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June 25, 2020

Ms. Marija Tresoglavic
Acting Commission Secretary and Manager
Regulatory Support
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Tresoglavic:

**RE: Project No. 1598969
British Columbia Utilities Commission (BCUC or Commission)
British Columbia Hydro and Power Authority (BC Hydro)
Electricity Purchase Agreement (EPA) Renewals – Sechelt Creek Hydro,
Brown Lake Hydro, and Walden North Hydro**

BC Hydro writes, in compliance with BCUC Order No. G-148-20, directive 1, to file the enclosed Forbearance Agreement between BC Hydro and Cayoose Creek Power Limited Partnership¹ (**CCPLP**) pursuant to section 71 of the *Utilities Commission Act* (**UCA**).

Pursuant to the Order No. G-148-20 Decision dated June 10, 2020, the BCUC determined that the Forbearance Agreement is an amendment to the 1990 Electricity Purchase Agreement (**Walden North 1990 EPA**) between BC Hydro and CCPLP, and on that basis directed BC Hydro to file the Forbearance Agreement pursuant to section 71 of the UCA by June 25, 2020.

BC Hydro has concerns with the BCUC's reasoning in the Order No. G-148-20 Decision and the resulting directives. BC Hydro believes that the BCUC's Rules for Energy Supply Contracts for Electricity (the **Rules**), as established pursuant to BCUC Order No. G-61-12, provide appropriate guidance as to whether a document or action is an amendment of an energy supply contract that is to be filed under section 71 of the UCA or a "contractual development" that is not filed under section 71. Parties to an

¹ The Forbearance Agreement was entered into with an effective of April 1, 2014 between BC Hydro and the owner of the Walden North facility at that time, ESI Power-Walden Corporation Ltd. In February 2016, the Walden North facility was acquired by CCPLP, and the Forbearance Agreement was assigned to CCPLP at that time.

agreement or action related to an energy supply contract should be able to rely on the Rules to ascertain their filing requirements.

The Rules are a component of the legislative scheme such that the legislation and Rules should be read together harmoniously and not as one taking precedence over the other.² In our view, the Rules and the legislation are consistent.

We note also that the Rules were developed and revised over the years in consultation with utilities and other stakeholders. Both parties to energy supply contracts are subject to the filing requirements, and therefore have an interest in the Rules. As we interpret the Order No. G-148-20 Decision, the BCUC appears to provide a new definition of “amendment” that includes an agreement that materially affects the terms of an energy supply contract, and this definition determines the section 71 filing requirement. This may not have been the BCUC’s intention and it would be helpful if this was clarified. Also, since the Order requires the filing of agreements entered into since 2001, this change is effectively retroactive and did not follow the BCUC’s historical practice of first consulting with utilities and other stakeholders before changing the Rules. We submit this was not procedurally fair and is not consistent with the expectations of utilities and other stakeholders.

Additionally, we remain of the view that a forbearance agreement is a common form of commercial agreement where one party agrees to forbear from exercising a right in an underlying agreement for a period of time in exchange for consideration from the other party without amending the underlying contract. There is nothing improper about a forbearance agreement.

Accordingly, BC Hydro will be filing with the BCUC an application for reconsideration in relation to Order No. G-148-20. The application for reconsideration will be filed as soon as possible and in any event well within the 60 day timeframe specified in section 26.02 of the BCUC’s Rules of Practice and Procedure.

In the meantime, a copy of the Forbearance Agreement is enclosed for filing pursuant to section 71 of the UCA to ensure compliance with the BCUC’s order.

We would ask that if the BCUC determines that a public hearing process should be established for reviewing the Forbearance Agreement, the proceeding be placed in abeyance until the BCUC has decided upon our reconsideration application.

The following sections provide background information on the Walden North project and the context for entering into the Forbearance Agreement in 2014, all of which was provided in the original BCUC Project No. 1598969 proceeding. We also provide below

² Section 71(1)(a) of the UCA provides that a person who enters into an energy supply contract must file a copy of the contract “with the commission under rules and within the time it specifies” (underlining added), making the BCUC’s Rules an integral component of the legislative scheme.

information on the applicable factors and criteria to be considered in respect of a contract filed pursuant to section 71 of the UCA.

Walden North Project

The Walden North project is a run-of-river hydroelectric facility on Cayoosh Creek about five kilometers west of Lillooet, British Columbia. The project is located near the confluence of Cayoosh Creek and the Seton River which is just downstream of BC Hydro's Seton Dam. The Walden North project has five generating units with total installed capacity of 16 MW producing an average of 33.8 GWh per year.³

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.

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 maintains and operates 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 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 salmon migration to spawning areas in the Bridge River system, via Seton River and Seton Lake. In 2001, the Department of Fisheries and Ocean provided guidance for BC Hydro and the Walden North IPP on the minimum discharges for

³ There is a sixth generating unit at the Walden North facility, which BC Hydro understands has been decommissioned.

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. This guidance was provided to facilitate salmon migration to spawning areas in the Bridge River system during the salmon migration period. In 2017, BC Hydro commissioned a study to assess the impact of the dilution ratio on salmon migration, and it was confirmed that maintaining the dilution ratio facilitates salmon migration during spawning.

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.

Context for entering into the Forbearance Agreement

The Walden North 1990 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 Walden North 1990 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.

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. At the time, a 10-year extension of the project was being proposed by ESI. With respect to the EPA renewal, BC Hydro was unable to reach an agreement with ESI because the upper limit of pricing BC Hydro was able to offer for a 10-year extension was not, as indicated by ESI, adequate to recover its costs at that time.

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. However, BC Hydro also wanted to reduce the cost of the EPA. Parallel to these EPA renewal discussions, BC Hydro and FortisBC Energy Inc. (an affiliate of ESI) were engaged in confidential negotiations in relation to a suite of agreements, including the gas arrangements in relation to the Burrard Generating Station. The gas-related issues were resolved by Order in Council 749 issued in December 2014.

Around this same time period, BC Hydro also wished to resolve the outstanding Walden North 1990 EPA and Diversion Agreement issues, and therefore entered into the Forbearance Agreement with an effective date of April 1, 2014. 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, we 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.

Present Situation

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

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.

All energy supplied to BC Hydro by the Walden North project and all payments for such energy purchased by BC Hydro continue to be under the Walden North 1990 EPA. The rights and obligations of the parties in respect of the Cayoos Diversion Tunnel and related works continue to be under the Diversion Agreement. Consideration provided by CCPLP to BC Hydro under the Forbearance Agreement also continues at this time in accordance with that agreement.

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.

Energy Supply Contract Considerations

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*.

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. The BCUC is to consider:

- 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.

In BC Hydro’s view, the factors and criteria specified under section 71(2.21) overall do not contemplate evaluation of an agreement like the Forbearance Agreement. Rather, the factors and criteria contemplate evaluation of a contract for the supply of a quantity of energy to BC Hydro at a specified price against other forms of energy that are available and could be used instead of the energy to be supplied under the contract, in the context of the drivers and policies set out in the IRP and B.C.’s energy objectives.

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. 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 - BC Hydro believes that the Forbearance Agreement is in the interests of both current and future BC Hydro customers because BC Hydro 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; 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” - BC Hydro believes that the Forbearance Agreement supports this energy objective for the same reasons as the point above.

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Lake Hydro, and Walden North Hydro

Confidentiality

Pursuant to Order No. G-148-20, directive 4, the BCUC ordered that the un-redacted version of the original application, including the Forbearance Agreement, will be kept confidential due to its commercially sensitive nature. Accordingly, BC Hydro has redacted the Forbearance Agreement in its entirety (Appendix 1) from the public version of this filing.

For further information, please contact Chris Sandve at 604-974-4641 or by email at bchydroregulatorygroup@bchydro.com.

Yours sincerely,



(for) Fred James
Chief Regulatory Officer

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Enclosure

**Sechelt Creek Hydro, Brown Lake Hydro and
Walden North Hydro**

Electricity Purchase Agreement

Renewals

Appendix 1

Walden North Forbearance Agreement

PUBLIC

CONFIDENTIAL
ATTACHMENT

FILED WITH BCUC
ONLY