



**ORDER NUMBER**  
**G-279-20**

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

**BEFORE:**

D. M. Morton, Panel Chair  
R. I. Mason, Commissioner`  
W. M. Everett, QC, Commissioner

on November 2, 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 the 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 submits 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, provides the Rules for the reconsideration process (Rules);
- G. By Order G-239-20, dated September 18, 2020, the BCUC established a regulatory timetable to review the Reconsideration Application; and
- H. The BCUC has reviewed the Reconsideration Application and submissions from all parties filed in the proceeding and makes the following determination.

**NOW THEREFORE** pursuant to section 99 of the UCA, the BCUC Rules of Practice and Procedure, and for the reasons attached as Appendix A to this order, the BCUC orders that Directive 3 of Order G-148-20 is varied to state “BC Hydro is directed to file with the BCUC all future agreements that are associated with and materially affect existing EPAs”.

**DATED** at the City of Vancouver, in the Province of British Columbia, this                      2<sup>nd</sup>                      day of November 2020.

BY ORDER

*Original signed by:*

D. M. Morton  
Commissioner

British Columbia Hydro and Power Authority  
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

## **REASONS FOR DECISION**

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### **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 offset the levelized energy price as set out in the Original EPA during the proposed renewal term.<sup>1</sup>

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.<sup>2</sup> In the reasons attached as Appendix A to that order, the Panel found that the Forbearance Agreement had the effect of changing at least two material aspects of the Original EPA (the termination provisions and the price) and was therefore an "energy supply contract" as defined in section 68 of the UCA based on the following reasons:<sup>3</sup>

- 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; and
- Payments received under the Forbearance Agreement in consideration of forbearing to exercise its rights to terminate the Original EPA have the practical effect of amending the price under the Original EPA.

Accordingly, 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;

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<sup>1</sup> Order G-148-20, Appendix A, p. 3

<sup>2</sup> Ibid., p. 6.

<sup>3</sup> Order G-148-20, Appendix, A p. 6.

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 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 seeks 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 be filed with the BCUC for information purposes only to support the BCUC keeping itself informed about the conduct of BC Hydro, and would not be filed or reviewed pursuant to section 71;<sup>4</sup>
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;<sup>5</sup> 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.<sup>6</sup>

BC Hydro submits that the BCUC should rescind Directive 3 due to the alleged errors in law described above. BC Hydro also submits that in addition to the relief requested, the BCUC should consider undertaking a review of the ESC Rules.<sup>7</sup>

By Letter dated August 28, 2020, the BCUC confirmed BC Hydro's understanding that Directive 2 allows the BCUC to keep itself informed about the conduct of BC Hydro as follows:<sup>8</sup>

In the Reconsideration Application, BC Hydro indicates that given Directive 2 does not make reference to section 71 of the UCA, it understands that the BCUC intended for the materials submitted in response to Directive 2 to be filed for information purposes only to support the BCUC keeping itself informed about the conduct of BC Hydro. Further, BC Hydro understands that the BCUC did not intend for the materials to be filed or reviewed pursuant to section 71, nor for materials related to EPAs that are exempt from section 71 to be filed or reviewed pursuant to section 71.

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<sup>4</sup> Exhibit B-1, p. 3-4.

<sup>5</sup> Ibid., p. 4.

<sup>6</sup> Ibid., p. 7.

<sup>7</sup> Ibid., p. 12.

<sup>8</sup> Exhibit A-2.

The BCUC confirms BC Hydro's understanding of Directive 2.

In the letter, the BCUC also approved 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.<sup>9</sup>

### **1.3 Review Process**

On September 18, 2020, the BCUC issued Order G-239-20 with Reasons for Decision, establishing a public hearing process for the Reconsideration Application. In the Reasons for Decision, attached as Appendix B to Order G-239-20, the Panel stated it was of the view that there were reasonable grounds to proceed to a hearing to consider the alleged errors in law. The Panel also expressed its view that Directive 3 ought to be reconsidered and, on its own motion, requested that BC Hydro and interveners 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
- 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.<sup>10</sup>

Submissions from BC Hydro and the Commercial Energy Consumers Association of British Columbia (CEC) were received October 1, 2020 and October 8, 2020, respectively. BC Hydro submitted its reply submission on October 15, 2020.

## **2.0 Regulatory Framework and Legislation**

Section 99 of the UCA provides "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."

Part V of the Rules of Practice and Procedure (Rules), included in Appendix A to Order G-15-19, establishes the rules regarding a reconsideration. Specifically, Rule 26.05 provides:

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:

- 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

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<sup>9</sup> Exhibit A-2, p. 2.

<sup>10</sup> Exhibit A-3, Appendix B, p. 3.

e) where there is otherwise just cause.<sup>11</sup>

Rule 29.01 of the Rules provides that “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.”

### 3.0 Reconsideration of Directive 3

#### *Position of the Parties*

BC Hydro submits that Directive 3 should be rescinded based on three alleged errors in law, as described in section 1.2 above. BC Hydro also submits that varying Directive 3 as suggested would significantly expand the scope of agreements to be reported upon, and that any consideration of expanding general reporting requirements is an issue that should be considered in a separate proceeding with the participation of other utilities and stakeholders.<sup>12</sup>

The CEC submits that suspending Directive 3 until a review of the following has been completed is substantively and procedurally fair:

1. A review of the ESC Rules; and
2. A determination on the appropriate materials to be filed by BC Hydro and other utilities regulated by the BCUC, consistent with the appropriate statutory interpretation of section 71 of the UCA. Such a determination should be made in the context of full submissions on legal and practical considerations, as well as in accordance with regulatory effectiveness and efficiency.<sup>13</sup>

In reply, BC Hydro disagrees with the CEC and submits that Directive 3 should not be suspended and held in abeyance because:

- “No stand-alone process has been established to review the [ESC] Rules” and “if no stand-alone process is held to review the [ESC] Rules, then there would be no need to suspend and hold Directive 3 in abeyance”;
- BC Hydro would comply with any changes to the ESC Rules at the end of that process, and there would be no need to reinstate or vary Directive 3; and
- Regardless of a stand-alone process, BC Hydro’s position remains that the BCUC made three errors of law in issuing Directive 3. As a result, Directive 3 cannot be reinstated and, therefore, should not be suspended or held in abeyance.<sup>14</sup>

#### *Panel Determination*

The Panel agrees with both BC Hydro and the CEC that additional clarity regarding the BCUC’s filing requirements under section 71 of the UCA could be provided through a focused review of the ESC Rules, and that such a review should be conducted as a separate, stand-alone process that includes an opportunity for consultation with utilities and stakeholders.

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<sup>11</sup> BCUC Rules of Practice and Procedure, Order G-15-19, dated January 22, 2019, pp. 15-16.

<sup>12</sup> Exhibit B-3, pp. 7-8.

<sup>13</sup> Exhibit C1-2, p. 2.

<sup>14</sup> Exhibit B-4, p. 2

The Panel considers that, irrespective of such a review process, it is appropriate to reconsider the specific language used in Directive 3. As currently written, Directive 3 includes the phrase “as separate amending agreements, pursuant to section 71.” The Panel finds that this language has the improper affect of pre-judging any agreements to be filed under Directive 3 as being subject to the BCUC’s jurisdiction under section 71, regardless of whether the agreement qualifies as an energy supply contract, as defined under section 68 of the UCA. **Therefore, the Panel finds that the BCUC made an error in law by including in Directive 3 the phrase “as separate amending agreements, pursuant to section 71”.** For this reason, the Panel must now examine whether Directive 3 should be rescinded or varied.

Absent the phrase “as separate amending agreements, pursuant to section 71” the language used in Directive 3 mirrors that used in Directive 2:

- Directive 2 directs BC Hydro to file all existing, but unfiled agreements entered after and including October 1, 2001, that are associated with and materially affect existing EPAs; and
- Directive 3 directs BC Hydro to file future agreements that are associated with and materially affect existing EPAs. (emphasis added)

Directive 3, revised as set out immediately above, becomes complementary to Directive 2 by requiring all existing and future contracts associated with existing EPAs to be filed with the BCUC. The BCUC can keep itself informed about the conduct of BC Hydro’s business in accordance with the responsibility afforded to the BCUC under section 23 of the UCA. Because the BCUC relies on its authority under section 23 of the UCA, neither Directive 2 nor Directive 3 revised as set out immediately above presumes an agreement is an EPA. Such an approach makes moot the objections raised by BC Hydro and the CEC in this proceeding, as their concerns relate specifically to the propriety of Directive 3 in relation to section 71 of the UCA and the ESC Rules relating thereto. **Therefore, the Panel determines that Directive 3 be varied to direct BC Hydro to file with the BCUC future agreements that are associated with and materially affect existing EPAs.**