

Fred James

Chief Regulatory Officer

Phone: 604-623-3918

Fax: 604-623-4407

bchydroregulatorygroup@bchydro.com

March 24, 2021

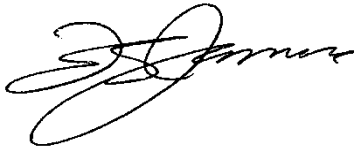
Mr. Patrick Wruck
Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Mr. Wruck:

**RE: British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
Walden North Hydro Forbearance Agreement
Final Argument**

BC Hydro writes to provide its Final Argument in accordance with the regulatory timetable established by Commission Order No.G-48-21.

Yours sincerely,



Fred James
Chief Regulatory Officer

df/tl

Enclosure

Walden North Hydro Forbearance Agreement

Counsel's Final Written Submission
on behalf of
British Columbia Hydro and Power Authority

March 24, 2021

Table of Contents

1	Introduction	1
1.1	Filing of the Forbearance Agreement.....	1
1.2	Context for entering into the Forbearance Agreement	2
2	Applicable Law	6
3	Application of Applicable Law to the Forbearance Agreement	8
4	Conclusion	10

1 Introduction

1.1 Filing of the Forbearance Agreement

1. Effective as of April 1, 2014, BC Hydro entered into an agreement (the **Forbearance Agreement**) with the owner of the Walden North run-of-river hydroelectric project located on Cayoosh Creek about 5 kilometers west of Lillooet, British Columbia (**Walden North Project**). At that time, ESI Power-Walden Corporation Ltd. (**ESI**) was the owner of the Walden North Project.
2. In February 2016, the Walden North Project was acquired by Cayoose Creek Power Limited Partnership (**CCPLP**), and the Forbearance Agreement was assigned to CCPLP at that time. CCPLP is comprised of Cayoose Creek Development Corporation (49%) and Innergex Renewable Energy Inc. (51%).¹ The Sekw'el'was Cayoose Creek Indian Band (**Cayoose Creek Indian Band**) is the sole beneficial shareholder of Cayoose Creek Development Corporation. Cayoose Creek Indian Band is part of the St'at'imc Nation.
3. At the time of entering into the Forbearance Agreement there was (and continues to be presently) an electricity purchase agreement in effect between BC Hydro and the owner of the Walden North Project (**Walden North 1990 EPA**).
4. The Walden North 1990 EPA has an initial 20-year term and an evergreen provision providing that the contract continues from year-to-year unless terminated by either party after providing six months' notice. Pursuant to the Forbearance Agreement, BC Hydro agrees to forbear from exercising its

¹ A copy of the partnership agreement has not been provided to BC Hydro. The Walden North IPP has provided this limited information about the partnership.

termination rights under the evergreen Walden North 1990 EPA in consideration for a forbearance payment from the IPP.

5. For reasons disclosed and reviewed in previous proceedings, at the time of entering into the Forbearance Agreement BC Hydro was of the view that the Forbearance Agreement is not an amendment of the Walden North 1990 EPA and not subject to section 71 of the *Utilities Commission Act (UCA)*.
6. Pursuant to the BCUC's Order G-148-20 Decision dated June 10, 2020, the BCUC determined that the Forbearance Agreement is an amendment of the Walden North 1990 EPA, and on that basis directed BC Hydro to file the Forbearance Agreement pursuant to section 71 of the *UCA*.²
7. On June 25, 2020, BC Hydro filed a copy of the Forbearance Agreement with the BCUC pursuant to section 71 of the *UCA* in compliance with the applicable directive of Order G-148-20.
8. For clarity, for the reasons outlined above, the Forbearance Agreement was filed with the BCUC pursuant to section 71 of the *UCA* approximately six years after it became effective.

1.2 Context for entering into the Forbearance Agreement

9. The Walden North 1990 EPA was awarded in August 1990 under BC Hydro's 1989 Request for Proposals process. There were existing hydroelectric facilities at the Walden North site. For the Walden North 1990 EPA those facilities were

² BC Hydro applied to the BCUC for reconsideration and variance in relation to Order G-148-20. BC Hydro did not seek reconsideration of the BCUC's determinations that (i) the Forbearance Agreement is an amendment of the Walden North 1990 EPA, and (ii) the Forbearance Agreement is therefore an "energy supply contract" subject to section 71 of the *UCA* filing requirements. A substantial number of the IRs submitted to BC Hydro in this proceeding sought (i) further views of BC Hydro in connection to issues in the Order G-148-20 proceeding and/or in the reconsideration proceeding (e.g., BCUC IR 1.1.1; BCOAPO IRs 1.1.1 to 1.1.2.1; BCSEA IRs 1.1.1, 1.4.1, 1.4.3; CEC IRs 1.1.1 to 1.2.1.1), and (ii) information related to consequences of the BCUC's Order G-278-19 Decision not to accept the Walden North EPA Renewal (e.g., BCUC IRs 1.7.1, 1.7.2, BCUC Series 1.12, 1.13, 1.14, 1.15 IRs). Such matters are not at issue in this proceeding regarding the filing of the Forbearance Agreement pursuant to section 71, and will not be addressed in this final argument.

renewed and upgraded, and the Walden North Project achieved commercial operation in June 1993.

10. The Walden North Project is located near the confluence of Cayoosh Creek and the Seton River which is just downstream of BC Hydro's Seton Dam.
11. The Walden North Project has five generating units with total installed capacity of 16 MW producing an average of 33.8 GWh per year.³ The Walden North Project provides support to nearby BC Hydro facilities in relation to generation and water flow. BC Hydro's Seton Dam was completed in 1956 and is the final dam of the Bridge River hydroelectric system. As part of the Seton Dam project, BC Hydro built a tunnel (**Cayoosh Diversion Tunnel**) to divert water from Cayoosh Creek to Seton Lake for BC Hydro generation purposes at Seton Generating Station (**Seton GS**). It is also BC Hydro's understanding that diverting Cayoosh Creek flows into Seton Lake supports salmon migration to spawning areas in the Bridge River system, via Seton River and Seton Lake, during the sockeye salmon migration period.
12. Maps and satellite imagery of the Walden North Project and nearby BC Hydro facilities have been provided in the previous related BCUC proceedings. A map is also provided in this proceeding in Ex. B-5, the response to CEC IR 1.4.1.
13. The Walden North tailrace, owned by the IPP, is designed to channel flows from the Walden North powerhouse directly to BC Hydro's Cayoosh Diversion Tunnel, with flows in excess of 1400 cubic feet per second diverted by a culvert back to Cayoosh Creek. A Diversion Agreement dated November 14, 1990 (the **Diversion Agreement**) sets out the rights and obligations of BC Hydro and the Walden North IPP with respect to the design, construction, operation and maintenance of a permanent "Walden North Diversion" enabling the diversion of Cayoosh Creek water into the Cayoosh Diversion Tunnel to Seton Lake and

³ There is a sixth generating unit at the Walden North Project, which BC Hydro understands has been decommissioned.

replacing the prior use of temporary structures before the Walden North Project was renewed and upgraded in the early 1990's.⁴ Pursuant to the Diversion Agreement, the Walden North IPP maintains and operates the permanent works that are used to divert water from the Walden North tailrace into BC Hydro's Cayoosh Diversion Tunnel and the culverts that return excess water to Cayoosh Creek and a fish spawning area. The Diversion Agreement provides the following benefits to BC Hydro:

- ▶ About 24.4 GWh per year of additional heritage generation from the water diverted by the Cayoosh Diversion Tunnel into Seton Lake, approximately 91 per cent of which is outside the freshet season; and
- ▶ Diversion of Cayoosh Creek water facilitates maintenance of the dilution ratio of Seton River water to Cayoosh Creek water below the Cayoosh confluence which is critical for salmon migration to spawning areas in the Bridge River system, via Seton River and Seton Lake. In 2001, the Department of Fisheries and Ocean provided guidance for BC Hydro and the Walden North IPP on the minimum discharges for Seton River and the prescribed Cayoosh Creek flows in order to support the dilution ratio of Cayoosh Creek to Seton Creek water below the Cayoosh confluence. This guidance was provided to facilitate salmon migration to spawning areas in the Bridge River system during the salmon migration period. In 2017, BC Hydro commissioned a study to assess the impact of the dilution ratio on salmon migration, and it was confirmed that maintaining the dilution ratio facilitates salmon migration during spawning.⁵

⁴ Ex. B-3, the response to BCUC IR 1.15.1.

⁵ Ex. B-7, the response to BCOAPO IR 2.5.1.

-
14. The contract term of the Diversion Agreement is tied to the term of the Walden North 1990 EPA such that if the EPA terminates the Diversion Agreement also terminates.⁶
 15. In anticipation of the expiry of the initial 20-year term of the Walden North 1990 EPA (at which time the EPA would become evergreen subject to either party terminating the agreement after providing six months' notice), BC Hydro and ESI began discussions in 2012 to explore the potential for an EPA renewal. At the time, a 10-year EPA extension was being proposed by ESI. With respect to the EPA renewal, BC Hydro was unable to reach an agreement with ESI because the upper limit of pricing BC Hydro was able to offer for a 10-year extension was not, as indicated by ESI, adequate to recover its costs at that time.
 16. BC Hydro wanted to maintain the incremental generation and environmental benefits it receives as a result of the Diversion Agreement, and without the Walden North 1990 EPA the Diversion Agreement would terminate. BC Hydro also wanted to reduce its cost related to the EPA. Parallel to these EPA renewal discussions, BC Hydro and FortisBC Energy Inc. (an affiliate of ESI)⁷ were engaged in confidential negotiations in relation to a suite of agreements, including the gas arrangements in relation to the Burrard Generating Station.

⁶ Certain of the IRs submitted in this proceeding appear to be based on an assumption that the Forbearance Agreement is needed to continue the existing Diversion Agreement or that a new diversion agreement could be reasonably negotiated completely separate from an EPA. For clarity, the contract term of the Diversion Agreement is tied to the term of the Walden North 1990 EPA such that if the EPA terminates, the Diversion Agreement also terminates. Under the Forbearance Agreement, the parties agreed to forbear for a period of time from exercising their respective rights to terminate the Walden North 1990 EPA. Ex. B-5, the response to BCSEA IRs 1.3.2, 1.3.2.1. It may be possible to negotiate a diversion agreement in the absence of an EPA, but any diversion agreement with the Walden North IPP needs to take into consideration the operation of the Walden North Project because the facility's tailrace channels flows from the Walden North powerhouse directly to BC Hydro's Cayoosh Diversion Tunnel. The feasibility of a separate diversion agreement in the absence of an EPA has not been explored with CCPLP. Ex. B-5, the response to CEC IRs 1.5.2, 1.5.2.1.

⁷ In 1994, West Kootenay Power Ltd. (now FortisBC Inc.) acquired all of the shares of ESI Power-Walden Corporation Ltd.

The gas-related issues were resolved by Order in Council 749 issued in December 2014.

17. Around this same time period, BC Hydro also wished to resolve the outstanding Walden North 1990 EPA and Diversion Agreement issues, and therefore entered into the Forbearance Agreement with an effective date of April 1, 2014.⁸
18. The Walden North 1990 EPA and the Diversion Agreement remained (and continue to remain) in effect providing the above-noted benefits.
19. Under the Forbearance Agreement, BC Hydro agrees to forbear from exercising its termination rights under the evergreen Walden North 1990 EPA for a specified period of time in consideration for forbearance payments made by the Walden North IPP to BC Hydro. For administrative convenience, BC Hydro agreed that the forbearance payment would simply be set-off against the EPA payments. The terms of the Forbearance Agreement do not directly or indirectly in any way change the quantity or form of energy supplied under the 1990 Walden North EPA, nor do they change the Diversion Agreement in any way.

2 Applicable Law

20. The Walden North 1990 EPA is a separate, underlying agreement which is not at issue in this proceeding. The 1990 Walden North EPA is exempt from the *UCA* section 71 filing requirement pursuant to Minister's Order M-22-9801-A1. Section 4(1)(b) of Direction No. 8 to the BCUC provides that in setting rates for BC Hydro, the BCUC must not disallow for any reason the recovery in rates of the costs incurred by BC Hydro with respect to energy supply contracts entered into before April 1, 2016, which includes the Walden North 1990 EPA.

⁸ The circumstances of entering into the Forbearance Agreement are elaborated in Ex. B-3, the response to BCUC IR 1.1.3.

Therefore, the Walden North 1990 EPA is not subject to section 71 of the *UCA*, and the costs that BC Hydro incurs pursuant to the Walden North 1990 EPA must be recovered in rates pursuant to Direction No. 8.⁹

21. The BCUC determined that the Forbearance Agreement is an amendment of the Walden North 1990 EPA, and therefore the Forbearance Agreement is an “energy supply contract” within the meaning of that term defined in section 68 of the *UCA*.¹⁰ In compliance, BC Hydro has filed the Forbearance Agreement as an “energy supply contract” pursuant to section 71 of the *UCA*.
22. What is at issue in this proceeding, therefore, is the Forbearance Agreement itself which the BCUC determined is an “energy supply contract” within the meaning of section 68 of the *UCA*.¹¹ The amendment itself (in this case the Forbearance Agreement as determined by the BCUC) is the energy supply contract that is to be and has been filed pursuant to section 71.¹²
23. Section 71(2) of the *UCA* provides that the BCUC may, after a hearing, determine whether or not a filed energy supply contract is in the public interest. Section 71(2.21) of the *UCA* describes the factors and criteria that the BCUC is to consider when assessing whether or not an energy supply contract filed by BC Hydro, in this case the Forbearance Agreement, is in the public interest. The BCUC is to consider:
 - ▶ The interests of both current and future BC Hydro customers;

⁹ Ex. B-1, page 5; Ex. B-3, the response to BCUC IR 1.1.5.

¹⁰ Section 68 of the *UCA* provides the following definition – “energy supply contract” 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, but does not include a contract in respect of which a schedule is approved under section 61 of this Act [underlining added].

¹¹ Ex. B-3, the response to BCUC IR 1.1.2.

¹² In Ex. B-3, the response to BCUC IR 1.2.1, BC Hydro also provided references to three recent examples of other proceedings where the BCUC reviewed amendments of EPAs pursuant to section 71 on a stand-alone basis separate from the underlying EPAs.

-
- ▶ British Columbia's energy objectives as set out in section 2 of the *Clean Energy Act (CEA)*;
 - ▶ The most recent Integrated Resource Plan (**IRP**);
 - ▶ The quantity, availability and price of the energy to be supplied under the contract; and
 - ▶ The quantity, availability and price of any other form of energy that could be used instead of the energy to be supplied under the contract.
24. As is evident from the considerations required under the *UCA* as reproduced in the paragraph above, the BCUC's focus overall is to be on whether energy procured under the subject energy supply contract is cost effective in the context of the drivers and policies of British Columbia's energy objectives and the most recent IRP.

3 Application of Applicable Law to the Forbearance Agreement

25. The factors and criteria prescribed under section 71(2.21), as reviewed above, are a good fit for evaluation of an amendment of an EPA where the amendment provides for the supply of an additional quantity of energy and/or a change in the form of energy to be supplied relative to the underlying EPA, for example. However, the prescribed factors and criteria overall do not contemplate evaluation of an amendment that does not directly or indirectly change the quantity, availability, form or environmental attributes of energy supplied pursuant to the underlying EPA, as is the case with the Forbearance Agreement.
26. The Forbearance Agreement does not directly or indirectly increase or otherwise change the quantity or form of energy supplied to BC Hydro.¹³

¹³ Ex. B-1, page 6; Ex. B-5, the response to BCOAPO IR 1.4.2.

Pursuant to the Forbearance Agreement, the parties agree to forbear for a specified period of time from exercising their respective rights to terminate the Walden North 1990 EPA. The BCUC determined that that is an amendment of the Walden North 1990 EPA; however, the EPA remains otherwise unchanged.

27. Coordinated operation of the Cayoosh Diversion Tunnel benefits BC Hydro and is critical for salmon migration to spawning areas in the Bridge River system. The Diversion Agreement provides for such coordination in the context of the ongoing operating regime of the Walden North Project. The contract term of the Diversion Agreement is tied to the term of the Walden North 1990 EPA such that if the EPA terminates, the Diversion Agreement also terminates.
28. Certain of the IRs submitted to BC Hydro in this proceeding posit the Forbearance Agreement as an amendment (extension) of the term of the Walden North 1990 EPA and/or an amendment (extension) of the term of the Diversion Agreement. The Forbearance Agreement does not extend the term of the EPA nor of the Diversion Agreement. The Walden North 1990 EPA has an evergreen provision providing that the contract continues from year-to-year unless terminated by either party after providing six months' notice. The Walden North 1990 EPA did not terminate in 2014, and it remains in effect at this time pursuant to its terms and specifically the evergreen provision. The Walden North 1990 EPA does not terminate in the absence of the Forbearance Agreement. The Diversion Agreement does not terminate in the absence of the Forbearance Agreement; it terminates in the absence of the EPA.
29. In 2014, BC Hydro was not obligated to exercise its termination rights under the Walden North 1990 EPA, and the agreement to forbear from exercising these rights cannot be implied to mean that BC Hydro would have terminated the EPA absent the Forbearance Agreement.¹⁴ The Diversion Agreement is critical as

¹⁴ Ex. B-3, the response to BCUC IR 1.5.2; Ex. B-5, the response to BCSEA IR 1.3.1.

described above and continues so long as the Walden North 1990 EPA remains in effect. BC Hydro therefore presently has no plans to issue a termination notice for the Walden North 1990 EPA.¹⁵

30. In BC Hydro's view, therefore, of the factors and criteria to be considered under section 71(2.21) of the *UCA*, the only ones that could be viewed as applicable to consideration of the Forbearance Agreement are:¹⁶

- ▶ The interests of both current and future BC Hydro customers - BC Hydro believes that the Forbearance Agreement is in the interests of both current and future BC Hydro customers because BC Hydro does not incur any costs under the Forbearance Agreement, and the agreement reduces the total costs otherwise payable to CCPLP by BC Hydro and its ratepayers by way of an offset against amounts invoiced to BC Hydro under the Walden North 1990 EPA;¹⁷ and
- ▶ British Columbia's energy objective (f), "to ensure the authority's rates remain among the most competitive of rates charged by public utilities in North America" - BC Hydro believes that the Forbearance Agreement supports this energy objective for the same reasons as the point above.

4 Conclusion

31. In the absence of the Forbearance Agreement, the Walden North 1990 EPA would continue in full force and, in accordance with Direction No. 8, BC Hydro would continue to recover its costs of the EPA in rates, however without the benefit of an offsetting forbearance payment.

¹⁵ Ex. B-3, the response to BCUC IR 1.11.2.

¹⁶ This view was elaborated in Ex. B-3, the response to BCUC IR 1.2.4.

¹⁷ Appendix A of the Forbearance Agreement, and Ex. B-3, the response to BCUC IR 1.10.1.1 describe the forbearance payment calculation. Ex. B-3, the response to BCUC IR 1.11.1 describes the total payments BC Hydro has received under the Forbearance Agreement to January 1, 2021. Ex. B-5, the response to CEC IR 1.5.3 confirms that the net effect of the Forbearance Agreement is that BC Hydro outlays less money overall for the energy it receives than it did without the Forbearance Agreement.

32. The net effect of the Forbearance Agreement is that BC Hydro outlays less money overall for the same energy than it would without the Forbearance Agreement. Against the *UCA* section 71(2.21) factors and criteria that the BCUC is to consider, the Forbearance Agreement is in the interests of both current and future BC Hydro customers because BC Hydro does not incur any costs under the Forbearance Agreement, and the agreement reduces the total costs otherwise payable by BC Hydro and its ratepayers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED MARCH 24, 2021

Per: *Ian Webb*

Ian D. Webb, Counsel for British Columbia Hydro and Power Authority