



BCPIAC
Public Interest Advocacy Centre

Reply to: Leigha Worth
ED@bcpiac.org
Ph: 604-687-3034
Our File: 7500.430

May 1, 2020

VIA E-FILING

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

Dear Mr. Wruck,

**Re: British Columbia Hydro and Power Authority Electricity Purchase Agreement
Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro ~
Project No. 1598969
BCOAPO submission on filing of Forbearance Agreement**

We represent the BC Old Age Pensioners' Organization, Active Support Against Poverty, Council of Senior Citizens' Organizations of BC, Disability Alliance BC, Tenant Resource and Advisory Centre, and Together Against Poverty Society known collectively in BC Hydro regulatory processes as "BCOAPO et al." ("BCOAPO").

We provide this submission in accordance with the regulatory timetable established by the Commission Letter dated April 6, 2020 (Exhibit A-22).

Introduction

The original Walden North EPA was awarded in August 1990. The Walden North project subsequently achieved commercial operation in June 1993. That EPA had a 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.

In anticipation of the expiry of the initial 20-year term, BC Hydro and ESI Power-Walden Corporation Ltd ("ESI" - the owner of project) began discussions in 2012 to explore the potential for an EPA renewal. However, BC Hydro was unable to reach an agreement with ESI.

Nevertheless, BC Hydro wanted to maintain the incremental generation and environmental benefits it received as a result of a related Diversion Agreement which would terminate without the EPA. As a result, on April 1, 2014, BC Hydro entered into a Forbearance Agreement with ESI under which BC Hydro (among other provisions) agreed to forebear for a minimum period¹ from

¹ The provisions of the Agreement, including the forbearance period, are considered by BC Hydro to be confidential and are not publically available per Exhibit B-1, page 26.

exercising its right to terminate the Walden North EPA which then allowed the continuation of the Diversion Agreement.

In its May 2018 Application renewal of the Walden North EPA BC Hydro noted that:

“The Forbearance Agreement remains in effect at this time, and will terminate effective with Commission acceptance of the Walden North EPA renewal. If the Walden North EPA renewal is not accepted, original EPA and the Forbearance Agreement will remain in effect until at least [REDACTED]² at which time either party may exercise their right to terminate the original Walden North EPA with six months’ notice.”

On November 8, 2019, the BCUC issued Order No. G-278-19 (Order) expressing certain concerns regarding the length of the terms of the EPA Renewals for Sechelt Creek Hydro, Brown Lake Hydro and Walden North Hydro Independent Power Producer (IPP) facilities. The Order adjourned the proceeding for 60 days to allow BC Hydro and the counterparties, should they so choose, to restructure and resubmit to the Commission EPA renewals that addressed the Commission’s stated concerns.

On February 21, 2020, BC Hydro filed³ with the Commission amended EPA Renewals for Sechelt Creek Hydro and Brown Lake Hydro. At the same time, BC Hydro advised the Commission that BC Hydro and the Cayoose Creek Power Limited⁴ Partnership (Cayoose LP) had agreed not to amend the Walden North EPA Renewal, as suggested by the BCUC, and as such BC Hydro had delivered a termination notice to Cayoose LP with respect to the Walden North EPA Renewal. The filing went on to note that, as a result, BC Hydro and Cayoose LP will continue to operate under the original Walden North EPA, and its related Forbearance Agreement, following termination of the EPA Renewal as had been the case since the effective date of the EPA Renewal.

On March 4, 2020, the BCUC issued Order G-39-20 accepting the amended EPA Renewal Agreements for Sechelt Creek Hydro and Brown Lake Hydro.

On April 6, 2020 the BCUC issued a request for comments seeking submissions from parties to the EPA Renewal proceeding⁵ on whether the Forbearance Agreement should be submitted for filing to the BCUC, pursuant to section 71 of the *Utilities Commission Act* (UCA), and why.

² See Footnote #1

³ Exhibit B-20

⁴ In February 2016, the Walden North project was acquired by Cayoose Creek Power Limited Partnership (CCPLP), which is comprised of Cayoose Creek Development Corporation and Innergex. The Sekw’el’was Cayoose Creek Indian Band (Cayoose Creek Indian Band) is the sole beneficial shareholder of Cayoose Creek Development Corporation. Cayoose 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.

⁵ Exhibit A-22

BC Hydro's Position Regarding the Filing of the Forbearance Agreement

On April 17, 2020, BC Hydro filed its submission⁶ wherein it referenced a number of related information request responses and stated that:

"While the terms of the Forbearance Agreement are confidential, BC Hydro confirms that no energy is being sold to BC Hydro pursuant to the Forbearance Agreement. All energy being sold to BC Hydro continues to be sold exclusively under the original Walden North Electricity Purchase Agreement dated August 18, 1990.

Further, as BC Hydro has noted, a forbearance agreement is a common, stand-alone commercial arrangement whereby one party agrees to forbear from exercising a right under a contract for a period of time without amending the underlying contract. Therefore, this is also not an amendment to an energy supply contract.

As a result, BC Hydro confirms its submission that the Forbearance Agreement need not be filed with the BCUC under section 71 the UCA."

BCOAPO Position

BC Hydro's rationale as to why the Forbearance Agreement need not be filed with the BCUC under Section 71 of the *UCA* rests on two points:

- It is not an amendment to an existing energy supply contract which is still in effect but rather a stand-alone commercial agreement whereby it has agreed to forbear from exercising a right under the contract.
- There is no energy being sold to BC Hydro under the Agreement as all energy being sold to BC Hydro continues to be sold exclusively under the original Walden North Electricity Purchase Agreement.

With respect to the first point, the fact that the Forbearance Agreement is a commercial contract is no reason for it not being filed under Section 71 as all EPAs are effectively commercial contracts. The suggestion that it is a "stand-alone" agreement that does not amend the existing Walden North EPA is debatable. While the Walden North EPA was not formally amended (i.e., formally changed), the Forbearance Agreement does change/limit certain rights that BC Hydro had under the original EPA (i.e., the right, for a certain period of time, to terminate with notice). Furthermore, this right was clearly considered to have some "value" as BC Hydro received payment for entering into the Forbearance Agreement⁷. In BCOAPO's view, this means that, even if from a technical perspective the original EPA has not been amended, in reality the execution of the Forbearance Agreement means that BC Hydro no longer has certain rights which it had under the original contract and the original EPA has "effectively" been amended.

⁶ Exhibit B-23

⁷ Exhibit B-1, page 31

The second point made by BC Hydro is that there is no energy being sold under the Forbearance Agreement and that all energy continues to be sold in accordance with the original Walden North Electricity Purchase Agreement. However, the pricing of the energy sold under an EPA is not the only matter that the BCUC considers when determining whether or not to accept an EPA filed under Section 71. As the Commission's recent Order G-278-19⁸ has demonstrated, the term of the agreement is also taken into consideration and can be of concern to the Commission.

Overall, it is BCOAPO's submission that the Forbearance Agreement is effectively an amendment to the original Walden North EPA as it changes and limits certain rights that BC Hydro has under the original agreement. Furthermore, these changes are material as: i) they have a value to BC Hydro and ii) they impact the term of the agreement which is a relevant matter that the Commission considers in determining whether or not to accept an EPA under Section 71.

As result, it is BCOAPO's submission that the Forbearance Agreement should be submitted for filing to the BCUC, pursuant to section 71 of the *UCA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Original on file signed by:

Leigha Worth, Executive Director

Irina Mis, Staff Lawyer

⁸ Reasons for Decision, pages 14-15