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October 1, 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: British Columbia Utilities Commission (BCUC or Commission)  
British Columbia Hydro and Power Authority (BC Hydro)  
Electricity Purchase Agreement (EPA) – Sechelt, Brown Lake, Walden  
North Renewals - Reconsideration (Reconsideration Application)**

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BC Hydro writes to provide its submissions regarding the Reconsideration Application in accordance with BCUC Order No. G-239-20. In that Order, the BCUC invited parties to provide submissions on:

- (i) Their position on the Reconsideration Application, including whether Directive 3 of BCUC Order No. G-148-20 should be rescinded, varied or remain the same; and
- (ii) Whether Directive 3 should be varied to direct BC Hydro to file with the BCUC all future agreements that are associated with existing EPAs.

For the reasons below, BC Hydro submits that Directive 3 should be rescinded. BC Hydro further submits that Directive 3 should not be varied to direct BC Hydro to file with the BCUC all future agreements that are associated with existing EPAs, nor should it be varied otherwise.

BC Hydro supports the BCUC Panel's determination<sup>1</sup> that any review of the existing BCUC Rules for Energy Supply Contracts for Electricity (**BCUC's Rules**) will require a stand-alone process to ensure that there is adequate consultation with utilities and other stakeholders.

BC Hydro is committed to being open and transparent in meeting our regulatory requirements. The narrow issue in this Reconsideration is the definition of "amendments" to energy supply contracts, or **ESCs**, that are required to be filed with the BCUC under section 71 of the UCA and the process for changing the BCUC's Rules.

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<sup>1</sup> Order G-239-20, Appendix B, Section 3.

## 1 Background

BC Hydro filed an application on August 6, 2020,<sup>2</sup> for reconsideration of BCUC Order No. G-148-20, particularly Directive 3, which directed BC Hydro "...to file with the BCUC future agreements that are **associated with and materially affect** existing EPAs as separate amending agreements, pursuant to section 71 of the *Utilities Commission Act*<sup>3</sup>." (emphasis added)

BC Hydro also requested in the Reconsideration Application that the BCUC confirm the intended scope of Directive 2 of Order No. G-148-20 and extend the associated filing deadline. Directive 2 directed 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**). BC Hydro requested that the BCUC confirm whether BC Hydro's understanding of Directive 2 was correct, namely that the BCUC did not intend for the EPA Materials to be filed or reviewed pursuant to section 71 of the UCA nor did the BCUC intend for the EPA Materials related to EPAs that are exempt from section 71 to be filed or reviewed pursuant to section 71. In its letter dated August 28, 2020,<sup>4</sup> the BCUC confirmed BC Hydro's understanding of Directive 2 and it extended the associated filing deadline as requested.

Accordingly, in this proceeding, BC Hydro is only seeking reconsideration of Directive 3 of Order No. G-148-20.

## 2 Section 71 of the UCA

Section 71 of Part 5 of the UCA requires a person who enters into an energy supply contract to file a copy of the contract with the BCUC.

Section 71 states that the BCUC may determine whether an energy supply contract is in the public interest. If the contract is not in the public interest, the BCUC has the extraordinary power to:

- (i) By order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
- (ii) Make any other order it considers advisable in the circumstances.

Section 68 of the UCA defines "energy supply contract" as follows:

"...means a contract under which energy is sold by a seller to a public utility or another buyer, **and includes an amendment of that contract,**

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<sup>2</sup> Exhibit B-1.

<sup>3</sup> RSBC 1996, c 473.

<sup>4</sup> Exhibit A-2.

but does not include a contract in respect of which a schedule is approved under section 61 of the Act,” (emphasis added).

A person is only obligated to file a contract with the BCUC under section 71 if the contract is a section 68 energy supply contract or if the agreement in question amends an energy supply contract.

Similarly, the BCUC’s jurisdiction under section 71 to declare an ESC unenforceable or exercise the other remedies under section 71(3) is only invoked if the contract in question is an energy supply contract or if it amends an energy supply contract.

### 3 Energy Supply Contract Rules

To facilitate the BCUC’s review of ESCs under section 71, and to provide guidance to parties to ESCs, the BCUC developed the **BCUC’s Rules** pursuant to the UCA and section 11 of the *Administrative Tribunals Act*. There have been at least two versions of these rules. The current version was issued on May 17, 2012 after considerable engagement with utilities and other stakeholders.

Section 1.7 of the BCUC’s Rules defines “amendment”:

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.

Section 2.0 of the BCUC’s Rules defines “Contractual Developments”. The term Contractual Development does not appear in the UCA. It means “any document or action that does not alter or revise, by modification, addition or deletion, any term or condition of the ESC”. Put another way, Contractual Developments are documents or actions that are *not* amendments. Some examples of Contractual Developments set out in the BCUC’s Rules include assignments, waivers and termination agreements.

Under the BCUC’s Rules, a buyer must file a report every year with the Commission providing details of any Contractual Developments that have occurred pursuant to any ESCs. Section 2.3 states that Contractual Developments are filed for information purposes only and will not be subject to further Commission Orders. This makes sense because Contractual Developments are not amendments to ESCs by definition and section 71 only applies to amendments to ESCs.

The version of the BCUC’s Rules in effect from 1993 to 2012, prior to the update pursuant to Order No. G-61-12, did not include Contractual Developments. That prior version of the Rules stated:

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

...

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

The update to the BCUC's Rules in 2012 clarified for ESC parties the BCUC's expectations in relation to filing information about actions and agreements related to ESCs that do not amend the contract or where there otherwise might be uncertainty about the filing requirement.

BC Hydro submits that the BCUC's Rules provide important guidance as to whether an action or agreement related to an existing energy supply contract amends the contract and consequently must be filed pursuant to section 71; or whether the action or agreement is a "contractual development" that is not filed but is provided for information purposes only.

#### **4 Directive 3 of Order No. G-148-20**

Directive 3 of Order No. G-148-20 states:

BC Hydro is directed to file with the BCUC future agreements that are **associated with and materially affect existing** EPAs as separate amending agreements, pursuant to section 71 of the UCA. (emphasis added).

This phrase – "*associated with and materially affect*" – is new and does not appear in the UCA or the BCUC's Rules. Since the BCUC only has jurisdiction to direct filings under section 71 if the document in question is an amendment to an ESC, we have interpreted the Directive as modifying the definition of "amendment" as set out in section 1.7 of the BCUC's Rules. It also calls into question the definition of Contractual Development in section 2.0 of the BCUC's Rules.

As explained in our Reconsideration Application, we respectfully submit that the BCUC erred in law in three ways:

- (i) Finding that the term "amendment" in section 68 of the UCA encompasses any agreement that is associated with and materially affects an existing energy supply contract;
- (ii) Finding that the existing BCUC's Rules are inconsistent with the legislation and are not effective to the extent of the inconsistency; and
- (iii) Establishing a criterion ("materially affects" an existing energy supply contract) that is uncertain and establishing it without following the BCUC's historical practice of first consulting with utilities and other stakeholders before changing the BCUC's Rules.

BC Hydro relies on its submissions regarding those errors of law in section 4 of its Reconsideration Application,<sup>5</sup> which BC Hydro will repeat here for convenience.

**(i) Definition of “amendment”**

As noted, the definition of “amendment” is very important because the BCUC only has jurisdiction under section 71 of the UCA if the document in question is an amendment to an ESC.

The BCUC found that the term “amendment” in section 68 of the UCA encompasses any agreement that is “associated with” and “materially affects” an existing energy supply contract. This is very broad definition. A waiver, for example, may materially affect an existing ESC but, in the BCUC’s Rules, a waiver is correctly defined as a Contractual Development and not an amendment because it does not alter or revise the ESC by modification, deletion or addition.

We submit that the materiality of the affect on an existing contract does not determine whether the action or agreement amends the existing contract as a matter of law.

As section 1.7 of the BCUC’s Rules states, the issue is whether the document *alters or revises the existing contract by modification, deletion or addition*. The materiality of the impact on an ESC is not relevant.

The definition in the BCUC’s Rules is consistent with the Merriam-Webster dictionary’s definition of “amend”: *“to alter formally by modification, deletion, or addition.”*<sup>6</sup>

BC Hydro submits it was an error of law to determine that an amendment includes an agreement that materially affects an existing ESC. Rather, the definition set forth in section 1.7 of the BCUC’s Rules is correct.

**(ii) No inconsistency between the Rules and the UCA**

The BCUC found inconsistency between the BCUC’s Rules and the UCA and, as a result, the BCUC appears to have found the “materially affect” criterion takes precedence over the BCUC’s Rules, including the Contractual Developments provisions. However, BC Hydro submits that there is no inconsistency between the UCA and the BCUC’s Rules.

First, as set out above the existing definition of “amendment” in section 1.7 of the BCUC’s Rules is correct and the BCUC’s Rules and the legislation are therefore consistent.

<sup>5</sup> Exhibit B-1 at pages 4 to 11.

<sup>6</sup> <https://www.merriam-webster.com/dictionary/amend>.

Second, while the BCUC's Rules do say that in the event of any inconsistency with the Rules and the legislation, the legislation governs, BC Hydro submits that sentence in the Rules should be read in the context of the preceding sentence which notes that the legislation may change from time to time. We understand that the statement in the BCUC's Rules about potential inconsistency with the legislation recognizes the possibility that an inconsistency could arise because of legislative amendment after establishing the BCUC's Rules. In that case, the revised legislation would govern over the outdated BCUC's Rules. BC Hydro submits that in the present case, the BCUC's Rules are consistent with the legislation.

### **(iii) Uncertain Criterion and Procedural Unfairness**

Directive 3 is uncertain in relation to the scope of the "materially affects" criterion. As noted above, a waiver could materially affect an energy supply contract even though it does not alter or revise the contract. Further, an agreement that alters or revises an energy supply contract might not actually materially affect the contract (e.g., a change to a notice provision). There is also uncertainty in relation to the kinds of effects that may require a section 71 filing or what is or is not material.

Additionally, Directive 3 appears to have effectively changed the BCUC's Rules without consulting impacted parties and without expressly incorporating the changes into the Rules.

The BCUC's Rules were developed and revised in consultation with utilities and other stakeholders. Both buyers and sellers under energy supply contracts are subject to the filing requirements, and therefore have an interest in the BCUC's Rules. The BCUC did not follow its historical practice of first consulting with utilities and other stakeholders before changing the BCUC's Rules. We respectfully submit that this was not procedurally fair and is not consistent with the expectations of utilities and other stakeholders.

## **5 Directive 3 of Order No. G-148-20 should be rescinded, not varied**

As a result of the errors of law discussed above, we submit that Directive 3 should be rescinded rather than varied.

The requirements to file energy supply contracts pursuant to section 71 of the UCA and to file annual reports providing details of any amendments to energy supply contracts and of any contractual developments (for information purposes only) are addressed by the BCUC's Rules. BC Hydro files a description of EPA amendments and Contractual Developments for non-exempt EPAs with the BCUC for each fiscal quarter.

Amendments to energy supply contracts are required to be filed with the BCUC for acceptance, whereas copies of Contractual Development documents are filed with the

BCUC for information purposes only (Rule 2.3). The BCUC has jurisdiction to ask for further information from BC Hydro regarding these filings if it has questions.

As we state in our Reconsideration Application, Directive 3 appears to have effectively changed the BCUC's Rules without consulting impacted parties and without expressly modifying the BCUC's Rules. Although Directive 3 pertains to BC Hydro specifically, all buyers and sellers under energy supply contracts are subject to the section 71 filing requirement. If BC Hydro is required to file pursuant to section 71 any agreements that "materially affect" EPAs it follows that all other buyers and sellers would be subject to the same requirement since the BCUC's Rules are applicable to everyone.

If the BCUC considers that the existing BCUC's Rules may generally be inadequate in relation to contractual developments and agreements related to energy supply contracts, a stand-alone process for a review of the BCUC's Rules should be commenced with the participation of other utilities and stakeholders. We note that the BCUC Panel has also determined that any review of the BCUC's Rules should be by way of a process separate from this Reconsideration process. BC Hydro agrees.

## **6 Directive 3 should not be varied**

BC Hydro submits that the potential variation of Directive 3 suggested in Order G-239-20 would also effectively change the BCUC's Rules for the same reasons summarized above and as discussed in the Reconsideration Application. In fact, any potential variation of Directive 3 would effectively change the BCUC's Rules because it would either change the meaning of "amendments" (as compared to contractual developments) as currently described in the BCUC's Rules and/or expand the scope of contractual developments to be reported, both of which are matters directly covered by the BCUC's Rules. Any changes to the BCUC's Rules should be reviewed with the participation of other utilities and stakeholders in a stand-alone review and not as part of this Reconsideration.

Further, with respect to the potential variation of Directive 3 suggested in Order G-239-20, which would specifically direct "BC Hydro to file with the BCUC all future agreements that are associated with existing EPAs" (but exclude the concept of "materially affects"), the concern remains that it is not clear what is meant by the words "associated with". Interpreted broadly, there are numerous agreements that may be "associated with" an EPA, such as interconnection agreements, meter lease agreements, e-meter access agreements, non-disclosure agreements, lender consent agreements, etc. These agreements may be "associated with" an EPA, but generally do not occur pursuant to the terms of the EPA. They are not amendments to EPAs and may not even be a contractual development to an EPA, but would be "associated with" an EPA. Thus, such a change would significantly expand the scope of agreements to be reported upon and would involve additional disclosure of information commercially sensitive to third parties, as well as to BC Hydro.

Again, any consideration of expanding general reporting requirements to include such additional agreements is an issue that should be considered in a separate proceeding with the participation of other utilities and stakeholders.

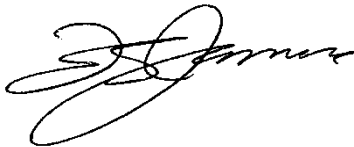
## 7 Conclusion

As discussed above and in its Reconsideration Application, BC Hydro submits that Directive 3 of BCUC Order No. G-148-20 should be rescinded, because the BCUC made errors in law in ordering it.

BC Hydro further submits that Directive 3 should not be varied, either as suggested in Order G-239-20 or otherwise. Any variation of Directive 3 will in effect change the BCUC's Rules and BC Hydro supports the Panel's determination that if such changes may be required, they should only be made after the BCUC's Rules are reviewed in a stand-alone process with the participation of other utilities and stakeholders.

For further information, please contact Chris Sandve at 604-974-4641 or by email at [bchydroregulatorygroup@bchydro.com](mailto:bchydroregulatorygroup@bchydro.com).

Yours sincerely,



Fred James  
Chief Regulatory Officer

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