

BRITISH COLUMBIA UTILITIES COMMISSION

**British Columbia Hydro and Power Authority (BC Hydro)
Walden North Hydro Forbearance Agreement**

BCUC Project No. 1599133

**Final Argument
of
BC Sustainable Energy Association**

March 30, 2021

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PART ONE: INTRODUCTION AND SUMMARY

A. Final argument of BCSEA

1. This is the final argument of the intervener B.C. Sustainable Energy Association (BCSEA). It is filed pursuant to the further regulatory timetable established by BCUC Order G-48-21.¹ This final argument responds to BC Hydro’s March 24, 2021 Counsel’s Final Written Submission.²

B. BCSEA’S interests in the proceeding

2. BCSEA is a registered charity and a non-profit association of citizens, professionals and practitioners committed to promoting the understanding, development and adoption of sustainable energy, energy efficiency and energy conservation in British Columbia. BCSEA supports the province’s transition to a lower-carbon economy. BCSEA has four chapters across BC and approximately three hundred individual and organizational members. Many of BCSEA’s members are ratepayers of one or more of BC’s energy public utilities. BCSEA represents individuals and organizations in BC who care about energy sustainability and climate change mitigation, and who want the energy they purchase and use to be sustainably produced and transported.³
3. BCSEA’s interests in this proceeding are as a non-profit public interest organization, and as a representative of its members’ interests as ratepayers.

¹ Exhibit A-7.

² https://www.bcuc.com/Documents/Arguments/2021/DOC_61759_2021-03-24-BCH-Final-Argument.pdf.

³ Exhibit C4-1.

4. BCSEA has participated actively in the current proceeding. BCSEA's counsel and policy advisor entered confidentiality undertakings⁴ and received copies of confidentially filed material.

C. BCSEA's position

5. BCSEA respectfully submits that the Commission should accept the Forbearance Agreement for filing under s.71 of the UCA.

D. Background

6. The present proceeding has a complicated factual and procedural background. BCSEA adopts BC Hydro's summary set out in paragraphs 1 to 19 of BC Hydro's Final Argument. BCSEA will generally use the same terminology and abbreviations as are used in BC Hydro's Final Argument.⁵
7. While BC Hydro's summary (properly) focuses strictly on the Forbearance Agreement and its antecedents, BCSEA provides a broader description of the background in paragraphs 8 to 21, below. This description was provided to BC Hydro during the information request process. BC Hydro confirmed that it has no corrections to its previous submissions in the proceedings referred to BCSEA summary of the background.⁶
8. In May 2018, BC Hydro filed with the BCUC three EPAs for acceptance under section 71 of the UCA: Sechelt Creek EPA Renewal, Brown Lake EPA Renewal, and Walden North EPA Renewal. Each EPA Renewal was for a 40-year term. The BCUC held a proceeding titled "British Columbia Hydro and Power Authority Electricity Purchase Agreement Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro ~ Project No. 1598969."⁷ For convenience, this will be referred to here as the Three EPA Renewals Proceeding.
9. In the Three EPA Renewals Proceeding, by Decision and Order G-278-19, the Panel expressed the view that the 40-year term of the EPA Renewals "exposes ratepayers to a significant level of risk due to uncertainty in market prices and changes in the energy industry in general" and that "if the EPA renewals were restructured to have

⁴ Exhibit C1-3.

⁵ Key terms include: the Walden North Project, the Walden North IPP, the Walden North 1990 EPA, Direction No. 8, the Diversion Agreement, and the Forbearance Agreement.

⁶ Exhibit B-5, BCSEA IR1.1.1, pdf p.18.

⁷ <https://www.bcuc.com/ApplicationView.aspx?ApplicationId=642>

shorter terms ... the level of market and price risks would be reduced, and the other benefits provided by each project would outweigh the lack of cost-effectiveness of each EPA renewal.” The Panel adjourned the proceeding to allow BC Hydro and the counterparties, should they so choose, to restructure and resubmit the EPA renewals with a term not to exceed three years.

10. Regarding Walden North, the Panel stated on page 6 of the Reasons for Order G-278-19:

“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. To preserve this value, BC Hydro entered into a Forbearance Agreement, effective November 1, 2014, where BC Hydro agreed to forbear from exercising its rights to terminate the original EPA for a number of years.

The original EPA and related Forbearance Agreement will continue in accordance with their respective terms unless the [Walden North] EPA renewal is accepted.”

11. BC Hydro and the counterparties amended the Sechelt Creek EPA Renewal and the Brown Lake EPA Renewal to three-year terms. BC Hydro issued a notice of termination for the Walden North EPA Renewal.
12. By Order G-39-20 dated March 4, 2020,⁸ the BCUC accepted for filing under s.71 the amended versions of the Sechelt Creek EPA Renewal and the Brown Lake EPA Renewal. The proceeding continued.
13. By letter of March 4, 2020 [Exhibit A-21 in the Three EPA Renewals Proceeding] the BCUC noted that the Walden North EPA Renewal will be terminated as of March 22, 2020 and invited submissions “on whether costs accrued under the term of the Walden North EPA Renewal are recoverable from ratepayers and why.”
14. In a March 17, 2020 letter to the Commission [Exhibit B-21⁹], BC Hydro stated that there have been no costs accrued by BC Hydro under the Walden North EPA Renewal. Regarding the Original Walden North EPA [the Walden North 1990 EPA] and the Forbearance Agreement, BC Hydro stated:

⁸ https://www.bcuc.com/Documents/Other/2020/DOC_57918_G-39-20-BCH-Sechelt-Brown-Walden-Final-Order.pdf

⁹ https://www.bcuc.com/Documents/Proceedings/2020/DOC_57593_B-21-BCH-response-on-recoverability.pdf

- “BC Hydro further submits that all energy purchase payments which have been made to Cayoose LP, to date, have all been under the Original Walden North EPA. In addition, consideration provided by Cayoose LP to BC Hydro under the Forbearance Agreement has also continued during this period. BC Hydro notes that any Walden North EPA costs that BC Hydro has incurred, or will be incurring, pursuant to the Original Walden North EPA (whether or not the Forbearance Agreement is in effect) are recoverable pursuant to section 4(1)(b) of Direction No. 8 to the BCUC.¹⁰”
15. BC Hydro’s Footnote 1 [in the passage quoted in the previous paragraph] refers to paragraphs 41 to 43 of BC Hydro’s July 5, 2019 final argument in the Three EPA Renewals Proceeding,¹⁰ which in Footnote 34 states that “The original [Walden North] EPA remains exempt from the UCA section 71 filing requirement pursuant to Minister's Order M-22-9801-A1.”
16. After receiving submissions from the parties, the BCUC issued Decision and Order G-148-20, Direction 1 of which directs BC Hydro to file the Forbearance Agreement with the BCUC, pursuant to section 71 of the UCA. Direction 1 is the genesis of the current proceeding.
17. The Panel in G-148-20 described the Forbearance Agreement as follows:
- “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). 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.” [p.3, footnote omitted]
18. Under the heading “Regulatory Framework and Legislation,” the G-148-20 Panel acknowledged Ministerial Orders M-22-9801 and M-22-9801-A1 as follows:
- 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. [p.3]
19. The Panel in G-148-20 found that “the [Walden North] Forbearance Agreement is an amendment to the Original EPA and should have been filed with the BCUC under section 71 of the UCA.” The Panel said: “The Forbearance Agreement has the effect of changing at least two material aspects of the Original EPA: the termination

¹⁰ https://www.bcuc.com/Documents/Arguments/2019/DOC_54469_2019-07-05-BCH-Final-Argument.pdf

provisions and the price.” [p.6] The Panel found that “the Forbearance Agreement is an energy supply contract under the UCA and must be filed accordingly.” It concluded:

“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.” [underline added]

20. By letter of June 25, 2020 [Exhibit B-1 in the current proceeding], BC Hydro filed the Walden North Forbearance Agreement under section 71, in compliance with Direction 1 of Order G-148-20. Among other things, BC Hydro states:

“The Walden North 1990 EPA and Diversion Agreement remain in effect at this time in accordance with their respective terms. In addition, the Forbearance Agreement also remains in effect at this time...

The Walden North 1990 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. Therefore, the costs that BC Hydro incurs pursuant to the Walden North 1990 EPA are recoverable in rates pursuant to Direction No. 8....

BC Hydro does not incur any costs pursuant to the Forbearance Agreement, however, the consideration provided by CCPLP pursuant to the agreement is an offset against the costs BC Hydro incurs pursuant to the Walden North 1990 EPA.”

21. Under the heading “Energy Supply Contract Considerations,” BC Hydro acknowledges that the Forbearance Agreement is an “energy supply contract” as defined in section 68 of the UCA. It states:

“The BCUC determined that the Forbearance Agreement is an amendment of the Walden North 1990 EPA and directed BC Hydro to file the Forbearance Agreement pursuant to section 71 of the UCA. The BCUC’s finding that the Forbearance Agreement is an amendment of the Walden North 1990 EPA means that the Forbearance Agreement is an “energy supply contract” as that term is defined in section 68 of the UCA.” [Exhibit B-1, pp.6-7]

E. Issue and Remedy Requested

22. The issue in the current proceeding is whether the Forbearance Agreement, which the BCUC determined is an energy supply contract, should be filed as an energy supply contract under s.71 of the UCA.¹¹

PART TWO: ARGUMENT

23. BCSEA agrees with BC Hydro that the BCUC should review the Forbearance Agreement as a stand-alone energy supply contract.¹² The Walden North 1990 EPA remains in effect and continues to be exempt from UCA s.71 despite the execution of the Forbearance Agreement.¹³ The Commission's powers under section 71 apply only to the Forbearance Agreement and not to the original EPA.¹⁴

24. The statutory framework is formed by sections 71(2) and 71(2.21) of the UCA. Section 71(2) 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) 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.¹⁵

25. Under section 71(2.21), the factors and criteria pertinent to the Commission's consideration of the Forbearance Agreement are:

- a. the interests of current and future customers of BC Hydro,
- b. BC's energy objectives,
- c. the 2013 Integrated Resource Plan,
- d. the quantity, availability and price of the energy to be supplied under the contract; and
- e. 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.

¹¹ BC Hydro Final Argument, para.22, footnotes omitted.

¹² Exhibit B-5, BCSEA IR 1.1.2; Exhibit B-4, BCUC IR 1.1.2.

¹³ Exhibit B-3, BCUC IR 1.1.4.

¹⁴ Exhibit B-3, BCUC IR 1.1.2.

¹⁵ BC Hydro Final Argument, para.23.

26. BCSEA agrees with BC Hydro’s summary statement that under section 71(2.21) “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.”¹⁶
27. Under the Forbearance Agreement, BC Hydro and the IPP agree to forbear for a specified period of time from exercising their respective rights to terminate the Walden North 1990 EPA. However, the Forbearance Agreement does not directly or indirectly change the quantity, availability, form or environmental attributes of energy supplied pursuant to the Walden North 1990 EPA.¹⁷
28. BCSEA accepts BC Hydro’s point that the Forbearance Agreement does not extend the term of the EPA or of the Diversion Agreement. The Walden North 1990 EPA continues from year-to-year unless terminated by either party after providing six months’ notice. 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.¹⁸
29. BCSEA submits that continuation of the Walden North 1990 EPA cannot be considered a cost of the Forbearance Agreement. Costs incurred by BC Hydro pursuant to the Walden North 1990 EPA are recoverable pursuant to Direction No. 8 whether or not the Forbearance Agreement is in effect.¹⁹ BCSEA notes BC Hydro’s explanation that it was not obligated to exercise its termination rights under the Walden North 1990 EPA.²⁰
30. Further, the existence of the Forbearance Agreement does not mean that BC Hydro would have terminated the Walden North 1990 EPA if it had not entered the Forbearance Agreement.²¹ In fact, the evidence is that BC Hydro has no immediate plans to terminate the Walden North 1990 EPA.²² BC Hydro states:
- “The Diversion Agreement is critical as described above and continues so long as the Walden North 1990 EPA remains in effect. BC Hydro

¹⁶ BC Hydro Final Argument, para.24.

¹⁷ Exhibit B-1, p.6; Exhibit B-5, BCOAPO IR 1.4.2.; BC Hydro Final Argument, paras.25-26.

¹⁸ BC Hydro Final Argument, para.28.

¹⁹ Exhibit B-5, BCSEA IR 1.3.1.1.

²⁰ Exhibit B-5, BCSEA IR 1.3.1; Exhibit B-3, BCUC IR 1.5.2; BC Hydro Final Argument, para.29.

²¹ Exhibit B-5, BCSEA IR 1.3.1; Exhibit B-3, BCUC IR 1.5.2; BC Hydro Final Argument, para.29.

²² Exhibit B-3, BCUC IR 1.11.2, pdf p.57.

therefore presently has no plans to issue a termination notice for the Walden North 1990 EPA.”²³

31. As noted above, the Diversion Agreement remains in effect, tied to the continuation of the Walden North 1990 EPA. BC Hydro explains:

“The contract term of the Diversion Agreement is tied to the term of the Walden North EPA such that if the EPA terminates, the Diversion Agreement also terminates. Under the Forbearance Agreement, the parties agreed to forebear for a minimum of [redacted] from exercising their respective rights to terminate the Walden North EPA which allows the continuation of the Diversion Agreement.”²⁴

32. Continuation of the Diversion Agreement is consistent with BC Hydro’s most recent Integrated Resource Plan (the 2013 IRP).²⁵ BC Hydro states: “To the best of BC Hydro’s knowledge, the flows diverted from the Walden IPP, as a result of BC Hydro’s diversion tunnel, were included as part of the Seton inflow (and thus correspondingly in generation values) in studies for the 2013 IRP.”²⁶

33. BCSEA agrees with BC Hydro that “To the extent that the Forbearance Agreement allows for the continuation of the Diversion Agreement, which supports the diversion of water flows from the Walden IPP facility to the Seton Lake, the Forbearance Agreement is not inconsistent with the 2013 IRP.”²⁷

34. BC Hydro states:

“Without an EPA and Diversion Agreement, there are uncertainties regarding how the parties will manage water flows in relation to the diversion tunnel and BC Hydro would likely incur costs to achieve the objectives otherwise met by the Diversion Agreement.

The continuation of the Diversion Agreement enables BC Hydro to avoid the cost of an alternative diversion structure (in order to feed water into BC Hydro’s diversion tunnel) if such a structure is required sometime in the future. Given the existing diversion structure is already in place and owned by the IPP, BC Hydro has not carried out an assessment of available options for building an alternative diversion structure at this time. BC Hydro have also not considered the alternative of negotiating a new diversion agreement in the absence of an EPA and we do not have an estimate of what such an agreement might cost.”²⁸

²³ BC Hydro Final Argument, para.29.

²⁴ Exhibit B-5, BCSEA IR 1.3.2.

²⁵ Exhibit B-5, BCSEA IR 1.2.1.

²⁶ Exhibit B-5, BCSEA IR 1.2.1.

²⁷ Exhibit B-5, BCSEA IR 1.2.2.

²⁸ Exhibit B-5, BCSEA IR 1.3.2, underline added.

35. BCSEA agrees with BC Hydro's comments about the Diversion and the Diversion Agreement:

"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."²⁹

36. In BCSEA's view, continuation of the Diversion Agreement is also desirable for costs reasons, acknowledging (again) that the Forbearance Agreement is not needed to continue the existing Diversion Agreement.³⁰ BC Hydro states:

"As BC Hydro has no immediate plans to terminate the Walden North EPA, the scenarios above illustrate that the most-cost effective scenario (at this time) for BC Hydro and its ratepayers is to have the Forbearance [Agreement]."³¹

37. Further, BC Hydro does not incur any costs under the Forbearance Agreement. Rather, the Forbearance Agreement reduces the total costs otherwise payable to the Walden North 1990 EPA counterparty by BC Hydro and its ratepayers by way of an offset against amounts invoiced to BC Hydro under the EPA. BCSEA agrees with BC Hydro that this means the Forbearance Agreement is in the interests of current and future BC Hydro customers.³² Similarly, the Forbearance Agreement puts downward pressure on BC Hydro's rates, consistent with the BC energy objective to keep BC Hydro's rates competitive.³³

38. BCSEA agrees with BC Hydro's concluding statement:

"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."³⁴

39. BCSEA agrees with BC Hydro that the reasoning in the BCUC Panel's decisions in Orders G-278-19 and G-39-20 – regarding the Sechelt Creek EPA Renewal and Brown Lake EPA Renewal – does not apply to whether the Forbearance Agreement

²⁹ BC Hydro Final Argument, para.27.

³⁰ BC Hydro Final Argument, footnote 6 to para.14.

³¹ Exhibit B-3, BCUC IR 1.11.2.

³² BC Hydro Final Argument, para.30.

³³ *Ibid.*

³⁴ BC Hydro Final Argument, para.31.

is in the public interest under section 71.³⁵ Among other distinctions, the Forbearance Agreement is not a 40 year energy supply contract.

40. BCSEA notes that the Walden North EPA Renewal has expired and is not a factor in the current proceeding.

PART THREE: CONCLUSION

41. BCSEA respectfully submits that the Commission should accept the Forbearance Agreement for filing as an energy supply contract under section 71(2) of the UCA taking into consideration the factors and criteria set out in section 71(2.21) of the UCA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 30, 2021



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³⁵ Exhibit B-5, BCSEA IR 1.1.4.