British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998 – Final Written Argument

Friday, October 4, 2019

Donald Flintoff, BASc.

Contents

Chapter 1. JURISDICTION 3

Chapter 2. CONSULTATION 4

Chapter 3. UTILITIES COMMISSION ACT 5

Chapter 4. OIC No. 108 6

4.1. Ownership and Operation 6

4.2. Services Provided 6

4.3. Persons receiving Service 6

4.4. Geographical Area Served 7

4.5. Means of Regulation 7

4.6. Ceasing to be an Indigenous Utility 8

Chapter 5. STRANDED ASSETS 9

Chapter 6. EXHIBIT A-38 10

Chapter 7. RECOMMENDATIONS 14

Chapter 1. JURISDICTION

Jurisdiction is an issue that must be negotiated since some Indigenous nations are under federal legislation – the Indian Act. Section 18(1) of the Indian Act states: "Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band." Section 80(1) states: "The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable" and section 80(2) states: "The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1)."

Section 88 of the Indian Act deals with the general provincial laws applicable to Indians and it states: "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

Unless a settlement through consultation and negotiation with the indigenous nations is reached and agreed to by all parties, it could be difficult to confer "municipal or regional district" status on the lands controlled by indigenous nations.

It may be beneficial to all parties to agree to a 5 year trial period to further understand the needs of the indigenous nations and the scope of regulation required. This would allow all participants to better understand the impact of the UCA on the indigenous nations and other non-indigenous utilities; and the indigenous nations time to grasp the impact of the UCA on their plans and projects.

Chapter 2. CONSULTATION

If consultation and negotiation are successful and all parties have agreed to adopt a "municipal or regional district" status on the lands controlled by an indigenous nation in the UCA. Then the indigenous nations should be able to proceed with their plans and implement their projects.

If consultation and negotiation fail and the parties do not agreed to adopt a "municipal or regional district" status on the lands controlled by an indigenous nation in the UCA, then a further process must be undertaken. Meanwhile, the indigenous nations' plans and projects will encounter further delays.

To adopt a "municipal or regional district" status on the lands controlled by an indigenous nation in the UCA could allow the indigenous nations to proceed with their plans and projects.

If the indigenous nation accepts "municipal or regional district" status, and if its indigenous utility is declared a public utility, the indigenous utility may submit to the BCUC a CPCN application for approval, submit an application for rates, and request an exemption from regulation under section 22 of the UCA (Section 71 and any provision of Part 3 of the UCA). This type of regulation may amount to light-handed regulation on complaint only.

The advantages of indigenous nations being included under the current UCA with the status of a public utility are in Part 5, sections 70 & 71 of the UCA. Section 70 deals with access to transmission lines and section 71 deals with energy supply contracts both of which may be required for a successful indigenous project.

Chapter 3. UTILITIES COMMISSION ACT

The reason to retain the UCA is to provide a uniform regulatory framework for all utilities within the province. If the indigenous nations wish to have their own regulatory Act, this will take a significant time to develop and agree to as the other public utilities may be involved and impacted. A better path would be to opt in under the current UCA and work with the affected parties to modify the current UCA over time as experience is gained in its application to indigenous nations and their utilities, and how the impacts may affect all utilities.

As already mentioned, the UCA approach may assist the indigenous utilities (regulated) in gaining access to the transmission facilities of BC Hydro and FortisBC and the sale of the indigenous utilities' clean energy.

This approach may lead to an expedited growth in the implementation of indigenous utilities (regulated) and to increased indigenous employment going forward.

If the indigenous nations agreed to adopt a "municipal or regional district" status on the lands controlled by an indigenous nation; and opt in to the UCA, this allows the indigenous nations to move forward quickly with their plans and projects without significant negative impacts.

Chapter 4. OIC No. 108

4.1. Ownership and Operation

Indigenous utility is defined in OIC No. 108 as a public utility that is owned or operated in full or in part by an indigenous nation. If the UCA definition is used and an indigenous nation definition is incorporated into the UCA; then an indigenous utility that is owned and operated in full by an indigenous nation within its treaty/reserve/district lands is not included in the UCA's definition of a public utility. However, an indigenous utility that is owned and operated in part by an indigenous nation within its treaty/reserve/district lands is included in the definition of a public utility in the UCA and therefore should be regulated.

4.2. Services Provided

The services that could be provided are the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

4.3. Persons receiving Service

The indigenous utilities that operate on reserve, treaty or district lands should be able to supply energy to those persons whether they are indigenous or not. Persons on traditional lands should have the ability to choose their supplier of energy.

4.4. Geographical Area Served

The geographical are served should be reserve, treaty or district lands. If another utilities transmission lines are available on those lands, then the indigenous utilities should be able to connect and sell their surplus energy to other utilities if the BCUC determines that the sale of energy is in the public interest.

4.5. Means of Regulation

"BC Hydro is supportive of an Indigenous utility located in British Columbia which operates under a different regulatory framework on reserve lands and current treaty settlement lands for which ownership has been transferred to the First Nation government (Current Treaty Settlement Lands), if the BCUC retains its current power to compel solutions to disputes between utilities, and the BCUC retains its jurisdiction of Mandatory Reliability Standards and other safety and reliability provisions of the UCA. Future treaty settlement lands should be considered on a case-by-case basis, in the context of the provisions of the particular treaty.[1]"

While I'm not opposed to BC Hydro's position, I do not see the immediate need to create a different regulatory framework for indigenous utilities. The regulation of energy in BC should be separate from the indigenous issues within the Province. Considering that there are 198 First Nations within the Province, advancing the indigenous objectives of economic benefits and employment, establishing an indigenous regulatory framework could become too cumbersome to advance in a timely matter. If the 198 First Nations agree to being included in the current UCA, then they may be able to advance their objectives in a timely matter and the Province will have a uniform framework to regulate the energy sector in the Province and provide safe, reliable, non-discriminatory service at reasonable rates.

[1] Exhibit C-2-3, BCUC IR 1.1.4

4.6. Ceasing to be an Indigenous Utility

Assuming indigenous utilities are under the UCA, they would become subject to Section 41 of the UCA on ceasing to be an indigenous utility. Further, other sections of the UCA may apply such as section 54, Reviewable Interests.

Chapter 5. STRANDED ASSETS

BC Hydro's GIS system has identified 180 different First Nations who have one or more distinct reserves and whose members are served by BC Hydro. BC Hydro provided an approximate but not comprehensive list[2] of on reserve assets as follows:

Asset Category	Approximate Count of BC Hydro Assets
Customer Meters	**32,800**
Street Lights	**4,700**
Distribution Poles	**25,200**
Distribution Transformers (Overhead)	**7,100**
Distribution Transformers (Underground)	**1,200**

Unfortunately BC Hydro could not provide an estimate of the annual operating costs for these assets.

As one can see from the list provided, the value of the assets on reserve is significant. If indigenous utilities are to supply on reserve customers, how will the value of these assets be recovered?

[2] Exhibit C-2-3, Flintoff IR 1.2.1, p. 1

Chapter 6. EXHIBIT A-38

In Exhibit A-38 the British Columbia Utilities Commission (BCUC) provided guidance for the intervenes regarding their final arguments by posing the following questions and the Inquiry Panel is inviting final oral or written submissions on the those questions:

1. The need for regulation of monopoly service providers is generally considered necessary where there is a need to protect the consumer against potential abuse of monopoly power by the service providers.

1.1. Is this an applicable to and important factor for Indigenous utilities?

Yes, this is why regulation exists since it may be found to be a public utility even though it operates within its own boundaries.

1.1.1. Why or why not?

If a monopoly service provider is not regulated then the service provider can set rates as it desires and in excess of what is required to operate the service with an excessive return without any repercussions.

2. If the regulation of Indigenous utilities were undertaken by an entity other than the BCUC (for example, self-regulated by a First Nation),

2.2. Would it be appropriate for the BCUC to retain its jurisdiction to act upon complaints?

No, the jurisdictional issues would impede the BCUC's ability to act upon complaints.

2.2.1. Why or why not?

As each indigenous nation comes under federal jurisdiction, an agreement between the indigenous nation and the BCUC would have to be agreed to by all parties. Also, there are variations in each treaty that would have to be considered.

3. If the regulation of Indigenous utilities were undertaken by an entity other than the BCUC,

3.1. Should the BCUC retain its jurisdiction over system safety and reliability issues?

No, the jurisdictional issues would impede the BCUC's ability to act upon complaints. Technical Safety BC may be a better choice.

3.1.1. Why or why not?

As the BCUC, through the UCA only has control over public utilities, the indigenous nations may not be deemed public utilities. Currently, the BCUC has no authority on indigenous nations' lands.

4. If Indigenous utilities are not to be regulated under the Utilities Commission Act,

4.1. Should there also be different regulatory treatment for non-indigenous utilities that provide services on-reserve or, in the absence of a specific treaty provision, on Treaty lands (for example, BC Hydro utility services in a non-integrated area)?

No, the indigenous nations should have the same treatment as any non-indigenous municipality or regional district or regulated public utility in BC.

4.1.1. Why or why not?

In the absence of a specific treaty provision, a non-indigenous utility directly owned or operated by the indigenous nation that provides services on-reserve or on treaty lands should be treated the same as any municipality or regional district.

Further, in the absence of a specific treaty provision, a non-indigenous utility that provides services on-reserve or on treaty lands not directly owned or operated by the indigenous nation it serves should be treated as a regulated public utility.

5. In the absence of alternative regulatory arrangements respecting indigenous utilities, please provide examples of how the UCA or other existing legislation relating to utility regulation might be amended to protect the interests of Indigenous Nations, while working towards reconciliation.

5.1. In the absence of alternative regulatory arrangements respecting indigenous utilities, I would recommend a change to the UCA definitions that includes indigenous nations.

I recommend the definition of a public utility be expanded similar to the highlighted change below:

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or
(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries; ***or an indigenous nation in respect of services provided by the indigenous nation within its own boundaries, reserve, treaty or district lands.***
(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,
(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,
(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or
(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement;

As per FBC’s Exhibit C4-6, Flintoff’s IR 1.1, I agree that village may be too narrow to capture all the nuances of “indigenous nations”; hence, the insertion of the term “indigenous nation” in place of village. However, the definitions would have to be expanded to include indigenous nations, indigenous utilities, and reserves, districts and treaty lands.

6. If there were to be a recommendation to establish an “Indigenous Utilities Commission” or similar body to regulate Indigenous utilities,

6.1. Do interveners have a view whether such a body could or should have some degree of authority over all Indigenous utilities, or should the jurisdiction of such a body be limited to some extent (e.g., confined to specific territorial limits)?

The creation of such a body that would have some degree of authority over all indigenous utilities would extend the timeline to the detriment of the indigenous nations as their plans and projects may be delayed even more into the future.

As there are 198 different First Nations in BC, it’s hard to envision an “Indigenous Utilities Commission” or similar body being able to regulate all these different groups with different rights and treaties.

6.1.1. Why or why not?

If a similar body was to regulate indigenous utilities, would it be able to regulate all 198 indigenous utilities in a uniform manner or would the treaty differences create a regulatory minefield. Further, how would this regulatory body fit within the North American grid under the mandatory reliability standards and cross border sales of energy? Currently, the UCA handles these matters quite well and has the flexibility to accommodate the First Nations on a trial basis.

I support FBC’s assertion that “The main benefit of having the same regulations apply is addressed in Section 4.6 of FortisBC’s evidence. FortisBC believes that the existing regulatory framework in BC is well established and robust. This provides both utilities and consumers with the benefit of a consistent and predictable regulatory framework.”[3]

[3] Exhibit C4-6, Flintoff IR 4.3

Chapter 7. RECOMMENDATIONS

I would recommend that the BCUC provide regulation within the Province of BC including that of the indigenous nations and indigenous utilities. I feel that a trial basis be established to allow all parties to become familiar with the application of the UCA as it applies to the indigenous nations and indigenous utilities. I have suggested a minor change in the UCA definition of a public utility that can accommodate moving forward. I do not believe that there will be significant negative impacts as a result of my recommendation. A new regulation from the LIC may enable this change for a certain period of time so that all parties can become familiar with the proposed change to the regulation of energy in BC and allow time for further consultation on the matter on jurisdiction.

The issue of electric purchase agreements (EPAs) and standing offer programs (SOPs) has not been dealt with. Should the BCUC consider that indigenous nations having sole-ownership of a utility be given preferential treatment for EPAs and SOPs over non-BC companies for equivalent green or clean energy contracts or agreements? I believe that this matter needs further discussion.

Indigenous nations should be treated the same as municipalities or regional districts in the UCA. The form of indigenous government is adequate as not all those served by a municipality or regional district are eligible to vote in that municipality or regional district.

If the indigenous utility is not solely owned by the indigenous nation then it would be a regulated public utility that could apply for exemptions from certain parts of the UCA - the same as any other municipality or regional district government business enterprise utility.