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Via Email
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File No. 1316-004

Dear Commission Secretary:

Re: BCUC Indigenous Utilities Regulation Inquiry

Please see enclosed Beecher Bay First Nation and Adams Lake First Nation's joint final written argument.

Please contact me if you have any questions.

Yours truly,
JFK Law Corporation

Per:

Erin Thomson-Leach
ETL/clt

Encl.

Beecher Bay (S'cianew) First Nation
And
Adams Lake First Nation

Final Written Argument
October 4, 2019

British Columbia Utilities Commission Indigenous Utilities Regulation
Project No. 1598998

Introduction

1. These submissions are the Final Argument of Adams Lake First Nation ("**Adams Lake**") and Beecher Bay First Nation ("**Beecher Bay**"). As the Commission has encouraged intervenors with similar interests to work together, we have chosen to collaborate. While our circumstances are unique (and are described in our respective written evidence),[1] we share similar concerns respecting Indigenous utilities regulation and common objectives for participating in the Inquiry respecting regulatory reform.

2. This Final Argument is intended to assist the Commission in preparing its report to the Minister. We are concerned that with a focus on matters related to administrative efficiency, the Inquiry has missed an opportunity to meaningfully engage with Indigenous perspectives on Indigenous utilities and regulation. For example, throughout the Information Request process, the Commission and other participants asked the Nations to opine about hypothetical regulatory situations and complex constitutional and legal questions. Although these matters are relevant, few non-Indigenous participants engaged with the subject matter in a context of reconciliation.

3. We understand that the nature of the Inquiry is for the most part exploratory. However, we are concerned the process has not provided sufficient time or resources to comprehensively research various scenarios or fully consider their potential outcomes. Thus, it is important to emphasize that while we have each offered our views on concepts for Indigenous utilities and explained our individual experiences and goals, our submission in this process must be considered preliminary and without prejudice to the positions our Nations may take in other proceedings.

4. While we do not believe it would be an effective use of this process to reiterate all that we have said in our submissions to date, we note that we have described various tangible advantages to an Indigenous driven utilities system. These benefits include the development of emerging green technologies, local employment opportunities, and meeting the energy needs of underserved areas. Although we do not wish to repeat what is already on the record, these remain important

[1] Exhibit C9-2, Beecher Bay First Nation submitting written evidence; Exhibit C14-2, Adams Lake submitting written evidence.

considerations. In addition, we note that aspects of the Commission's guiding questions for Final Argument have been addressed through our responses to information requests and written evidence. For these reasons, although we respond to each question within the body of the text below, we felt it more important to refocus this inquiry on the principles that should inform the Commission's analysis.

Part I: The Inquiry in Context

5. In OIC No. 108, dated March 11, 2019 the Lieutenant Governor in Council tasked the Commission with considering Indigenous utilities and the appropriate nature and scope, if any, of regulating Indigenous utilities.[2] While the Commission is well-positioned to explore matters related to the regulatory process, regulation is only half of the picture. To understand the full picture of Indigenous utilities, the Commission must consider where Indigenous utilities fit within the greater context of reconciliation. For reconciliation to be meaningful, it must be directly led or informed by Indigenous peoples.

6. Although the Commission has invited Indigenous Peoples to participate in the Inquiry, the scope and focus of this Inquiry was predetermined by the OIC and the Commission's subsequent order (G-32-19) establishing the inquiry. The terms of reference directed the parties to answer specific questions about practical and legal regulatory matters with little substantive consideration of principles of reconciliation or recognition of Aboriginal rights under s.35 of the *Constitution Act, 1982*[3] or Indigenous rights under the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**").[4]

7. While we acknowledge that issues raised in terms of reference in OIC No. 108 are relevant to how Indigenous utilities may be structured in the future, the discussion of detailed hypothetical situations has produced a pseudo-adversarial process. Reconciliation requires meaningful and creative discussion and collaboration for diverse communities and entities to understand each other's perspectives. For example, in this case, the LGIC or the Commission could have collaboratively developed the Inquiry's terms of reference with Indigenous communities and developed a process that incorporated Indigenous governance principles and legal orders.

8. Without incorporating Indigenous perspectives from the outset, the Inquiry instead focused on specific and technical questions and arguments respecting administrative efficiency and potential jurisdictional issues. The questions asked do not grapple with the nature of the relationship between the Commission and Indigenous governments or recognizing Indigenous rights to self-determination or self-government. Indeed, as discussed in greater detail below, many of the

[2] British Columbia Utilities Commission Inquiry Respecting the Regulation of Indigenous Utilities, OIC No. 108 (11 March 2019).
[3] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*The Constitution Act*].
[4] United Nations Declaration on the Rights of Indigenous Peoples, GA Res A/61/295 September 13, 2007 [*UNDRIP*].

concerns raised in this Inquiry respecting coordinating jurisdictions can be addressed through collaborative agreements between jurisdictions; such solutions would reflect principles of reconciliation and a real government-to-government relationship.

Understanding colonial legacies

9. Fundamentally, this Inquiry should be an exercise in reconciliation. Numerous Indigenous participants have presented evidence about the barriers Indigenous communities face in realizing their socio-economic development objectives and have suggested that removing administrative and structural barriers to opportunities like operating an Indigenous utility could improve outcomes. The Commission has an opportunity to highlight and respond to such concerns in its report. If the Commission takes a purposive view of Indigenous utilities and considers Indigenous utilities as part of a long-term strategy for recognizing Indigenous self-determination, self-government, and economic growth, it would further reconciliation in British Columbia.

10. The Province has committed to true, lasting reconciliation. As Premier Horgan stated in his July 18, 2017 mandate letter to the Minister of Energy, Mines and Petroleum Resources, the government will be fully adopting and implementing UNDRIP and the Truth and Reconciliation Commission's ("**TRC**") Calls to Action.[5] In particular, the Minister is "responsible for moving forward on the calls to action and reviewing policies, programs and legislation to determine how to bring the principles of the declaration into action in British Columbia." The Commission can assist the Minister to fulfill that mandate by engaging with the principles of reconciliation and demonstrably incorporating the Indigenous perspective into its recommendations.

11. For example, the Commission must discuss the context of colonialization and its lasting and ongoing impacts on Indigenous Peoples and Indigenous communities in BC. This context helps to explain why it is appropriate for Indigenous utilities to be regulated differently than public utilities under the *Utilities Commission Act,* even if this may require additional efforts and resources.

12. In its written evidence, Beecher Bay provided specific examples of how colonization has impacted its community, noting that many members are struggling to make ends meet and rely on social assistance and the Nation's operational budgets are limited. Beecher Bay further explained it intended to use additional revenue generated from an Indigenous Utility to address funding gaps and otherwise address energy poverty.[6] Adams Lake explained that, like most Indigenous communities in BC, most of its territory has been developed or is being used for the benefit of non-Indigenous people or entities. Notably:

[5] *Ministerial Mandate Letter to Minister of Energy, Mines and Petroleum Resources* from Premier John Horgan (18 July 2017).
[6] Beecher Bay written evidence, paras 17-18.

> … thousands of km of hydro lines criss-cross Secwepemc territory distributing power from hydro dams at Mica, Revelstoke, Arrow, Pingston, and others, but the Secwepemc were not consulted about nor accommodated for these developments.[7]

13. As the Collective First Nations noted in this Inquiry, non-Indigenous utilities may not experience barriers to entry to the Utilities market in the same way as Indigenous utilities because they were not deprived of their rights and culture, including the lands and resources in their traditional territories.[8] The history of colonialization is well-documented, for example, in the TRC's Report. This context must be at the forefront of the Commission's recommendations and must be weighed accordingly to move toward meaningful reconciliation. As the TRC itself notes:

> In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land.[9]

Opportunities for reconciliation

14. The TRC directly calls upon all levels of government in Canada to fully adopt and implement UNDRIP as the framework for reconciliation.[10] In this instance, the Commission should consider and make recommendations consistent with UNDRIP. For example, the following articles are particularly relevant to matters raised in this Inquiry:

Article	Summary of Indigenous Peoples' Right	Application to this context
3	Affirms the right to self-determination, which includes the right to freely pursue economic, social and cultural development.[11]	This could include pursuing development of infrastructure, like utilities, to support and expand Indigenous community development.
4	Affirms the right to autonomy and self-government in matters related to internal and local affairs and ways and means for financing autonomous functions.[12]	This could include the ability to make decisions respecting and regulate Indigenous utilities or to enter into agreements with other bodies such as the BCUC or another, Indigenous-led commission respecting regulation.
5	Affirms the right to maintain and strengthen distinct political, legal, economic, social and cultural institutions while also participating fully, where they so choose, in the political, economic and social and cultural life of the state.[13]	The Commission should broadly consider and work collaboratively with First Nations to identify the roles of Indigenous institutions in economic development and their relationship to "mainstream" institutions – such as in regulation of utilities.
20	Affirms the right to maintain and develop political, economic and social systems or institutions, and to be	The Commission should consider and contrast these rights with the experience of Indigenous

[7] Exhibit C14-2, Adams Lake Indian Band written evidence, para 6 [*Adams Lake written evidence*].
[8] Exhibit C13-9, Collective First Nations Submitting Response to BCUC Information Request No. 1, at 1.1.
[9] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada," at p 190.
[10] Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action," Call to Action 43 at p 190.
[11] UNDRIP, Article 3.
[12] UNDRIP, Article 4.
[13] UNDRIP, Article 5.

	secure in and enjoy freely their traditional and other economic activities.[14]	peoples in the past (as discussed above) and seek opportunities to remove any existing barriers to fully realizing and recognizing these rights. In particular, the Commission should consider the state's obligation to recognize and protect these lands with due respect to the traditions of the Indigenous peoples.
26	Affirms the right to traditional lands, territories and resources; the right to own, use, develop and control those lands; and that states shall give legal recognition and protection to these lands, territories and resources (with due respect to the Indigenous peoples' traditions and land tenure).[15]	

15. Even though UNDRIP may not be implemented through legislation such that it is "legally binding" in Canada, it is still relevant and the Commission should consider and apply it in its report. As the Supreme Court of Canada noted in *Baker,* even where an international instrument is not specifically implemented in domestic legislation:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.[16] [Emphasis in original decision.]

This is especially the case where both the provincial and federal government have publicly committed to reconciliation and to implementing and honouring the principles of UNDRIP.

16. In the domestic context, the jurisprudence on s.35 of the *Constitution Act, 1982*[17] requires a broad, purposive approach to rights protected under s.35.[18] In addition, these rights are not considered to be "frozen in time," but must be able to evolve into a modern expression.[19] Thus, when considering the nature or scope of asserted or established rights to self-determination and self-government, the Commission should adopt a generous and liberal interpretation. If, as the Premier said, BC is committed to true and lasting reconciliation, the Commission must accept that self-determination and self-government include establishing and regulating Indigenous utilities.

17. This Inquiry has heard diverse perspectives from Indigenous Peoples, as well as concerns and opinions from non-Indigenous parties like BC Hydro and Fortis BC. We acknowledge that there is value in regulating services where circumstances demand it and also share a desire to protect the public interest. In their view, there are ways to achieve both of these objectives while also recognizing Indigenous rights, actively engaging in reconciliation, and stimulating sustainable economic and social growth for Indigenous communities. This will require an iterative approach to

[14] UNDRIP, Article 20.
[15] UNDRIP, Article 26.
[16] *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at para 70, 1999 CanLII 699; citing Ruth Sullivan, *Dreidger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 330.
[17] *The Constitution Act*, s 35.
[18] *R v Sparrow*, [1990] 1 SCR 1075 at para 1106, 1990 CanLII 104 (SCC); R v Van der Peet, [1996] 2 SCR 507 para 23, 1996 CanLII 216 (SCC) [*Van der Peet*].
[19] *Van der Peet* paras 63-64.

allow Indigenous utilities and Indigenous regulating bodies (however those may be constituted) to adapt and evolve as their capacity and resources increase. The following sections expand on these topics and address some of the Commission's questions from the Final Arguments Guidelines.

Part II: Evolving Indigenous Regulation

18. First Nations not only have an inherent right to self-government, based on their own laws and legal traditions, they also have experience enacting laws pursuant to authority recognised by the government of Canada. Although this is no substitute for true reconciliation and self-government, there is authority that may allow Indigenous governments to effectively regulate Indigenous utilities within the Canadian legal framework.

Existing Indigenous governance structures

19. As Beecher Bay described in their written submissions, it has established significant governance structures. In 2003, it enacted a comprehensive Land Code pursuant to the *First Nations Land Management Act* which establishes the specific authority to enact laws over "the provision of local services and the imposition of user charges."[20] Keeping in mind the legislative scheme, the context in which the legislation was enacted, and its aim and purpose, Beecher Bay submits it has law-making authority over the operation of an Indigenous utility. Further, as enclosed in its written submission, Beecher Bay has already drafted a Utilities law which is designed to ensure transparency and procedural fairness for all rate payers.[21]

20. Adams Lake is also exercising self-governance in a meaningful way. In promoting its law and governance, Adams Lake has implemented an election code, has assessed and applied property tax on reserve lands, and intends to develop a land code under the *First Nations Land Management Act* in the future.[22]

21. In addition, certain Nations may have other sources of authority within which to regulate, such as Treaties. These various sources of law demonstrate not only the adaptability of Indigenous governments, but also that a foundation exists to develop effective and Indigenous driven regulatory regimes over Indigenous utilities while carving a path towards true reconciliation.

22. As Adams Lake noted in its responses to Information Requests, there are various mechanisms that an Indigenous government may draw on to ensure consumers are protected against potential abuse of monopoly power by service providers. For example, bylaws and policies may be enacted that set transparent rates, establish dispute resolution processes and address how an Indigenous government will respond to its consumers. Developing clear processes set out in laws and policies would not only protect consumers, but also assist Indigenous governments to carry out their

[20] Beecher Bay written evidence, paras 23-28.
[21] Beecher Bay written evidence, at para 35.
[22] Adams Lake written evidence, para 10-11.

governmental mandates.[23] In sum, the protection of consumers does not stand in contrast to Indigenous regulation of Indigenous utility systems.

Broader views of Indigenous utilities regulation

23. As noted above, First Nations that currently enact their governance powers pursuant to legislation like the *Indian Act*, the *First Nations Land Management Act* or the *First Nations Financial Management Act* likely view their rights to self-government or self-determination beyond these Acts. These Acts, particularly the *Indian Act,* were imposed on Indigenous peoples broadly and do not reflect their unique legal orders or principles. As BC First Nations negotiate agreements directly with the provincial and federal governments, and as Indigenous Peoples across Canada work to affirm their inherent rights on a broader scale, so too will the nature of Indigenous governance powers change. It therefore follows that Indigenous utilities and regulation of those same utilities may also change as reconciliation progresses.

24. In light of this, we believe that, while the Commission works toward reconciliation, it would be appropriate to amend the *Utilities Commission Act* the ("**Act**") to protect Indigenous Nations' rights and interests. Although there may be different ways to achieve this, at a bare minimum, the Act should be amended to ensure that Indigenous utilities are exempt from regulation as public utilities in a manner similar to municipalities. This could be achieved by adding a definition of "Indigenous utility" to the Act (see below for the Nations' views on the characteristics of an Indigenous utility) and adding Indigenous utilities to the list of entities excluded from the definition of "public utility".

25. It is far more difficult to opine in a useful manner about the regulation of non-Indigenous utilities operating on-reserve or treaty settlement land in a future where there is Indigenous regulation over utilities, as the Commission has discussed in the Final Argument Guidelines.[24] At this point, where the precise characteristics of an Indigenous utility are still unknown, we do not believe we have enough information to answer the Commission's question. The answer would also depend on how Indigenous utilities themselves would be regulated, the type of utility infrastructure, the nature of the particular governance structure etc. We do believe that whatever the ultimate approach is, a collaborative approach will better meet the needs of all utility service providers.

26. Adams Lake and Beecher Bay submit that it is inconsistent with the principles of reconciliation and mutual respect through a government-to-government relationship for BCUC to impose regulatory jurisdiction in a top down manner over Indigenous utilities. However, we are not opposed to resource sharing and collaborating with the BCUC or another non-Indigenous body to resolve jurisdictional issues in a way that best serves the public interest. In circumstances where jurisdictional issues emerge, any determination that there will be residual concurrent jurisdiction

[23] Exhibit C14-3, Adams Lake Indian Band Responses to British Columbia Utilities Commission Information Request No. 1, at p 3 [*Adams Lake Response to IR No. 1*].
[24] Exhibit A-38, Final Argument Guidelines at p 2.

for the BCUC over Indigenous utilities should be negotiated and consented to by the relevant Indigenous government.

27. We recognize that the BCUC has experience in energy regulation. Although we do not view the BCUC as the appropriate regulator for Indigenous utilities, we believe that the BCUC could provide valuable resources to help build Indigenous expertise and capacity with respect to complaints and safety issues. Indigenous governments should be supported in developing an Indigenous utility system. By providing support without imposition, BCUC would be laying the groundwork for an authentic demonstration of reconciliation and working with Indigenous Nations on a government-to-government basis.

28. Any views on the limits of an alternative administrative body constituted to serve as regulator of Indigenous utility systems are highly speculative at this time and further research would have to be undertaken to inform a comprehensive response. To a certain extent, the jurisdiction of an Indigenous utilities commission may depend on practical considerations like the resources provided to such an independent body. We suggest that establishing an Indigenous administrative body to regulate Indigenous utilities, constituted by the Indigenous community and driven by Indigenous laws, would be a positive step forward regardless of whether an Indigenous utility commission acts regionally or more broadly.

29. In addition to the matters identified in the guiding questions for this final argument, we expect there may be areas of jurisdiction where it is in the public interest for the BCUC and Indigenous utilities to work together to reach mutually beneficial solutions. We look forward to exploring these matters with a focus on cooperation and with the objectives of reconciliation at the forefront.

Closing Comments

30. As a general comment, this Indigenous Utility Inquiry should remain focussed on the constitutional principles at stake. We do not suggest that this Inquiry process should purport to respond comprehensively to all possible questions related to establishing thriving Indigenous utility systems. However, simply because there remain issues to be resolved does not mean that an undertaking is not worthwhile. In this case, Beecher Bay and Adams Lake submit that the need to accept and respect the authority of Indigenous governments trumps any administrative issues that remain to be resolved.

31. Moreover, Indigenous communities are not homogenous, and each utility system should be developed to reflect the values integral to the particular Indigenous community developing the system. For some communities, stewardship may be a foundational principle. New and emerging technologies, for example geothermal and lake technology, may also be paramount.

32. The aim of social and economic growth and sustainability, as well as the ability to benefit from a community's own lands and resources, will support the development of clear policies and procedures related to the utility system. As noted in previous submissions, economic growth and energy self-sufficiency are also important. Finally, and perhaps most importantly, effectively regulating a utility system in accordance with Indigenous legal principles and legal regimes provide a vehicle to demonstrate Indigenous self-government.

33. While Beecher Bay and Adams Lake have appreciated the opportunity to participate in this process, we view this Inquiry as only the beginning. There are a range of possible outcomes on Indigenous utilities and regulatory approaches that may advance reconciliation. In our view, fully incorporating the principles of UNDRIP and recognizing Indigenous rights to self-government will require a process that is adequately funded and rooted in community-driven processes. Reconciliation, if it is to be meaningful, must move beyond discussion into real action in order to effect change. We look forward to continued participation and engagement on these important matters.