

31 March 2021

**VIA E-FILING**

Patrick Wruck  
Commission Secretary  
BC Utilities Commission  
6th Floor 900 Howe Street  
Vancouver, BC V6Z 2N3



Reply to: Leigha Worth  
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Ph: 604-687-3034  
Our File: 7500.432

Dear Mr. Wruck,

**Re: British Columbia Hydro and Power Authority (BC Hydro) Walden North Hydro  
Forbearance Agreement  
BCOAPO et al. Final Argument**

Please be advised that we submit the following Final Argument in regards to the above noted regulatory process on behalf of our clients in this matter, the community based organizations serving more than one hundred thousand members and clients throughout BC Hydro's service areas: the British Columbia Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, the Tenant Resource and Advisory Centre, and Together Against Poverty Society, known collectively in this process as "BCOAPO et al."

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,  
**BC PUBLIC INTEREST ADVOCACY CENTRE**

*Original on file signed by:*

Leigha Worth  
Executive Director | General Counsel

encl.

**BRITISH COLUMBIA OLD AGE PENSIONERS' ORGANIZATION, ACTIVE SUPPORT  
AGAINST POVERTY, COUNCIL OF SENIOR CITIZENS' ORGANIZATIONS  
OF BC, DISABILITY ALLIANCE BC, THE TENANT  
RESOURCE AND ADVISORY CENTRE, AND TOGETHER AGAINST POVERTY SOCIETY  
("BCOAPO")**

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

**BCOAPO et al. Final Argument**

**31 March 2021**

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## **BACKGROUND**

### *The Walden North Project*

The Walden North project is a run-of-river hydroelectric facility on Cayoosh Creek about five kilometers west of Lillooet, B.C. that has five generating units with total installed capacity of 16 MW producing an average of 33.8 GWh per year<sup>1</sup>.

The original Walden North EPA was awarded in August 1990 under the 1989 Request for Proposals. The Walden North project achieved commercial operation in June 1993 and at that time was owned by ESI Power-Walden Corporation Ltd (ESI). In 1994, West Kootenay Power Ltd. (now FortisBC Inc.) acquired all of the shares of ESI. The original EPA had an initial 20-year term with an evergreen provision allowing the contract to continue from year-to-year unless terminated by either party after providing six months' notice.<sup>2</sup>

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 GS. It is also BC Hydro's understanding that diverting Cayoosh Creek flows into Seton Lake facilitates salmon migration to spawning areas in the Bridge River system, via Seton River and Seton Lake, during the sockeye salmon migration period<sup>3</sup>.

The Walden North tailrace, owned by the IPP, was 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 the "Walden North Diversion" and enabled the diversion of Cayoosh Creek water into the Cayoosh Diversion Tunnel. Pursuant to the Diversion Agreement, the Walden North IPP operates and maintains the 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 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<sup>4</sup>.

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

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<sup>1</sup> BC Hydro's Electricity Purchase Agreement (EPA) Renewals – Sechelt Creek Hydro, Brown Lake Hydro, and Walden North Hydro Application, Exhibit B-1, page 23

<sup>2</sup> BC Hydro's Electricity Purchase Agreement (EPA) Renewals – Sechelt Creek Hydro, Brown Lake Hydro, and Walden North Hydro Application, Exhibit B-1, page 25

<sup>3</sup> Exhibit B-1, page 3

<sup>4</sup> Exhibit B-1, pages 3-4

salmon migration to spawning areas in the Bridge River system, via Seton River and Seton Lake<sup>5</sup>.

### *The Diversion Agreement and DFO Requirements*

Water needs to be fed from Cayoosh Creek through the IPP's plant (which includes its diversion structure) to reach BC Hydro's Cayoosh Diversion Tunnel. The diversion structure is essentially the Walden North IPP's tailrace structure which feeds into and connects to BC Hydro's Cayoosh Diversion Tunnel. Pursuant to the Diversion Agreement, the IPP built and maintains its diversion structure connecting to the tunnel. The Cayoosh Diversion Tunnel is owned and operated by BC Hydro and allows for the diversion of water from the Walden North IPP's tailrace to Seton Lake which is part of BC Hydro's Bridge River system<sup>6</sup>. Without the Diversion Agreement (or an agreement negotiated to replace the existing Diversion Agreement) there would be a contractual gap in BC Hydro's relationship with the Walden North IPP to whose facilities BC Hydro's Cayoosh Diversion Tunnel is dependent upon<sup>7</sup>.

In 2001 the Department of Fisheries and Ocean (DFO) 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. The dilution targets are a condition of BC Hydro's DFO Fisheries Act Authorization<sup>8</sup>.

If the diversion of water from Cayoosh Creek to Seton Lake is discontinued, salmon migration will be negatively affected. BC Hydro has conducted an analysis that showed the (diversion) tunnel being opened (which allows water from the Cayoosh Creek to flow into Seton Lake) is critical in maintaining the dilution ratios that support salmon migration<sup>9</sup>.

### *The Forbearance Agreement*

In anticipation of the expiry of the initial 20-year term, BC Hydro and ESI began discussions in 2012 to explore the potential for an EPA renewal. BC Hydro was unable to reach an agreement with ESI. However, BC Hydro wanted to maintain the incremental generation and environmental benefits it received as a result of the Diversion Agreement and without the EPA the Diversion Agreement would terminate. Therefore, BC Hydro entered into the Forbearance Agreement with an effective date of April 1, 2014<sup>10</sup>.

Under the Forbearance Agreement, BC Hydro agreed to forbear from exercising its termination rights under the evergreen Walden North 1990 EPA in consideration for a forbearance payment. For administrative convenience, the parties agreed that the forbearance payment would simply be set-off against the EPA payments. The Forbearance Agreement did not change the term of the EPA, which is evergreen, nor did it change the quantity of energy or price under the EPA<sup>11</sup>. BC Hydro considers the term of the Forbearance Agreement to be confidential<sup>12</sup>.

In February 2016, the Walden North project was acquired by CCPLP, which is comprised of Cayoosh Creek Development Corporation and Innergex. The Sekw'el'was Cayoosh Creek Indian

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<sup>5</sup> Exhibit B-1, pages 3-4

<sup>6</sup> Exhibit A2-1, pdf page 10

<sup>7</sup> Exhibit B-7, BCOAPO 2.5.1

<sup>8</sup> Exhibit B-7, BCOAPO 2.5.1

<sup>9</sup> Exhibit A2-1, PDF page 11

<sup>10</sup> Exhibit B-1, page 4

<sup>11</sup> Exhibit B-1, pages 4-5

<sup>12</sup> Exhibit B-5, CEC 1.5.2

Band (Cayoos Creek Indian Band) is the sole beneficial shareholder of Cayoos Creek Development Corporation. Cayoos Creek Indian Band is part of the St'at'imc Nation. The original Walden North EPA, Forbearance Agreement and Diversion Agreement were assigned to CCPLP at that time<sup>13</sup>.

### *Current Application*

Pursuant to the BCUC's Order G-148-20 and 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 *Utilities Commission Act* (UCA). On June 25, 2020, BC Hydro filed a copy of the Forbearance Agreement with the BCUC in compliance with the applicable directive of Order G-148-20.

The BCUC subsequently established a process<sup>14</sup> for review the Forbearance Agreement that involved two rounds of information requests to be followed by written arguments.

Set out below are BCOAPO's submissions.

## **WALDEN NORTH FORBEARANCE AGREEMENT**

### *Forbearance Agreement versus Original Walden North EPA*

As noted above, in Order G-148-20 the BCUC determined that the Forbearance Agreement is an amendment to the Walden North 1990 EPA and, on that basis, directed it be filed pursuant to Section 71 of the UCA.

In information requests<sup>15</sup>, BCUC staff asked whether BC Hydro expects the BCUC's review to be: (i) limited to only the specific provisions of the EPA that had been modified; (ii) to encompass the entirety of the amended EPA; or (iii) some other alternative. In its response BC Hydro states:

*If BC Hydro were to file a contract that amends an EPA with the BCUC pursuant to section 71 of the Utilities Commission Act (UCA), the BCUC's powers under section 71 would be limited to the amending contract filed. That is, the BCUC could accept the amending contract or if the BCUC, after a hearing, determines that the amending contract is not in the public interest the BCUC could declare the amending contract unenforceable, for example.*

*Section 68 of the UCA defines "energy supply contract" as meaning "a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract...". Therefore a contract that amends an EPA is itself an "energy supply contract" that must be filed pursuant to section 71 of the UCA so long as the contract is not otherwise exempt.*

*BC Hydro believes that the filing of an amending contract under section 71 does not provide the BCUC with any powers in respect of the existing, underlying EPA whether or not the underlying EPA is exempt.*

*In the case of the Walden North IPP facility, the original EPA is exempt from the section 71 filing requirement pursuant to the Minister's Order No. M-22-9801-A1. Therefore, since the Commission has now determined that the Forbearance*

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<sup>13</sup> Exhibit B-1, page 5

<sup>14</sup> BCUC Orders G-268-20, G-3-21 and G-48-21

<sup>15</sup> Exhibit B-3, BCUC 1.1.2

*Agreement is an amendment of the original EPA and BC Hydro has accordingly filed the Forbearance Agreement under section 71 of the UCA, the Commission's powers under section 71 apply only to the Forbearance Agreement and not the original EPA.*

BCOAPO agrees with BC Hydro's position that, in dealing with an amendment to a supply contract filed pursuant to section 71, "the BCUC's powers under section 71 would be limited to the amending contract filed". In the case of the Walden North Forbearance Agreement, this position is reinforced by the fact that original EPA is exempt from the section 71 filing requirement.

#### *Relevant Considerations Under Section 71*

Section 71(2) of the UCA provides that the BCUC may 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. In this regard, the BCUC is to consider<sup>16</sup>:

- The interests of both current and future BC Hydro customers;
- 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.

BC Hydro contends that there is no energy supplied under the Forbearance Agreement nor does the Forbearance Agreement increase or otherwise change the quantity or form of energy supplied to BC Hydro under the Walden North 1990 EPA. As a result, in BC Hydro's view, of the factors and criteria to be considered under section 71(2.21), the only ones that could be viewed as applicable to consideration of the Forbearance Agreement are:

- The interests of both current and future BC Hydro customers; 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"<sup>17</sup>.

In considering what the applicable factors and criteria are under Section 71(2.21), BCOAPO referred back to the BCUC's decision in G-148-20 and the Panel's rationale for determining the Forbearance Agreement is a "supply contract". In the Decision<sup>18</sup> the Panel stated:

***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*

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<sup>16</sup> Exhibit B-1, page 6

<sup>17</sup> Exhibit B-1, page 6 and Exhibit B-3, BCUC 1.2.4

<sup>18</sup> Appendix A, page 6

*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. 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.*

*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 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 submits that in 2014 it 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 interpreted to mean that BC Hydro would have terminated the EPA absent the Forbearance Agreement<sup>19</sup>. However, in BCOAPO's submission, the fact the Forbearance Agreement changes the termination provisions of the original EPA (i.e., the right, for a certain period of time, to terminate with notice), limiting BC Hydro's flexibility to terminate the original EPA<sup>20</sup> and to consider other alternatives (in lieu of supply from Walden North) for a specified period of time. Instead, it obligates BC Hydro to accept supply available from Walden North. Also, as noted in the BCUC Decision, the Forbearance Agreement effectively changes the levelized price paid by BC Hydro for energy delivered. In BCOAPO's view this means that the following criteria/factors under section 71(2.21), are also relevant considerations:

- 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.

#### *Forbearance Agreement Assessment*

BC Hydro contends that, because it 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, the Forbearance Agreement is in the interests of both current and future BC Hydro customers. For the same reason, BC Hydro contends the Forbearance Agreement supports 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"<sup>21</sup>.

With respect to the fact the Forbearance Agreement limits BC Hydro's flexibility to terminate the original EPA, BC Hydro notes that in the 2014 timeframe, it was not planning to terminate the Walden North EPA without alternative arrangements to replace the existing agreements (e.g., the

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<sup>19</sup> Exhibit B-5, BCSEA 1.3.1

<sup>20</sup> In response to BCOAPO 1.1.2 BC Hydro agreed that the Forbearance Agreement does change the ability of BC Hydro to exercise its termination rights.

<sup>21</sup> Exhibit B-1, page 6

Diversion Agreement) with the Walden North IPP<sup>22</sup>. Furthermore, BC Hydro acknowledges that it had not carried out an assessment of available options for building an alternative diversion structure when the Forbearance Agreement was negotiated<sup>23</sup>.

BC Hydro has also indicated that, as of this point in time:

- It has no plans to issue a termination notice for the Walden EPA<sup>24</sup>, and
- It has not carried out an assessment of available options for building an alternative diversion structure at this time nor has it considered the alternative of negotiating a new diversion agreement in the absence of an EPA<sup>25</sup>.

Analysis provided by BC Hydro in its responses to information requests indicates that, based on BC Hydro's current plans not to terminate the original EPA, the most-cost effective scenario (at this time) for BC Hydro and its ratepayers is to maintain the Forbearance Agreement<sup>26</sup>. Analysis undertaken at the time the Forbearance Agreement was being negotiated indicated similar results<sup>27</sup>.

BCOAPO notes that critical to these analyses and the conclusion that the Forbearance Agreement was/is cost-effective is the assumption that BC Hydro had/has no plans to terminate the original EPA, regardless of the alternative supply options available. Indeed, it is useful to note that BC Hydro's response to BCUC 1.11.2 specifically avoids any discussion of the cost-effectiveness of the Forbearance Agreement relative to a scenario where the Forbearance Agreement is determined to not be in the public interest and is declared unenforceable as of January 1, 2021, and BC Hydro chooses to immediately issue a termination notice under the Walden North EPA.

BCOAPO acknowledges that, assuming BC Hydro had/has no plans to avail itself of the flexibility provided by the termination provisions in the original Walden North EPA and terminate the original Walden North EPA, the Forbearance Agreement is cost effective and satisfies the relevant criteria set out in Section 71.

However, based on BCOAPO's reading of the evidence, BC Hydro's plans to not terminate the Walden North EPA (either now or at the time the Forbearance Agreement was being negotiated) were/are based on the need to maintain the Diversion Agreement which continues only so long as the Walden North EPA is in effect<sup>28</sup>. What BCOAPO finds troubling is the fact BC Hydro's plans to not terminate the original EPA (and the associated Diversion Agreement) are not because it is the most cost-effective alternative (out of a number of available options) but due to the fact that BC Hydro appears to have no viable alternatives for meeting its obligations to the DFO other than the Diversion Agreement linked to the Walden North EPA:<sup>29</sup>

- When the Forbearance Agreement was negotiated in 2014 the costs and benefits of an alternative diversion structure versus costs and benefits of the continuation of the Walden North EPA and Diversion Agreement were not considered,
- As of this time, BC Hydro has not carried out an assessment of available options for building an alternative diversion structure, and

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<sup>22</sup> Exhibit B-3, BCUC 1.1.3

<sup>23</sup> Exhibit A2-1, pdf page 11

<sup>24</sup> Exhibit B-3, BCUC 1.11.2

<sup>25</sup> Exhibit B-5, BCSEA 1.3.2

<sup>26</sup> Exhibit B-3, BCUC 1.11.2

<sup>27</sup> Exhibit B-3, BCUC 1.1.3

<sup>28</sup> Exhibit B-3, BCUC 1.8.1

<sup>29</sup> Exhibit B-3, BCUC 1.15.4

- It is BC Hydro's view that an alternative diversion structure may not be feasible.

## **CONCLUSION**

So, relying on the above and registering our concerns about the lack of alternatives, BCOAPO does find sufficient persuasive evidence on the record to recommend to this Panel that it accept the Forbearance Agreement for filing under section 71(2) of the UCA, subject to the recommendations and concerns set out in this Final Submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Original on file signed by

Leigha Worth  
Executive Director | General Counsel

Original on file signed by

Irina Mis  
Staff Lawyer