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ORDER NUMBER
G-239-20

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

and

Application for Reconsideration and Variance of Order G-148-20
In the matter of the
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
R. I. Mason, Commissioner
W. M. Everett, QC, Commissioner

September 18, 2020

ORDER

WHEREAS:

A. On August 6, 2020, pursuant to section 99 of the *Utilities Commission Act* (UCA), British Columbia Hydro and Power Authority (BC Hydro) filed with the British Columbia Utilities Commission (BCUC) an application for the reconsideration and variance of Order G-148-20 (Reconsideration Application);

B. On June 10, 2020, the BCUC issued Order G-148-20 with accompanying reasons for decision (Decision) and determined that the Forbearance Agreement is an amendment to an energy supply contract that should have been filed with the BCUC pursuant to section 71 of the UCA. Consequent to the Decision, the BCUC issued, among other things, Directive 3, which 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";

C. By Order G-61-12 dated May 17, 2012, the BCUC approved Rules for Energy Supply Contracts for Electricity (ESC Rules). The ESC Rules facilitate the BCUC's review of energy supply contracts for electricity, and proposed energy supply contracts for electricity under section 71 of the UCA*;*

D. In the Reconsideration Application, BC Hydro requests that the BCUC rescind Directive 3 of Order G-148-20 (Directive 3) on the grounds that the BCUC erred in law by:

    1. 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;

2. Finding that the existing ESC Rules are inconsistent with the legislation and are not effective to the extent of the inconsistency;

3. 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 ESC Rules;

E. In addition to BC Hydro's request to rescind Directive 3, BC Hydro suggests the BCUC may wish to consider undertaking a review of the ESC Rules;

F. Part V of the BCUC's Rules of Practice and Procedure, which are attached to Order G-15-19, provide the Rules for the reconsideration process (Rules);

G. The Panel has reviewed both Directive 3 and the Reconsideration Application and considers that a public hearing process is warranted, in accordance with Rule 29 of the Rules.

NOW THEREFORE pursuant to section 99 of the Utilities Commission Act, the BCUC orders as follows:

1. A public hearing process is established, in accordance with the regulatory timetable as set out in Appendix A, and the Reasons for Decision as set out in Appendix B to this order.
2. BC Hydro and interveners are requested to provide written submissions on the following in accordance with the regulatory timetable as set out as Appendix A to this order:
    i. Positions on the Reconsideration Application, including whether Directive 3 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.
3. BC Hydro is directed to publish on its website the Reconsideration Application, this order and the regulatory timetable, and to provide a copy of the same to all parties who participated in BC Hydro's Application for Electricity Purchase Agreement Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro by Wednesday, September 22, 2020

DATED at the City of Vancouver, in the Province of British Columbia, this 18th day of September 2020.

BY ORDER

Original signed by:

D. M. Morton
Commissioner

Attachment

British Columbia Hydro and Power Authority.
Application for Reconsideration and Variance of Order G-148-20 in the matter of 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

REGULATORY TIMETABLE

Action	Date (2020)
Intervener Registration	Friday, September 25
BC Hydro Submission	Thursday, October 1
Intervener Submissions	Thursday, October 8
BC Hydro reply on Intervener Submissions	Thursday, October 15
Further Process	TBD

British Columbia Hydro and Power Authority.
Application for Reconsideration and Variance of Order G-148-20 in the matter of 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

1.0 Introduction

1.1 Background

In 1990, British Columbia Hydro and Power Authority (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. Effective April 1, 2014, BC Hydro entered into an agreement to forbear from exercising its rights to terminate the original EPA for a period of time (Forbearance Agreement). 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.[1]

On June 10, 2020, the British Columbia Utilities Commission (BCUC) issued Order G-148-20 with reasons, stating that the Forbearance Agreement was an amendment to the Original EPA and should have been filed with the BCUC pursuant to section 71 of the UCA.[2] The following directions were issued with Order G-148-20:

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

1.2 Reconsideration Application and Relief Sought

On August 6, 2020, BC Hydro filed with the BCUC an application to reconsider and vary Order G-148-20 (Reconsideration Application) pursuant to section 99 of the UCA. In the Reconsideration Application, BC Hydro requested the following:

1. To confirm BC Hydro's understanding that materials submitted to the BCUC in response to Directive 2 of Order G-148-20 (Directive 2), including materials related to EPAs that are exempt from section 71, would not be filed or reviewed pursuant to section 71;

[1] Order G-148-20, Appendix A, p. 3
[2] Ibid., p. 6

2. To further vary and extend the filing deadline for Directive 2 to 60 days after the date of the BCUC's decision on the Reconsideration Application or 60 days after the date of a BCUC letter clarifying the intended scope of Directive 2;[3] and
3. To rescind Directive 3 of Order G-148-20 (Directive 3), on the grounds that the BCUC erred in law by:
    - 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;
    - Finding that the existing BCUC Rules for Electricity Supply Contracts for Electricity (ESC Rules) are inconsistent with the legislation and are not effective to the extent of the inconsistency; and
    - 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 ESC Rules.[4]

BC Hydro submits that as a result of errors related to Directive 3, the BCUC should grant relief by rescinding Directive 3. BC Hydro also submits that in addition to the relief requested, the BCUC should consider undertaking a review of the ESC Rules.[5]

By Letter dated August 28, 2020, the BCUC confirmed BC Hydro's understanding that materials submitted in response to Directive 2 would be filed for information purposes only. BC Hydro's request to further extend the filing deadline for Directive 2 (initially established as July 10, 2020 in Order G-148-20, and varied by Order G-185-20 from July 10, 2020 to August 10, 2020) from August 10, 2020 to October 27, 2020, was also approved.[6]

2.0 Regulatory Framework and Legislation

2.1 Utilities Commission Act

Section 68 of the UCA provides, among other things, that "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 99 of the UCA states, "the commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

2.1 BCUC Rules of Practice and Procedure

Review of the Reconsideration Application is governed by Part V of the BCUC's amended Rules of Practice and Procedure effective February 1, 2019 (Rules). Specifically, Rule 26.05 states:

> An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:

[3] Ibid., p. 4
[4] Ibid., p. 7
[5] Ibid., p. 12
[6] Exhibit A-2 dated August 28, 2020.

a) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;

b) facts material to the decision that existed prior to the issuance of the decision were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;

c) new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;

d) a change in circumstances material to the decision has occurred since the issuance of the decision; or

e) where there is otherwise just cause.[7]

Rule 28.01 of the Rules states, "Upon the filing of an application for reconsideration of a decision, the BCUC may, without further process, summarily dismiss the application, in whole or in part, on the basis that it fails to establish, on its face, any reasonable grounds for reconsideration of the decision."[8]

Rule 29.01 of the Rules states, "In the event the BCUC does not dismiss the whole application for reconsideration pursuant to Rule 28.01, the application for reconsideration or the portion of the application that is not dismissed will proceed to a hearing."[9]

3.0 Panel Determination

In applications for reconsideration, the BCUC considers whether an application, in whole or in part, establishes, on its face, any reasonable grounds for reconsideration, as listed in Rule 26.05. In this case, the Panel has reviewed the Reconsideration Application and is of the view that there are reasonable grounds to proceed to a hearing to consider the alleged error in law by the BCUC.

Further, the BCUC is also of the view that Directive 3 ought to be reconsidered and, on its own motion, requests submissions on whether Directive 3 should be varied, as set out in ii. below.

The Panel is also of the view that a review of the ESC Rules requires a stand-alone process and will, therefore, not be part of this proceeding. This ensures that adequate consultation with utilities and other stakeholders is considered in that review. Further, a review of the ESC Rules as a stand-alone process ensures that this proceeding focuses solely on the Reconsideration Application at hand.

Accordingly, the Panel establishes a public hearing process, pursuant to section 99 of the UCA and Rule 29 of the BCUC Rules of Practice and Procedure.

As part of the public hearing process, the BCUC directs notice to be given to all registered interveners in the Application for Electricity Purchase Agreement Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro proceeding. All parties are invited to provide written submissions on the following:

i. Positions on the Reconsideration Application, including whether Directive 3 should be rescinded, varied or remain the same; and

[7] BCUC Rules of Practice and Procedure, Order G-15-19, dated January 22, 2019, pp. 15-16
[8] Ibid., p. 16
[9] Ibid.

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.