



ORDER NUMBER
G-148-20

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

British Columbia Hydro and Power Authority
Application for Electricity Purchase Agreement Renewals for
Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro
Walden North Forbearance Agreement

BEFORE:

D. M. Morton, Panel Chair
B. A. Magnan, Commissioner
R. I. Mason, Commissioner

on June 10, 2020

ORDER

WHEREAS:

- A. On May 31, 2018, British Columbia Hydro and Power Authority (BC Hydro) filed with the British Columbia Utilities Commission (BCUC) an application, pursuant to section 71 of the *Utilities Commission Act* (UCA), to accept for filing the following Electricity Purchase Agreements (EPA) (collectively, the Application):
1. An EPA effective March 1, 2018 between BC Hydro and MPT Hydro LP for the Sechelt Creek run-of-river hydroelectric project for a term of 40 years (Sechelt Creek EPA Renewal);
 2. An EPA effective April 1, 2018 between BC Hydro and Brown Miller Power Limited Partnership for the Brown Lake Storage hydroelectric project for a term of 40 years (Brown Lake EPA Renewal); and
 3. An EPA effective April 1, 2018 between BC Hydro and Cayoose Creek Power Limited Partnership for the Walden North run-of-river hydroelectric project for a term of 40 years (Walden North EPA Renewal);
- B. By Order G-61-12, dated May 17, 2012, the BCUC approved the Rules for Energy Supply Contracts for Electricity (Rules). Appendix A of Order G-61-12 contains the Rules, which are intended to facilitate the BCUC's review of energy supply contracts for electricity, pursuant to section 71 of the UCA;
- C. In August 1990, BC Hydro entered into a 20-year EPA to purchase energy from the Walden North run-of-river hydroelectric project (Original EPA). The Original EPA also contained a provision allowing the contract to continue from year-to-year unless terminated by either party after providing six months' notice;

- D. Effective April 1, 2014, BC Hydro entered into an agreement to forbear from exercising its right to terminate the Original EPA for a period of time (Forbearance Agreement). Both the Original EPA and Forbearance Agreement will continue in accordance with their respective terms unless the Walden North EPA Renewal is accepted;
- E. By Order G-153-18, dated August 16, 2018, the BCUC established the initial regulatory timetable to review the Application. The regulatory timetable was further amended by Orders G-168-18, G-200-18, G-91-19, G-154-19 and G-174-19;
- F. On February 21, 2020, BC Hydro issued a notice of termination for the Walden North EPA Renewal, effective March 22, 2020. A subsequent letter from the BCUC dated April 6, 2020, requested submissions from all parties to the proceeding on whether the Forbearance Agreement should be submitted for filing to the BCUC, pursuant to section 71 of the UCA; and
- G. The BCUC has considered the Application, evidence, and submissions from all parties filed in the proceeding, and considers that the Forbearance Agreement should be filed with the BCUC, pursuant to section 71 of the UCA.

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

1. BC Hydro is directed to file the Forbearance Agreement with the BCUC, pursuant to section 71 of the UCA, within 15 days of the date of this order.
2. BC Hydro is directed 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, within 30 days of the date of this order;
3. 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;
4. The BCUC will hold confidential the un-redacted version of the Application, including the Forbearance Agreement, due to its commercially sensitive nature.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of June 2020.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

British Columbia Hydro and Power Authority
Application for Electricity Purchase Agreement Renewals for
Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro
Walden North Forbearance Agreement

REASONS FOR DECISION

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1.0 Background and Context

1.1 Application for Electricity Purchase Agreement Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro

On May 31, 2018, British Columbia Hydro and Power Authority (BC Hydro) submitted an application (Application) to the British Columbia Utilities Commission (BCUC) to accept for filing three electricity purchase agreements (EPAs) each with 40-year terms (EPA Renewals), pursuant to section 71 of the *Utilities Commission Act* (UCA) – one of these EPA Renewals was effective April 1, 2018 between BC Hydro and Cayoose Creek Power Limited Partnership for the Walden North project (Walden North EPA Renewal).

In the Reasons for Decision attached as Appendix A to Order G-278-19, the Panel acknowledged that while the benefits provided by each of the EPA renewals to their respective local and Indigenous communities included potential impacts on local employment, environmental impacts and salmon migration, the 40-year term associated with each of the EPA Renewals was problematic considering the level of market and price exposures placed on ratepayers, particularly in the absence of an updated and approved Integrated Resource Plan (IRP).¹

Accordingly, the Panel adjourned the proceeding for 60-days to allow BC Hydro to restructure the EPA Renewals to terms not to exceed three years in length, as the Panel considered it reasonable “to accept these EPA renewals until the conclusion of the IRP proceeding as they could potentially provide BC Hydro with options for long term sources of energy should BC Hydro be able to demonstrate the need within the upcoming IRP.”²

In a letter dated February 21, 2020, BC Hydro stated that it had agreed with Cayoose Creek Power Limited Partnership not to amend the term of the Walden North EPA Renewal, and subsequently BC Hydro terminated that contract, effective March 22, 2020.³ As a result, the Original EPA and related Forbearance Agreement will continue in accordance with their respective terms.⁴

1.2 Walden North project

The Walden North project is a run-of-river hydroelectric facility located near the confluence of Cayoosh Creek and the Seton River, approximately five kilometers west of Lillooet, BC and downstream of BC Hydro’s Seton Dam. The facility has an installed capacity of 16 MW and produces an average of 33.8 GWh per year.⁵ Since 2016, the Walden North project has been owned by Cayoose Creek Power Limited Partnership (CCPLP), which is comprised of the Cayoose Creek Development Corporation (CCDC) (49%) and Innergex (51%). The Cayoose Creek Indian Band (CCIB) is the sole owner of CCDC.⁶ The Walden North project provides environmental benefits by diverting water from the tailrace through BC Hydro’s Cayoosh Diversion Tunnel into Seton Lake, which facilitates salmon migration to spawning areas in the Bridge River system.⁷

¹ Order G-278-19, Appendix A, pp. 14–15

² Ibid., p. 15

³ Exhibit B-20, pp. 1–2

⁴ Exhibit B-21, pp. 1–2

⁵ Exhibit B-1, p. 23

⁶ Exhibit B-5, BCUC IR 1.2.1

⁷ Exhibit B-1, pp. 23–24

1.3 Original EPA and Diversion Agreement

In 1990, BC Hydro signed an agreement with the Walden North independent power producer (IPP) to purchase electricity from the Walden North project (Original EPA). The Original EPA had a 20-year term, along with an evergreen provision allowing the contract to continue on a year-to-year basis unless terminated by either party by providing six-months' notice.⁸

Following the signing of the Original EPA, BC Hydro signed a Diversion Agreement with the Walden North IPP in 1990, which set out the rights and obligations of each party, enabled the diversion of water from Cayoosh Creek through the Cayoosh Diversion Tunnel, and provided BC Hydro with incremental generation and environmental benefits. The contract term of the Diversion Agreement is tied to the term of the Original EPA such that if the Original EPA terminates the Diversion Agreement also terminates.⁹

1.4 Forbearance Agreement

BC Hydro entered into an agreement, effective November 1, 2014, where BC Hydro agreed to forbear from exercising its rights to terminate the original EPA for a period of time (Forbearance Agreement).¹⁰ In consideration of BC Hydro forbearing to exercise its right to terminate the Original EPA, BC Hydro receives payments under the Forbearance Agreement that offsets the levelized energy price as set out in the Original EPA during the proposed renewal term.^{11,12}

2.0 Regulatory Framework and Legislation

The review of an EPA is conducted pursuant to section 71 of the UCA and the Rules for Energy Supply Contracts (ESC) for Electricity (Rules). The Rules were established by the BCUC by Order G-61-12, dated May 17, 2012.

2.1 Ministerial Orders M-22-9801 and M-22-9801-1A

By Ministerial Order M-22-9801, dated August 28, 1998, any EPAs agreed upon by BC Hydro or any persons selling electricity to BC Hydro on or before March 31, 2000, were exempted from section 71 of the UCA. The threshold date for this exemption was subsequently updated to September 30, 2001, by Amending Ministerial Order M-22-9801-A1.

2.2 Utilities Commission Act

Section 68 states, among other things:

"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;

Section 71(2) states:

⁸ Exhibit B-1., p. 25

⁹ Ibid., pp. 23–25

¹⁰ Ibid., p. 26

¹¹ Ibid., p. 31

¹² Exhibit B-12, BCUC IR 2.22.1

The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

Section 71(2.21) states:

In determining under subsection (2) whether an energy supply contract filed by the authority is in the public interest, the commission, in addition to considering the interests of persons in British Columbia who receive or may receive service from the authority, must consider

- (a) British Columbia's energy objectives,
- (b) the most recent of the following documents:
 - (i) an integrated resource plan approved under section 4 of the *Clean Energy Act* before the repeal of that section;
 - (ii) a long-term resource plan filed by the authority under section 44.1 of this Act,
- (c) the extent to which the energy supply contract is consistent with the requirements under section 19 of the *Clean Energy Act*,
- (d) the quantity of the energy to be supplied under the contract,
- (e) the availability of supplies of the energy referred to in paragraph (d),
- (f) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (d), and
- (g) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (d).

A list of British Columbia's energy objectives can be found under Section 2 of the *Clean Energy Act* (CEA).¹³

2.2.1 Contract Filing

Section 71(1) of the UCA states:

Subject to subsection (1.1), a person who, after this section comes into force, 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 it considers necessary to determine whether the contract is in the public interest.

2.2.2 Rules for Energy Supply Contracts for Electricity

The Rules state:

In the event of any inconsistency with these Rules and the legislation, the legislation governs.

2.1 For the purposes of this section 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:

- (a) a deemed assignment agreement,

¹³ See attached link to view section 2 of the Clean Energy Act for BC's energy objectives;
http://www.bclaws.ca/civix/document/id/complete/statreg/10022_01#section2

- (b) an assignment and assumption agreement,
- (c) a consent,
- (d) a termination agreement,
- (e) a waiver,
- (f) a change of name, or
- (g) a Memorandum of Understanding

3.0 Topic of Discussion

3.1 Forbearance Agreement – submission under section 71 of the UCA

Position of Parties

BC Hydro views that the Forbearance Agreement need not be filed with the BCUC under section 71 of the UCA as the Forbearance Agreement is not an energy supply contract as defined under section 68 of the UCA, as no energy is being purchased or sold under the Forbearance Agreement.¹⁴ Further, BC Hydro states that the Forbearance Agreement does not amend, alter, revise, modify, add or delete any term of the ESC, as defined in section 1.7 of the BCUC Rules for Energy Supply Contracts – in particular, neither the evergreen term of the Walden North EPA, nor the contractual right to terminate the Walden North EPA with notice, have changed. Instead, BC Hydro states that it agreed to forbear from exercising its discretionary right to terminate for a period of time in exchange for consideration.¹⁵

The Commercial Energy Consumers Association of British Columbia (CEC) does not oppose BC Hydro's position.¹⁶

British Columbia Old Age Pensioners' Organization et al. (BCOAPO) views that the Forbearance Agreement should be submitted for filing with the BCUC, pursuant to section 71 of the UCA. In the view of BCOAPO, the Forbearance Agreement changes or limits certain rights (i.e. the right to terminate the Original EPA), and the payments BC Hydro receives indicate that the rights limited by the Forbearance Agreement have some value. Thus, BCOAPO argues that the Original Walden North EPA has "effectively" been amended by the Forbearance Agreement.¹⁷

In reply to BCOAPO, BC Hydro repeats its position that the Forbearance Agreement does not change any term or condition of the Original EPA. Rather, BC Hydro states that the Forbearance Agreement is a contractual development as contemplated in section 2.1 of the BCUC Rules for Energy Supply Contracts. Specifically, BC Hydro argues that the Forbearance Agreement is "similar in its practical effect to a waiver during the term of the forbearance."

BC Hydro adds that, according to the Rules, contractual developments need only be filed with the BCUC for informational purposes. However, BC Hydro did not file the Forbearance Agreement as a contractual development in this case because the Original EPA was an exempt EPA.¹⁸

¹⁴ Exhibit B-23, pp. 1–2

¹⁵ Exhibit B-24, BC Hydro Reply Submission, p. 3

¹⁶ Exhibit C2-9, CEC Submission

¹⁷ Exhibit C1-8, BCOAPO Submission, pp. 3–4

¹⁸ Exhibit B-24, pp. 3–4

Panel Determination

The Panel finds that the Forbearance Agreement is an amendment to the Original EPA and should have been filed with the BCUC under section 71 of the UCA.

The Forbearance Agreement has the effect of changing at least two material aspects of the Original EPA: the termination provisions and the price.

No party disputes that once the original 20-year term of the Original EPA had expired in 2014, it was possible under its ever-green renewal clause for BC Hydro to terminate the Original EPA at six months' notice. BC Hydro states that the Forbearance Agreement did not change BC Hydro's contractual right to terminate the Original EPA.¹⁹ The Panel disagrees. While the Original EPA and the Forbearance Agreement are indeed two separate agreements, the practical effect when considering the two of them together is that BC Hydro has amended the termination provisions of the Original EPA. As it acknowledges, BC Hydro would be in breach of the Forbearance Agreement if it attempted to exercise its original termination rights under the Original EPA during the period covered by the Forbearance Agreement.²⁰

Further, under the Forbearance Agreement, BC Hydro receives payments in consideration of forbearing to exercise its rights to terminate the Original EPA. As BC Hydro states in the Application,²¹ the compensation BC Hydro receives changes the levelized price paid by BC Hydro for the energy delivered under the Original EPA. The Panel considers that this change also has the practical effect of amending the Original EPA.

BC Hydro has argued that the Forbearance Agreement constitutes a contractual development of the Original EPA and, as a result, is not an amendment. The Panel acknowledges that the Rules do contemplate contractual developments, which are not themselves amendments to their respective EPAs. However, it is very clear to the Panel that the Forbearance Agreement is not a contractual development.

A contractual development is defined in the Rules as being a document or action that "does not alter or revise, by modification, addition or deletion, any term or condition" of an EPA, before going on to provide examples of possible contractual developments. However, the examples, such as a termination agreement, are not part of the definition. The fact that a document is a termination agreement plays no part in determining whether or not that document is a contractual development. If a document alters or revises, by modification, addition or deletion, any term or condition of an EPA, then it simply cannot be a contractual development. The definition of the term clearly takes precedence over the examples of possible contractual developments.

Further, as stated in the Rules, in the event of any inconsistency between the Rules and the legislation, the legislation takes precedence. Even if the Rules could be read to imply that termination agreements are by definition contractual developments, a position with which the Panel strongly disagrees, section 68 of the UCA is clear that an energy supply contract such as an EPA "includes an amendment of that contract". Because it amends the Original EPA, in at least the two ways described above, the Forbearance Agreement is an energy supply contract under the UCA and must be filed accordingly.

In the Panel's view, the intent of the UCA is clear. Unless otherwise exempted, any amendment to an energy supply agreement must be filed with the BCUC. To interpret the legislation otherwise would lead to the absurd and unintended result that almost any aspect of an EPA could be changed by a carefully constructed agreement with no oversight from the BCUC.

¹⁹ Exhibit B-24, p. 3

²⁰ Ibid.

²¹ Exhibit B-1, Table 7, p. 31