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August 6, 2020

Ms. Marija Tresoglavic
Acting Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Tresoglavic:

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
Application for Reconsideration and Variance of British Columbia Utilities
Commission (BCUC) Order No. G-148-20

BC Hydro is writing to the BCUC to submit the attached Application for Reconsideration and Variance of Order No. G-148-20 (the **Application**) in accordance with Part V of the BCUC's Rules of Practice and Procedure and pursuant to section 99 of the *Utilities Commission Act (UCA)*. Section 99 allows for the BCUC to reconsider, vary or rescind a decision or order made by it.

Order G-148-20 (the **Order**) contains four Directives to BC Hydro. BC Hydro is not applying for any reconsideration or variance of Directives 1 and 4. In compliance with Directive 1, on June 25, 2020 BC Hydro filed with the BCUC the subject Forbearance Agreement pursuant to section 71 of the UCA. Directive 4 provides for confidential treatment of commercially sensitive information and continues to be appropriate.

BC Hydro is however requesting the BCUC to reconsider and vary Directive 3 of the Order and may also seek reconsideration of Directive 2, as outlined below and explained more fully in the attached Application.

Directive 2 requires BC Hydro "to file with the BCUC all existing, but unfiled agreements entered after and including October 1, 2001, that are associated with and materially affect existing EPAs" (**EPA Materials**). Given that Directive 2 does not refer to section 71 of the UCA, we understand that the BCUC intended in Directive 2 that the EPA Materials are to be filed with the BCUC for information purposes only to support the BCUC keeping itself informed about the conduct of BC Hydro's business. We

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understand that the BCUC did not intend for the EPA Materials to be filed or reviewed pursuant to section 71. We also understand that the BCUC did not intend for EPA Materials related to EPAs that are exempt from section 71 to be filed or reviewed pursuant to section 71.

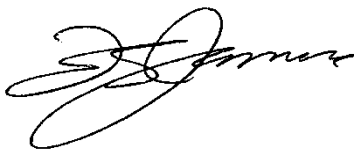
If, however, the BCUC intended that the EPA Materials are to be filed pursuant to section 71 of the UCA, we would request the BCUC to reconsider Directive 2 as set forth in Appendix A to the Application.

BC Hydro is also requesting an extension to the date for providing the EPA Materials. Directive 2 originally required BC Hydro to provide the EPA Materials within 30 days of the date of the Order, which would have been July 10, 2020. BC Hydro filed a request for an extension and the BCUC granted an extension to August 10, 2020 and also invited BC Hydro to file for a further extension, if required, once its Application for Reconsideration had been submitted.

Since the issuance of the Order, BC Hydro has been working to review its EPA-related files to determine the materials that may need to potentially be provided to the Commission pursuant to Directive 2. That work is ongoing, however there are a large number of agreements entered into since October, 2001 that are related to existing EPAs that will require review to assess the applicability of Directive 2. BC Hydro will not be able to complete an assessment of all of its agreements back to October, 2001 before August 10, 2020 and is therefore respectfully requesting that the BCUC grant an extension to 60 days after the date of either its letter clarifying the intent of Directive 2 or the date of its decision on BC Hydro's Application.

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

st/tl

Enclosure

**Sechelt Creek Hydro, Brown Lake Hydro and
Walden North Hydro
Electricity Purchase Agreement Renewals**

**Application for Reconsideration and Variance of
British Columbia Utilities Commission
Order No. G-148-20**

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Appendix A Application for Reconsideration of Directive 2

1 Introduction

1 Order No. G-148-20 dated June 10, 2020 arose indirectly from BC Hydro’s filing of
2 an energy purchase agreement (**EPA**) renewal in relation to the Walden North
3 run-of-river hydroelectric facility. The pertinent background information may be
4 summarized as follows:

- 5 • The original Walden North EPA, entered into in August 1990 (**Walden North**
6 **1990 EPA**), has an evergreen term providing for the contract to continue from
7 year-to-year after its initial 20-year term unless terminated by either party after
8 providing six months’ notice; and
- 9 • Effective April 1, 2014, BC Hydro entered into an agreement (**Forbearance**
10 **Agreement**) with the Walden North IPP under which BC Hydro agreed to
11 forbear from exercising its right to terminate the Walden North 1990 EPA for a
12 period of time in exchange for compensation from the Walden North IPP.

13 In the Order No. G-148-20 Decision the BCUC determined that the Forbearance
14 Agreement has the effect of amending the Walden North 1990 EPA and is therefore
15 an “energy supply contract” as defined in section 68 of the *Utilities Commission Act*
16 (**UCA**). On that basis, the BCUC determined that the Forbearance Agreement
17 should have been filed with the BCUC under section 71 of the *UCA*. Stemming from
18 those and other determinations in the Decision, the BCUC made the following
19 orders:

20 “**NOW THEREFORE** for the Reasons for Decision attached as
21 Appendix A to this order, the BCUC orders as follows:

- 22 1. BC Hydro is directed to file the Forbearance Agreement with
23 the BCUC, pursuant to section 71 of the *UCA*, within 15 days of
24 the date of this order.
- 25 2. BC Hydro is directed to file with the BCUC all existing, but
26 unfiled agreements entered after and including October 1, 2001,

1 that are associated with and materially affect existing EPAs,
2 within 30 days of the date of this order;

3 3. BC Hydro is directed to file with the BCUC future agreements
4 that are associated with and materially affect existing EPAs as
5 separate amending agreements, pursuant to section 71 of the
6 UCA;

7 4. The BCUC will hold confidential the un-redacted version of
8 the Application, including the Forbearance Agreement, due to its
9 commercially sensitive nature.”

10 BC Hydro requests the BCUC to reconsider and vary Directive 3 of Order
11 No. G-148-20. We also request the BCUC to confirm the intended scope of
12 Directive 2. Depending on such clarification of Directive 2, BC Hydro may also
13 request the BCUC to reconsider and vary Directive 2 as discussed further below.

14 For greater certainty, BC Hydro is not seeking reconsideration or variance of
15 Directives 1 and 4 of Order No. G-148-20.

- 16 • With respect to Directive 1, on June 25, 2020 BC Hydro filed the Forbearance
17 Agreement with the BCUC pursuant to section 71 of the *UCA*, and BC Hydro
18 confirms that it is not requesting reconsideration of this directive; and
- 19 • With respect to Directive 4, it remains the case that the un-redacted version of
20 the original Application, including the Forbearance Agreement, contains
21 commercially sensitive information.

22 **2 Directive 1**

23 The BCUC determined that the Forbearance Agreement has the effect of amending
24 the Walden North 1990 EPA in certain respects and on that basis the Forbearance
25 Agreement is subject to the filing requirement pursuant to section 71 of the *UCA*.

26 In compliance with Directive 1, on June 25, 2020 BC Hydro filed the Forbearance
27 Agreement with the BCUC pursuant to section 71 of the *UCA*. At that time, we asked

1 that if the BCUC determines that a public hearing process should be established for
2 reviewing the Forbearance Agreement, the proceeding be placed in abeyance until
3 the BCUC has decided upon the reconsideration application we indicated we would
4 be filing.

5 BC Hydro confirms that it is not seeking reconsideration of Directive 1. Accordingly,
6 we withdraw our request for the BCUC to hold in abeyance its review of the
7 Forbearance Agreement.

8 Additionally, we are reviewing our EPA-related files to identify additional forbearance
9 agreements. BC Hydro will provide such forbearance agreements to the BCUC
10 along with BC Hydro's views as to whether or not the agreement has the effect of
11 materially changing an EPA in some respect as per the determinations in the Order
12 No. G-148-20 Decision such that the agreement should be filed pursuant to
13 section 71 of the *UCA*. BC Hydro will also provide to the BCUC any future
14 forbearance agreements along with BC Hydro's views as to whether section 71
15 applies to the agreement per the determinations in the Order No. G-148-20
16 Decision.

17 **3 Directive 2**

18 Directive 2 directed BC Hydro to file with the BCUC all existing, but unfiled
19 agreements entered after and including October 1, 2001, that are associated with
20 and materially affect existing EPAs (**EPA Materials**).

21 Given that Directive 2 does not specify that the EPA Materials are to be filed
22 pursuant to section 71 of the *UCA*, we understand that the BCUC intended in
23 Directive 2 that the EPA Materials are to be filed with the BCUC for information
24 purposes only to support the BCUC keeping itself informed about the conduct of
25 BC Hydro's business. We understand that the BCUC did not intend for the EPA
26 Materials to be filed or reviewed pursuant to section 71. We also understand that the

1 BCUC did not intend for EPA Materials related to EPAs that are exempt from
2 section 71 to be filed or reviewed pursuant to section 71.

3 We request the BCUC to confirm whether our understanding as set out above aligns
4 to the BCUC's intentions:

- 5 • If our understanding is correct, we will file the EPA Materials for information
6 purposes as soon as reasonably possible; however, we request an extension to
7 the filing date specified by Directive 2, as amended by Order No. G-185-20, to
8 60 days after the date of the BCUC's decision on the reconsideration
9 application or 60 days after the date of its letter clarifying the intended scope of
10 Directive 2. The extension is requested as there are a large number of
11 agreements entered into since October, 2001 that are related to existing EPAs
12 that require review and BC Hydro will not be able to complete that work by
13 August 10, 2020, the date currently set by Order No. G-185-20 for that
14 information to be filed. If our understanding of Directive 2 is correct, we would
15 not seek reconsideration of this directive and the Appendix A to this
16 Reconsideration Application can be discarded; and
- 17 • If the BCUC intended that the EPA Materials are to be filed pursuant to
18 section 71 of the *UCA*, we would request the BCUC to reconsider Directive 2
19 for the reasons referenced and set forth in the attached Appendix A.

20 **4 Directive 3**

21 Directive 3 directed BC Hydro to file with the BCUC future agreements that are
22 associated with and materially affect existing EPAs as separate amending
23 agreements, pursuant to section 71 of the *UCA*.

24 BC Hydro has concerns with Directive 3, including the BCUC's reasoning and the
25 process that resulted in the directive. For the reasons set out below, and in

1 accordance with section 26.04 of the BCUC's Rules of Practice and Procedure¹,
2 BC Hydro requests reconsideration and variance of Directive 3.

3 BC Hydro also notes that this application for reconsideration of Directive 3 does not
4 detract from our commitment, above, to provide to the BCUC any future forbearance
5 agreements along with BC Hydro's views as to whether section 71 applies to the
6 agreement per the determinations in the Order No. G-148-20 Decision.

7 **4.1 Impact and Materiality of Directive 3**

8 BC Hydro interprets Directive 3 as directly or indirectly changing the BCUC's Rules
9 for Energy Supply Contracts for Electricity (the **BCUC's Rules**) as established
10 pursuant to BCUC Order No. G-61-12. The BCUC's Rules provide guidance as to
11 whether a document or action is an amendment of an energy supply contract that is
12 to be filed under section 71 of the *UCA* or a "contractual development" that is to be
13 reported to the BCUC but not filed under section 71, subject to applicable
14 exemptions from section 71.

15 Both parties to an energy supply contract are subject to the section 71 filing
16 requirement.² Therefore, we understand that Directive 3 is not limited in its
17 application to BC Hydro only. Under Directive 3, any person that enters into an
18 agreement that is associated with and materially affects an existing energy supply
19 contract would appear to be required to file the agreement with the BCUC under
20 section 71 or be out of compliance with *UCA*, unless the agreement is a subject of
21 an applicable exemption from section 71.

¹ The BCUC Rules of Practice and Procedure are established pursuant to Order G-15-19.

² Section 71(1) of the *UCA* requires that "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". The term "energy supply contract" is defined in section 68 as "a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act". Section 1.1.3 of the BCUC's Rules confirm that the obligation to file an energy supply contract (ESC) and provide information rests upon each party to the ESC, but for the purposes of these Rules, the Commission considers that the primary obligation to file and provide information rests with the buyer.

1 Accordingly, Directive 3 appears to have changed the BCUC's Rules by withdrawing
2 the existing guidance on amendments versus contractual developments, and
3 replacing it with "agreements that are associated with and materially affect existing
4 EPAs" must be filed as separate amending agreements under section 71.

5 The BCUC's Rules were developed and revised over the years in consultation with
6 utilities and other stakeholders.

- 7 • The BCUC's Rules were last updated in 2012. The preamble of Order
8 No. G-61-12 outlines the process employed at that time to update the Rules:
 - 9 ▶ Due to amendments to the *UCA* in 2008 and the enactment of the *Clean*
10 *Energy Act* in 2010, on July 12, 2011 the BCUC distributed new Draft Rules
11 to all regulated utilities and stakeholders, and invited written comments;
 - 12 ▶ The BCUC received comments from several parties, and circulated two
13 more versions of revised Draft Rules for further comment; and
 - 14 ▶ Following three iterations of Draft Rules and three rounds of stakeholder
15 comments, pursuant to Order No. G-61-12 dated May 17, 2012 the BCUC
16 ordered that the previous Rules are repealed and replaced them with new
17 Rules as attached to the Order; and
- 18 • The previous version of the BCUC's Rules had been in place since 1993.

19 The BCUC's Rules are readily available on the BCUC's website. BC Hydro believes
20 that parties to an agreement or action related to an existing energy supply contract
21 rely on the BCUC's Rules to ascertain their filing requirements. Both parties to
22 energy supply contracts are subject to the filing requirements, and therefore have an
23 interest in the BCUC's Rules and any changes proposed to be made to them.

24 The BCUC's powers in relation to an energy supply contract filed under section 71
25 are to determine whether the contract is in the public interest (in consideration of the

1 criteria set forth in the legislation and regulations applicable at the time) and, if the
2 BCUC determines that the contract is not in the public interest, the BCUC may:

3 (a) By order, declare the contract unenforceable, either wholly or to the extent the
4 commission considers proper, and the contract is then unenforceable to the
5 extent specified, or

6 (b) Make any other order it considers advisable in the circumstances.

7 If an energy supply contract is declared unenforceable either wholly or in part, the
8 BCUC may order that rights accrued before the date of the order be preserved, and
9 those rights may then be enforced as fully as if no proceedings had been taken
10 under section 71.

11 For the above reasons, BC Hydro submits that Directive 3 has a material impact on
12 all persons that enter into an agreement that is associated with an existing energy
13 supply contract and the agreement is not exempt from section 71 of the *UCA*.

14 **4.2 Grounds for Reconsideration of Directive 3**

15 The grounds for reconsideration are that in making Directive 3 of Order
16 No. G-148-20, the BCUC erred in law by:

- 17 1. Finding that the term “amendment” in section 68 of the *UCA* encompasses any
18 agreement that is associated with and materially affects an existing energy
19 supply contract;
- 20 2. Finding that the existing BCUC’s Rules are inconsistent with the legislation and
21 are not effective to the extent of the inconsistency; and
- 22 3. Establishing a criterion (“materially affects” an existing energy supply contract)
23 that is uncertain, and establishing it without following the BCUC’s historical
24 practice of first consulting with utilities and other stakeholders before changing
25 the BCUC’s Rules.

1 **4.2.1 Grounds for Reconsideration #1: Incorrect definition of**
2 **“amendment”**

3 The BCUC found that the term “amendment” in section 68 of the *UCA* encompasses
4 any agreement that is associated with and “materially affects” an existing energy
5 supply contract.

6 BC Hydro submits that the materiality of the affect on an existing contractual
7 relationship, of an action or agreement related to such contract, does not determine
8 whether the action or agreement in law amends the existing contract. The issue is
9 whether the action or agreement alters or revises the existing contract by
10 modification, deletion or addition.

11 The existing definition of “amendment” set forth in section 1.7 of the BCUC’s Rules
12 is as follows:

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

16 The definition in the BCUC’s Rules is wholly consistent with the Merriam-Webster
17 dictionary’s definition of “amend”:

18 “to alter formally by modification, deletion, or addition”³

19 Accordingly, BC Hydro submits it was an error of law to determine that an
20 amendment is an agreement that materially affects an existing, related contract. The
21 definition set forth in section 1.7 of the BCUC’s Rules is correct -- for the purposes of
22 the definition of energy supply contract, an amendment means an alteration or
23 revision, by modification, addition or deletion, to any term or condition of the energy
24 supply contract.

25 BC Hydro submits also that the determination and order to file under section 71 any
26 agreements that are associated with and materially affect existing EPAs exceeds the

³ <https://www.merriam-webster.com/dictionary/amend>.

1 BCUC's jurisdiction in that it would appear to require filing under section 71 of
2 agreements that in law do not amend an energy supply contract and therefore are
3 not an energy supply contract. For example, if a waiver is deemed to materially
4 affect an energy supply contract but does not amend it, Order No. G-148-20 would
5 require the parties to file the waiver under section 71 although in law it is not subject
6 to section 71. The BCUC could direct the waiver be filed for information as part of
7 general reporting and oversight, but in BC Hydro's submission it does not have
8 jurisdiction to order the parties to the waiver to file it pursuant to section 71.

9 BC Hydro understands also that the purpose of section 2.0 of the BCUC's Rules
10 regarding contractual developments is to provide clear guidance as to the BCUC's
11 expectations in relation to filing information about actions and agreements related to
12 energy supply contracts that do not amend the energy supply contract. That is,
13 actions and agreements that do not alter or revise, by modification, addition or
14 deletion, any term or condition of the energy supply contract.

15 On that point, we note that the version of the Rules in effect from 1993 to 2012, prior
16 to the update pursuant to Order No. G-61-12, did not include contractual
17 developments. That prior version of the Rules stated,

18 1.1 Each electricity supply contract and any amendments
19 thereto entered into, shall be filed with the Commission pursuant
20 to Section 71, and its approval obtained.

...

21 1.5 The purchaser is to supply, by April 30 of each year, a report
22 to the Commission providing details of any amendments
23 (expressed or implied) to the terms of the contract.

24 The update to the Rules in 2012 improved for energy supply contract parties the
25 clarity of the BCUC's expectations in relation to filing information about actions and
26 agreements related to energy supply contracts that do not amend the energy supply
27 contract or where there otherwise might be uncertainty about the filing requirement.

1 BC Hydro submits that the BCUC’s Rules provide important and correct guidance as
2 to whether an action or agreement related to an existing energy supply contract in
3 law amends the contract and therefore must be filed pursuant to section 71.

4 **4.2.2 Grounds for Reconsideration #2: No inconsistency between the**
5 **Rules and the Legislation**

6 The BCUC found inconsistency between the BCUC’s Rules and the *UCA* and, as a
7 result, the BCUC appears to have found that the agreements that “materially affect”
8 existing EPAs criterion takes precedence over the BCUC’s Rules, including the
9 contractual developments provisions. However, BC Hydro submits that there is no
10 inconsistency between the two.

11 Firstly, as set out above the existing definition of “amendment” in section 1.7 of the
12 BCUC’s Rules is an accurate definition of “amendment”, and the BCUC’s Rules and
13 the legislation are therefore consistent.

14 Secondly, while the BCUC’s Rules do say that in the event of any inconsistency with
15 the Rules and the legislation, the legislation governs, BC Hydro submits that
16 sentence in the Rules should be read in the context of the preceding sentence which
17 notes that the legislation may change from time to time. We understand that the
18 statement in the BCUC’s Rules about potential inconsistency with the legislation
19 recognizes the possibility that an inconsistency could arise as a result of legislative
20 amendment subsequent to establishing the Rules. In that case, the revised
21 legislation would govern over the outdated Rules. BC Hydro submits that in the
22 present case, the BCUC’s Rules are consistent with the legislation.

23 **4.2.3 Grounds for Reconsideration #3: Uncertain Criterion and**
24 **Procedural Unfairness**

25 BC Hydro submits that Directive 3 is uncertain in relation to the scope of the
26 “materially affects” criterion. As noted above, a waiver could potentially be deemed
27 to materially affect a contractual relationship under an energy supply contract though

1 it does not amend the contract. Further, an agreement that amends an energy
2 supply contract might not materially affect the commercial terms of the contract.
3 There is also uncertainty in relation to the kinds of effects to energy supply contracts
4 that would trigger the section 71 filing requirement under Directive 3.

5 Additionally, Directive 3 appears to have in effect changed the BCUC's Rules
6 without consulting impacted parties and without incorporating the changes into the
7 Rules.

8 The BCUC's Rules were developed and revised in consultation with utilities and
9 other stakeholders, as summarized above. Both buyers and sellers in energy supply
10 contracts are subject to the filing requirements, and therefore have an interest in the
11 BCUC's Rules. BC Hydro submits that the BCUC did not follow its historical practice
12 of first consulting with utilities and other stakeholders before directly or indirectly
13 changing the BCUC's Rules. We submit this was not procedurally fair and is not
14 consistent with the expectations of utilities and other stakeholders.

15 Both of the rule changes (in 2012 as noted above and in 2019 as noted in
16 Appendix A) followed public processes to seek input from utilities and other
17 stakeholders on proposed changes to the rules. Utilities and other stakeholders
18 would reasonably expect that same process to be followed again.

19 **4.3 Remedy Sought**

20 For the reasons set out above, BC Hydro requests the BCUC to rescind Directive 3.

21 Although Directive 3 is to BC Hydro specifically, both buyers and sellers in energy
22 supply contracts are subject to the section 71 filing requirement. BC Hydro cannot
23 be required to file pursuant to section 71 agreements that materially affect EPAs,
24 while other parties to energy supply contracts are required to file amendments.

25 Therefore, we understand that Directive 3 effectively changes the BCUC's Rules for
26 all parties to energy supply contracts.

1 Based on the views expressed in the Order No. G-148-20 Decision, we understand
2 that the BCUC might have concerns about specific aspects of the guidance in the
3 BCUC's Rules in relation generally to contractual developments and agreements
4 related to an energy supply contracts. In the circumstances overall, BC Hydro
5 therefore suggests that the BCUC should rescind Directive 3 and the BCUC might
6 also consider undertaking a review of its Rules. The last review and update to the
7 BCUC's Rules was in 2012.

8 Given that the BCUC's Rules apply to all persons that enter into an energy supply
9 contract, both buyers and sellers, and that other stakeholders also have an interest
10 in the Rules, such a review should be open to comment by all utilities regulated by
11 the BCUC and other stakeholders. Any changes to the Rules should have
12 prospective effect from the date of the BCUC order establishing revised Rules.

**Sechelt Creek Hydro, Brown Lake Hydro and
Walden North Hydro
Electricity Purchase Agreement Renewals**

**Application for Reconsideration and Variance of
British Columbia Utilities Commission Order No. G-
148-20**

Appendix A

Application for Reconsideration of Directive 2

1 If the BCUC confirms that Directive 2 of Order No. G-148-20 is intended to require
2 the EPA Materials to be filed with the BCUC pursuant to section 71 of the *UCA*,
3 BC Hydro would request the BCUC to reconsider and vary Directive 2.

4 If Directive 2 requires the EPA Materials to be filed pursuant to section 71 of the
5 *UCA*, the impact and materiality of Directive 2 would be the same as for Directive 3,
6 as discussed in the body of this filing. The grounds for reconsideration would also be
7 the same as those set out in the body of this filing, except that BC Hydro would
8 submit the following additional grounds for reconsideration of Directive 2.

9 **Additional Grounds for Reconsideration of Directive 2:**
10 **Overlooks Rule against Retroactivity**

11 If Directive 2 directs the EPA Materials to be filed pursuant to section 71 of the *UCA*,
12 this would mean that the “materially affects” criterion for filing pursuant to section 71
13 is established for all parties to energy supply contracts retroactive to
14 October 1, 2001.

15 There is a general presumption that statutorily-authorized policies (which would
16 include the BCUC’s Rules and orders) cannot be made to apply retroactively, unless
17 the statute clearly requires it. As articulated by the Supreme Court of Canada in
18 *Gustavson Drilling (1964) Ltd v Minister of National Revenue*, 1975 CanLII 4 at 279,

19 “...The general rule is that statutes are not to be construed as
20 having retrospective operation unless such a construction is
21 expressly or by necessary implication required by the language
22 of the Act.”

23 Whether a statutorily-authorized policy can be validly applied retroactively is a
24 question of statutory interpretation. For example, in determining whether a regulation
25 could be retroactively applied, the British Columbia Court of Appeal stated in *Aheer*
26 *Transportation Ltd v Office of the British Columbia Container Trucking*
27 *Commissioner*, 2018 BCCA 210 at para 52,

1 “...The only question is whether the enabling legislation
2 authorizes the retroactive elements of the Regulation. If it does,
3 the Regulation is valid and enforceable. If it does not, the
4 Regulation is invalid to the extent of its retroactivity.”

5 The public policy underlying the rule against retroactivity in application of
6 statutorily-authorized policies is that parties are entitled to know what the law is as of
7 the date they are making decisions about their conduct (*Skyline Roofing Ltd v*
8 *Alberta (Workers' Compensation Board Appeals Commission)*, 2001 ABQB 624 at
9 para 62). To overlook the rule against retroactivity undermines the rule of law since
10 parties are unable to possess adequate knowledge of the law and its temporal scope
11 (*Newton v Crouch*, 2016 BCCA 115 at para 54).

12 For the historical agreements that did not amend a related energy supply contract in
13 law, BC Hydro relied on the guidance of the BCUC's Rules when ascertaining its
14 filing requirements. The Rules were lawfully in effect pursuant to a BCUC Order and
15 were consistent with the legislation.

16 Sellers in energy supply contracts would have also reasonably taken guidance from
17 the BCUC's Rules in effect at the time to ascertain their filing requirements in
18 relation to any related agreements.

19 If Directive 2 requires filing pursuant to section 71 of the *UCA*, it would appear that
20 Directive 2 establishes a change to the section 71 filing requirement with retroactive
21 effect. Persons who were in compliance at the time of entering into an agreement
22 could now find themselves retroactively out of compliance as a result of the
23 retroactive application of the materially affects criterion, contrary to the rule of law as
24 articulated in the judicial decisions noted above.

25 Consistent with the rule against retroactivity, the BCUC has previously revised its
26 Rules with prospective effect only. For example:

- 1 • Pursuant to Order No. G-61-12 dated May 25, 2012, the BCUC ordered that the
2 1993 Energy Supply Rules - Electric are repealed and new Rules as attached
3 to the Order are approved and substituted for them effective immediately; and
- 4 • Pursuant to Order No. G-15-19 dated January 22, 2019, the BCUC replaced
5 the Reconsideration Guidelines and adopted amended Rules of Practice and
6 Procedure as attached to the Order effective February 1, 2019.

7 If Directive 2 requires the EPA Materials to be filed pursuant to section 71 of the
8 *UCA*, the remedy sought through reconsideration would be the same as for
9 Directive 3: BC Hydro would request the BCUC to also rescind Directive 2. If the
10 BCUC considers it appropriate to undertake a review of its Rules, such a review
11 should be open to comment by all utilities regulated by the BCUC and other
12 stakeholders, and any changes to the Rules should have prospective effect only.