effect) are recoverable pursuant to section 4(1)(b) of Direction No. 8 to the BCUC.

Two registered interveners to this proceeding, Commercial Energy Consumers Association of British Columbia (**CEC**) and BC Old Age Pensioners’ Organization *et al* (**BCOAPO**) provided submissions in regards to the BCUC’s question.

CEC’s Position

The CEC advises that it does not oppose BC Hydro’s position.²

BCOAPO’s Position

The BCOAPO agrees that the “Walden North EPA was not formally amended (i.e., formally changed)” by the Forbearance Agreement.³

However, in the BCOAPO’s view the Forbearance Agreement “does change/limit certain rights that BC Hydro had under the original EPA” such that the “original EPA has “effectively” been amended.”⁴

The BCOAPO provided the following summary of its position:⁵

“Overall, it is BCOAPO’s submission that the Forbearance Agreement is effectively an amendment to the original Walden North EPA as it changes and limits certain rights that BC Hydro has under the original agreement. Furthermore, these changes are material as: i) they have a value to BC Hydro and ii) they impact the term of the agreement which is a relevant matter that the Commission considers in determining whether or not to accept an EPA under Section 71.

² Ex. C2-9, CEC Submission dated April 29, 2020.

³ Ex. C1-8, BCOAPO Submission dated May 1, 2020 at p. 3.

⁴ *Ibid.*

⁵ *Ibid.*, at p. 4.

As result, it is BCOAPO’s submission that the Forbearance Agreement should be submitted for filing to the BCUC, pursuant to section 71 of the *UCA*.”

BC Hydro’s reply to the BCOAPO Submission

The BCOAPO’s position is that while the Forbearance Agreement does not “formally change” the original Walden North EPA, it changes and limits certain rights that BC Hydro has under the original EPA.

BC Hydro replies that the Forbearance Agreement does not change any term or condition of the original Walden North EPA. The contract term of the Walden North EPA (which is “evergreen” meaning that the contract continues from year-to-year indefinitely unless terminated by either party after providing six months’ notice) has not been changed nor has the contractual right to terminate the Walden North EPA with notice been changed. The right in the Walden North EPA to terminate the agreement with notice remains exercisable by either party in the party’s discretion.

Pursuant to the separate Forbearance Agreement, BC Hydro did not agree to remove that right from the Walden North EPA nor change it; BC Hydro agreed to forbear from exercising its discretionary right for a period of time in exchange for consideration. This separate time-limited commitment is solely contained within the terms of the Forbearance Agreement. If BC Hydro was to breach this commitment, or if the IPP was not to make a payment to BC Hydro required under the Forbearance Agreement, then these would be breaches under the Forbearance Agreement and not the Walden North EPA. Accordingly, BCOAPO’s submission that as a result of the Forbearance Agreement “BC Hydro no longer has certain rights under the original contract”⁶ is not accurate.

The BCOAPO’s argument that the Forbearance Agreement is subject to section 71 of the *UCA* because the agreement is “effectively” an amendment of the original Walden North EPA, though not a “formal” amendment nor an amendment “from a technical perspective”, is also not consistent with the BCUC’s Rules for Energy Supply Contracts for Electricity (**BCUC’s Rules**) established by Order G-61-12. Section 1.7 of the BCUC’s Rules provides that,

“For the purposes of this filing, an amendment means an alteration or revision, by modification, addition or deletion, to any term or condition of the ESC.”

The Forbearance Agreement does not do any of those things to the Walden North EPA, which is agreed by the BCOAPO and implicitly by the CEC also. The Forbearance Agreement does not change, by modification, addition or deletion, any term or condition

⁶ *Ibid*, at p.3.

of the Walden North EPA. The Forbearance Agreement is, rather, a separate development external to the terms and conditions of the Walden North EPA.

The BCUC's Rules distinguish such developments from energy supply contract amendments. Section 2.1 of the BCUC's Rules provides that,

“...a Contractual Development means any document or action that does not alter or revise, by modification, addition or deletion, any term or condition of the ESC and could include:..

(c) a consent,

...

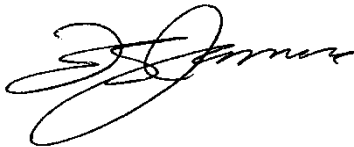
(e) a waiver,”

The Forbearance Agreement is not an amendment of an energy supply contract as defined in the BCUC's Rules; rather, it can reasonably be viewed as a Contractual Development. Forbearance from exercising a discretionary contractual right, without amending the right, is similar in its practical effect to a waiver during the term of the forbearance. Contractual Developments are filed with the BCUC for information purposes, and not pursuant to section 71 of the *UCA*.

In this case, BC Hydro did not report the Forbearance Agreement to the BCUC as a Contractual Development because the Walden North EPA was not filed with the BCUC due to an exemption. Where an EPA is not required to be filed pursuant to section 71 of the *UCA* due to exemption, BC Hydro's practice has been not to include any related developments in its Contractual Development reports to the BCUC.⁷

For further information, please contact Chris Sandve at 604-974-4641 or by email at bchydroregulatorygroup@bchydro.com.

Yours sincerely,



Fred James
Chief Regulatory Officer

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⁷ Ex. B-12, BC Hydro's response to BCUC IR 2.22.3.