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BCUC File 63059
Batch 59998

March 6, 2020

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC
V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Mr. Wruck:

Re: British Columbia Utilities Commission (BCUC) Indigenous Utilities Regulation Inquiry (Inquiry) – Project No. 1598998

FortisBC Group of Companies[1] (collectively FortisBC)

Comments on BCUC Draft Report

In accordance with BCUC Order G-26-20 updating the Regulatory Timetable for the above noted Inquiry, FortisBC respectfully submits the attached comments on the BCUC Draft Report.

If further information is required, please contact the undersigned.

Sincerely,

FORTISBC ENERGY INC.

Original signed:

Doug Slater

Attachments

cc (email only): Registered Parties

[1] Including FortisBC Energy Inc. (FEI), FortisBC Inc. (FBC), FortisBC Alternative Energy Services Inc. (FAES), and Mt. Hayes Limited Partnership (MHLP).

BRITISH COLUMBIA UTILITIES COMMISSION
INDIGENOUS UTILITIES REGULATION INQUIRY

Written Comments of
FortisBC
on the BCUC Draft Report

March 6, 2020

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1. INTRODUCTION

On November 1, 2019, the British Columbia Utilities Commission (BCUC) released its Draft Report in this Inquiry.[1] The Draft Report responds to the terms of reference set out in section 3 of Order in Council (OIC) No. 108 regarding the regulation of Indigenous utilities and includes fourteen discrete proposed recommendations. In conjunction with the release of the Draft Report, the BCUC sought feedback from the public through a series of workshops across the Province and has solicited written comments from interveners.

This submission represents the comments of FortisBC Energy Inc. (FEI), FortisBC Inc. (FBC), FortisBC Alternative Energy Services Inc. (FAES), and Mt. Hayes Limited Partnership (MHLP)[2] (collectively referred to as FortisBC) on the Draft Report. FortisBC's active participation in this Inquiry reflects:

- The importance FortisBC places on engagement, and related partnerships, with Indigenous groups throughout the province, which are expected to continue to create opportunities to work together;
- The interest expressed by some Indigenous groups to develop energy projects and associated utility infrastructure; and
- The need for the consistent application of well-established regulatory principles that protect consumers across British Columbia, while facilitating economic development opportunities for Indigenous groups.

In providing these comments, FortisBC recognizes that the Draft Report is intended to be a "catalyst for further discussion" in advance of the BCUC releasing its Final Report and recommendations on April 30, 2020.[3] FortisBC believes that, overall, the BCUC's proposed recommendations would facilitate participation by Indigenous groups in the energy sector, while providing important minimum safeguards to protect consumers. Some of the outstanding questions posed in the Draft Report are raising matters that could have significant implications for existing utilities, their customers and the public generally. The BCUC should exercise caution if it intends to formulate recommendations on these other matters.

FortisBC's comments are organized as follows:

- Section 2 provides some general comments about the need to retain consumer protection as an important regulatory objective as Indigenous groups develop utility infrastructure and frameworks for self-regulation.

[1] Exhibit A-43.
[2] MHLP is controlled by FEI. Although two First Nations own minority limited partnership interests, MHLP is not purporting to speak on their behalf.
[3] Exhibit A-43, Executive Summary, p. i.

- Section 3 explains why the BCUC's proposed recommendations generally strike an appropriate balance between consumer protection and the preservation of Indigenous self-governance.
- Section 4 identifies some of the significant implications if the BCUC were to expand the proposed recommendations beyond reserve or modern treaty lands, so as to include traditional territories and the entire Treaty 8 area.
- The remaining sections address topics that the BCUC has identified for discussion in section 7.2 of the Draft Report.[4]

2. SELF-DETERMINATION AND CONSUMER PROTECTION ARE BOTH IMPORTANT OBJECTIVES

As an initial comment, FortisBC recognizes the importance of self-determination to Indigenous groups in British Columbia. The existing framework of the UCA already accommodates Indigenous development of energy infrastructure in many respects, but FortisBC recognizes that more can be done. At the same time, Indigenous utilities, like non-Indigenous utilities, are in a position to exercise monopoly power, thereby putting consumers at potential risk. The existence of a monopoly over important services is the basis for utility regulation, and it remains relevant even in the context of Indigenous utilities. A balancing of interests is required.

FortisBC believes that the following principles are important, and underpin its endorsement of specific BCUC recommendations.

- We should respect modern treaties or self-government agreements that expressly contemplate self-regulation of utilities.
- In other circumstances (e.g., reserve lands), alignment between the owners and customers of an Indigenous utility gives rise to the opportunity for self-regulation by an Indigenous Nation. In such cases, the customers have recourse through their control over the utility. In ownership models where effective control by the customer base is absent (e.g., minority shareholdings), the case for maintaining BCUC regulation becomes more compelling.
- Non-Indigenous customers of an Indigenous utility, who do not control the Indigenous utility, need an accessible, effective and cost-efficient administrative process. The adjudicator of disputes should be independent from the owners of the Indigenous utility.
- The consumer protection offered by utility regulation comes not just from oversight by an independent regulator but also from well-established regulatory principles that address access to safe, reliable and cost effective service (e.g., rates and services should be just and reasonable, and provided without undue discrimination or preference). FortisBC favours maintaining these principles for all British Columbia consumers, but at a

[4] Exhibit A-43, pp. 96-97.

minimum it should be made clear to consumers up front if an Indigenous utility intends to depart from them.

Some of the other questions that the BCUC has posed have significant implications, and some raise significant issues that cannot be resolved in this Inquiry. FortisBC elaborates later in this submission.

3. FORTISBC'S VIEWS ON THE BCUC'S PROPOSED RECOMMENDATIONS (BCUC QUESTIONS (A), (B))

In its topics for discussion in section 7.2 of the Draft Report, the BCUC poses the following questions:

(a) What are your views on the BCUC's proposed recommendations?"

(b) Do the proposed recommendations strike the right balance between the need for ratepayer protection and the rights of First Nations to self governance?

As described in the table below and the sections that follow, FortisBC considers that the BCUC's proposed recommendations generally (with limited, but important caveats on Recommendation 10 in particular) strike an appropriate balance between consumer protection and the preservation of Indigenous self-governance. They provide opportunities for Indigenous groups to develop energy infrastructure, while providing some safeguards to protect consumers.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Regulation of Monopolies	
1) That all ratepayers of Indigenous utilities receive the same protection as do ratepayers of non-Indigenous utilities.	FortisBC agrees with this recommendation. It also agrees with the BCUC's view[5] that certain underlying regulatory principles have broad application to all utilities irrespective of its ownership or operation, including Indigenous utilities. Utility regulation is premised on the need to protect consumers against potential monopolistic behaviour on the part of a public utility. The safeguards inherent in a competitive environment are absent where natural monopoly characteristics are present, thereby putting consumers at risk. The protection offered by regulation includes ensuring that (a) rates charged are reasonable and non-discriminatory, (b) service is safe, reliable and commensurate with the amount that the utility charges for it, and (c) a utility meets its duty to provide service. The merits of regulation to protect the public interest have been acknowledged by the BCUC, the BCUC's consultant (Mr. Hempling), and several interveners in this Inquiry.[6] As noted in the Draft Report, from a policy perspective, the absence of any regulation is "undesirable" and "far from ideal".[7] FortisBC agrees with the BCUC that there are undoubtedly unique considerations arising from the special nature and status of Indigenous Nations.[8] Nonetheless, this does not change the need for all residents of British Columbia to have access to protection from monopoly power. Ultimately, an Indigenous utility is no more, and no less, capable of exerting monopoly power than a non-Indigenous utility. The BCUC's proposed recommendations show that there is flexibility around how that protection is provided, such that Indigenous utilities can also thrive.

5 Exhibit A-43, p. 75.
6 For a summary see: FortisBC Final Argument, pp. 4-7.
7 Exhibit A-43, p. 74.
8 Exhibit A-43, p. 74.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Regulation of Mandatory Reliability Standards	
2) That the BCUC retain jurisdiction with respect to approval, compliance and enforcement of Mandatory Reliability Standards applicable to all transmission infrastructure in the province, regardless of who owns or operates the infrastructure.	FortisBC agrees with this recommendation. The interconnected nature of transmission infrastructure in British Columbia and the need for safe integration with neighbouring jurisdictions necessitates the consistent application of Mandatory Reliability Standards (MRS). The compliance framework devoted to MRS is significant and highly specialized. Maintaining that framework requires ongoing interaction with technical bodies throughout North America. The BCUC is well-placed as a centralized regulatory body, given its resources and expertise, to carry out necessary oversight with respect to MRS, ensuring the safe operation of British Columbia's portion of the Western Interconnection grid. We offer two additional comments. First, the BCUC could effect this same result by regulating the utility to which the Indigenous utility was seeking to connect (e.g., BC Hydro or FBC). The BCUC will continue to oversee the interconnection regardless, and could order BC Hydro or FBC to disconnect an Indigenous utility in the event that the Indigenous utility was to act in a manner that placed the interconnected grid at risk. Having said that, directly overseeing an Indigenous utility in respect of its compliance with MRS would help to avoid a circumstance where disconnection becomes necessary. Second, as a practical matter, FortisBC expects that the vast majority of Indigenous utilities would fall below the thresholds that trigger the requirement to adhere to MRS.
Reserve Lands	
3) That a First Nation be given the opportunity to self regulate when it provides utility service on its reserve land, in much the same way municipalities and regional districts do. Subject to recommendations 4 to 6 below, this can be accomplished by enabling a First Nation or Band Council to "opt out" of BCUC regulation by notifying the BCUC of its intention.	FortisBC agrees with this recommendation, with the qualification that Recommendations 4 to 6 should also be adopted as the BCUC has proposed. As indicated previously, an Indigenous utility is no more, and no less, capable of exerting monopoly power than a non-Indigenous utility. Recommendations 4 to 6 provide critical safeguards to consumers taking service from a self-regulating Indigenous utility. They are proportional, such that they mitigate the risk posed by the exercise of monopoly power while leaving the First Nation free to operate without BCUC involvement on a day-to-day basis.

BCUC Proposed Recommendations	FortisBC's Summary Comments
4) That the First Nation should demonstrate that it has an appropriate complaint and dispute handling process in place to protect all ratepayers. In the event it cannot do so the BCUC would retain jurisdiction to handle all complaints.	FortisBC agrees with this recommendation. It is an important qualification to ensure all consumers are adequately protected. If an Indigenous group is to be given the opportunity to self regulate when it provides utility service on its reserve land, there is a need for meaningful recourse for all consumers living on reserve, as there is for other consumers across British Columbia. The requirement that an Indigenous group demonstrate that it has an appropriate complaints and dispute handling process is a reasonable means of providing some protection to consumers. A complaint and dispute handling process should be both effective and cost-efficient so as to provide benefits over an individual having to pursue litigation in the courts. As the BCUC noted in the Draft Report, courts ought to be regarded as a venue of "last resort" given the costs and complexity associated with litigation and their limited accessibility for the average consumer. See Section 5 below for further discussion regarding the form an appropriate complaint and dispute handling processes should take.

BCUC Proposed Recommendations	FortisBC's Summary Comments
5) That the BCUC complaint and dispute handling processes be available to any ratepayer who wishes to appeal a decision arising out of the First Nation utility's complaint process.	FortisBC agrees with this recommendation. The ability for consumers to access an effective and efficient appeal or review mechanism is an important element of a sound regulatory framework. FortisBC recognizes that Indigenous governance structures could offer sufficient protection in the first instance for consumers who can participate directly in those structures. This is unlikely to be the case for a non-Indigenous customer of an Indigenous utility. Regardless, appeal structures routinely exist in circumstances where the initial hearing is conducted pursuant to established and fair structures. The BCUC itself is an example of this; reconsideration and appeal are both options under the UCA. Retaining the BCUC as an appellate body for Indigenous utilities ensures a right of review by a centralized decision-making body, similar to the role served by the Court of Appeal in relation to the BCUC. An appeal to a regulatory tribunal like the BCUC will be more accessible to affected consumers and the Indigenous utility than the courts. FortisBC recognizes that the BCUC's recommendation differs from the framework in place for municipalities. Recourse from a municipality's decisions about its own municipal utility is to the courts, rather than the BCUC. FortisBC regards this as a shortcoming of that structure that ought not to be replicated in this context. See Section 5 below for further discussion regarding the form an appropriate complaint and dispute handling processes should take.
6) Safety and reliability (other then MRS) will be the subject of the workshop and comment period. If the Final Report recommends that the BCUC retains jurisdiction over safety and reliability, First Nations would not be able to opt out of those applicable portions of the UCA governing these issues.	FortisBC submits that the BCUC should retain jurisdiction with respect to safety and service reliability, in order to preserve a unified regulatory approach across British Columbia. This approach is in the best interest of consumers by (a) limiting the potential for a patchwork of safety and reliability regulation to cause confusion among stakeholders, not just in respect of the Indigenous utility but also for other non-Indigenous utilities, and (b) promoting efficiency through common safety and reliability standards. See Section 6 below for further comment in support of the BCUC retaining jurisdiction with respect to safety and service reliability.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Modern Treaty Lands – Nisga'a	
7) That the Nisga'a Nation be given the opportunity to self regulate, as do municipalities and regional districts, when it provides utility service on its own lands.	FortisBC agrees with this recommendation, given the nature of the modern treaty in place with the Nisga'a Nation. As described in Chapter 11 of the Nisga'a Final Agreement, the Nisga'a Nation has authority to enact laws regulating public works and utilities on its own lands.[9] This differentiates the Nisga'a Final Agreement from historic treaties.
8) Notwithstanding the Nisga'a's authority over their own lands, we recommend that the BCUC retain jurisdiction over Mandatory Reliability Standards, because of the interconnected nature of the North American bulk electric system.	FortisBC agrees with this recommendation for the reasons described in response to Recommendation 2.
Other Modern Treaty Lands	
9) Provided that a modern Treaty contains terms that are substantially similar to those set out in the Nisga'a Treaty, we would recommend, on the basis of parity, that a modern Treaty Nation be given the opportunity to self-regulate when it provides utility service on its own lands, in the same manner as we have proposed for the Nisga'a.	FortisBC agrees with this recommendation. Where an Indigenous Nation has concluded a modern treaty (or a self-government agreement) where the terms address self-regulation of utility service, self-regulation may be appropriate within the geographic scope contemplated by the treaty. As noted in the Draft Report, the appropriateness of self-regulation must be assessed on a case-by-case basis taking into consideration "the particular capacity, resources, and robustness of the First Nation and other governance structures that are put in place pursuant to those treaties".[10] The presence of terms in a modern treaty or self-government agreement providing for self-regulation of utility service is key in this regard, and such terms are absent in historic treaties. See our comments in response to Recommendation 10 below.

[9] See Exhibit C21-3 for further submissions from the Nisga'a Nation in this regard.
[10] Exhibit A-43, p. 85.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Lands Subject to Historical Treaties	
10) We are inclined to recommend that First Nations that are parties to Historical Treaties be covered by the recommendations outlined in respect of Reserve Land. However, we welcome comments on this recommendation during the workshop and comment period.	FortisBC believes that this recommendation is ambiguous. It is unclear as to whether the BCUC is asking (a) whether the Recommendations 3-6 should also apply to *reserve lands* within Historic Treaty areas, or (b) whether those Recommendations should be extended to the entire geographic territory covered by the Historic Treaties. If the BCUC intended the former, then FortisBC agrees with the recommendation for the reasons stated in respect of Recommendations 3-6. However, interpretation (b) would be inconsistent with the Treaty 8 framework. It would also result in large parts of the province being potentially without BCUC regulation, which could be detrimental to the public interest. FortisBC would not support interpretation (b) for the reasons described in Section 4.2.
Westbank First Nation	
11) Provided that the Advisory Council Law applies to resolution of utility complaints, we are inclined to recommend that the Westbank First Nation be given the opportunity to self-regulate when it provides utility service on its own lands, as we have proposed for the Nisga'a. To provide greater clarity, we invite the Westbank First Nation to give us further input as to how this law applies to utility complaint resolution during the workshop and comment period.	FortisBC's objective is to ensure that there is an effective procedure in place to protect consumers. FortisBC agrees with the principle of providing a similar opportunity to the Westbank First Nation subject to our points relating to Recommendation 9, and looks forward to the Westbank First Nation providing the clarification sought by the BCUC.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Sechelt Indian Band and Sechelt Indian Government District	
12) It appears uncertain that either the Sechelt Indian Band or the Sechelt Indian Government District qualifies for the current municipal exception under the UCA. Nonetheless, we would recommend that those entities be given the opportunity to self-regulate when they provide utility service on their own lands, as we have proposed for the Nisga'a, provided that the Advisory Council has the power to resolve utility complaints. To assist us in making this recommendation, we invite the Sechelt Indian Band and the Sechelt Indian Government District to give us further insight into their processes during the workshop and comment period.	FortisBC's objective is to ensure that there is an effective procedure in place to protect consumers. FortisBC agrees with the principle of providing a similar opportunity to the Sechelt Indian Band and the Sechelt Indian Government District subject to our points relating to Recommendation 9, and looks forward to those parties providing the clarification sought by the BCUC.
Ceasing to be an Indigenous Utility	
13) If a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA.	FortisBC agrees with this recommendation and notes that there appears to be broad consensus on this point.

BCUC Proposed Recommendations	FortisBC's Summary Comments
Definition of Indigenous Utility	
14) The definition of Indigenous utility should be further explored during the workshops. We have outlined above recommendations for the regulation of utility services provided by First Nations. The workshop topics further explore different ways that service is provided, thereby defining an Indigenous utility. We also recommend that consideration be given, during the workshop period, to any further context in which the definition of Indigenous utility is required.	FortisBC supports the BCUC's assessment that the definition of Indigenous utility in the Terms of Reference for this Inquiry is too broad to be anything more than a "useful starting point for discussion".[11] The definition should be refined to apply to a narrower group of utilities. As noted in the Draft Report, "there is broad agreement among First Nations that utility services provided by the Nation or Band Council should be distinguished and considered for self-regulation."[12] FortisBC agrees, but submits that additional criteria with respect to the governance, operation and management of the public utility should be incorporated into the definition. First, it is the alignment of the utility ownership and the utility's customers that provides consumer protection in the absence of active BCUC oversight. As such, an Indigenous Nation eligible for self-regulation should have a "controlling interest" in the Indigenous utility that it oversees and the Indigenous utility should be operating on its own Reserve, or Treaty / self-government lands where those receiving service can exercise effective control through governance mechanisms. The concept of a "controlling interest" still allows for investment by third-parties. Control could arise in a number of ways depending on the rights and obligations specified by (e.g., shareholder) agreement among the owners. Ultimately, control is critical for customers of the utility to be able to provide meaningful input into governance of the utility.[13] See Section 7 below in which FortisBC responds to the hypothetical scenarios expanding the scope of the proposed exclusion from the UCA (or portions therein). Second, FortisBC notes that any definition of an Indigenous utility must also be mindful of differing geographical/jurisdictional contexts (i.e., reserve, modern treaty or self-government lands), which may impact the ability of the BCUC to regulate the form an Indigenous utility may take. It is important, for instance, that the definition not inadvertently have the effect of extending an Indigenous utility's operating area to the entire geographic territory of a historic treaty or traditional territory, which would have detrimental implications.

[11] Exhibit A-43, p. 88.
[12] Exhibit A-43, p. 89.
[13] See Exhibit C4-3, BCUC-FortisBC IRs 1.1.1 and 1.4.2.

4. REGULATION OF INDIGENOUS UTILITIES ON TRADITIONAL TERRITORIES AND HISTORIC TREATY LANDS

In its Guidance for Final Written Comments,[14] the BCUC identified a number of issues with respect to the regulation of Indigenous utilities beyond reserve or modern treaty lands. In this section, FortisBC submits that the BCUC's proposed recommendations relating to reserve lands and lands subject to modern treaties should not be extended to encompass the entire asserted traditional territories of Indigenous groups or the entirety of historic treaty lands. Such steps would have far reaching implications for existing utilities, their customers and the public generally.

4.1 *EXPANSION OF INDIGENOUS SELF-REGULATION TO TRADITIONAL TERRITORIES WOULD HAVE FAR-REACHING IMPLICATIONS*

The entire province is covered by asserted traditional territories of Indigenous groups, and the claims overlap in many cases. These territories thus encompass the entire service areas of the existing utilities like FortisBC, Pacific Northern Gas and BC Hydro. They also encompass the bulk of the population and industry of British Columbia. There would be a number of significant issues with extending the proposed recommendations to entire asserted traditional territories.

First, utilities are natural monopolies, meaning that a particular utility service, with its significant capital requirements and finite customer base, can be provided most cost-effectively by one firm (i.e., the economic principle of sub-additivity of costs). By way of explanation, there is a finite pool of end users from which to recover the costs of providing utility service, and dividing that cost among more customers lowers the unit cost of service. All customers pay a lower unit cost when there is more load on the system. Conversely, having redundant infrastructure owned by multiple utilities, while splitting the customer base that pays for each utility's duplicate infrastructure, necessarily increases the rates paid by all consumers.

These principles are echoed in the Hempling paper, filed by the BCUC in this Inquiry as Exhibit A-8 (see p. 5):

> Most utilities are legal monopolies. The legislative body has passed a law, or a regulatory commission has issued an order, that does three things:
>
> 1. It draws the boundaries of a particular service territory.
>
> 2. It appoints a single company to provide some set of services to customers within that service territory.
>
> 3. It prohibits any other company from competing with the appointed company within that service territory.

[14] Exhibit A-48.

> We call this government action "granting a certificate of public convenience and necessity" or "granting a franchise." Governments grant these monopoly franchises when they find that the particular service, such as retail electric service or retail gas service, is a natural monopoly. A natural monopoly is a product or service having two main characteristics: (1) the per-unit cost of providing the service declines as output increases; and (2) the decline continues for the entire quantity sold within the defined market. If a service has these characteristics, costs to customers will be lowest if the market has only one company.

Mr. Hempling also noted that “competing distribution wires cluttering our neighborhoods would raise costs for all.” (p. 6).

Second, the provision of safe and reliable utility service requires a very significant up-front investment, which only makes commercial sense if there is a reasonable expectation of being able to recover that investment through rates. The potential for an existing utility to be faced with a fundamental challenge to its ability to operate as a BCUC-regulated monopoly in large portions of its current service area would represent a substantial business risk that could impact investment in utility infrastructure.

Third, extending the BCUC’s proposed recommendations to asserted traditional territories would significantly reduce the BCUC’s role as a regulator of safe, reliable and cost-effective service. British Columbia would face the potential for a patchwork of different regulatory models, as opposed to the consistent application of principles province-wide.

Fourth, the evolving and overlapping nature of asserted traditional territories is itself a challenge. While overlapping claims may be a matter best addressed within and amongst Indigenous groups themselves, in discussion with government or through the courts, the current uncertainty with respect to these boundaries is nonetheless a consideration that must be borne in mind by the BCUC. Granting an exemption to one Indigenous group to operate an Indigenous utility over lands also claimed as traditional territory by other Indigenous groups has the potential to create significant fairness issues. Authorizing competing Indigenous utilities to operate in the same area with duplicate infrastructure would be much more costly for consumers and could challenge the viability of the competing Indigenous utilities themselves.

Ultimately, FortisBC is of the view that (with limited, but important caveats on Recommendation 10 in particular) the BCUC’s current proposed recommendations are measured, will facilitate the participation by Indigenous groups in the energy industry, provide some protection for consumers, and provide greater certainty for existing utilities and their customers. The proposed recommendations also mirror, at least to some extent, where Indigenous utilities would operate and the geographic boundaries where all consumers can be properly protected. FortisBC submits that matters of regulation beyond the geographic boundaries of reserve or modern treaty lands are best addressed through agreement, likely on a Nation-to-Nation basis, and in consultation with existing utilities and the public. Such a process would need to take place on a case-by-case basis reflecting the considerations and concerns unique to each group, and the variety of forms Indigenous utilities and associated service offerings may take. As discussed

below in Section 4.3, FortisBC considers this approach to be consistent with the Declaration on the Rights of Indigenous Peoples Act (DRIPA).

4.2 BCUC Recommendations Should Be Extended to Reserves Within Historic Treaty Lands, but Not the Entirety of the Historic Treaty Lands

As discussed briefly above in Section 3, Recommendation 10 is ambiguous. FortisBC agrees with an interpretation that the BCUC's Recommendations 3-6 should be extended to reserves within a historic treaty area. However, if the BCUC intends for Recommendations 3-6 to apply to the entire geographic territory covered by the historic treaties in British Columbia, then FortisBC submits that this would be contrary to the public interest. It would also be inconsistent with the generally accepted interpretation of historic treaties, particularly in the context of Treaty 8.

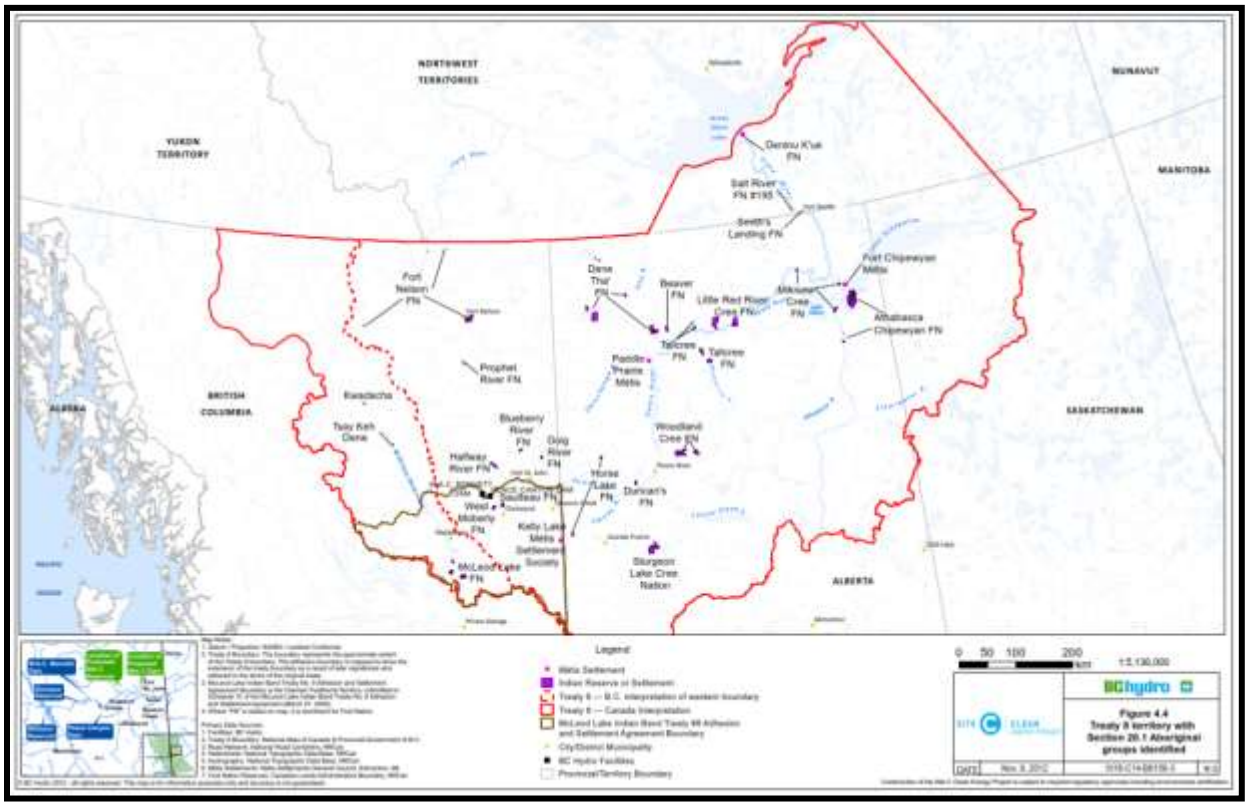
First, the Supreme Court of Canada has considered the rights prescribed under Treaty 8 on numerous occasions.[15] Treaty 8 should be viewed by the BCUC as providing Indigenous groups a prescribed set of treaty rights in exchange for the surrender of land. The geographic boundaries of Treaty 8 establish the area in which these rights may be exercised.

For context, Treaty 8 is one of the eleven numbered treaties concluded between the federal Crown and various Indigenous groups between 1871 and 1923 in order to facilitate settlement in the western portion of Canada. Treaty 8 was made on June 21, 1899 and provided for the surrender of approximately 840,000 square kilometres of land covering what is now northwestern Saskatchewan, northern Alberta, northeastern British Columbia, and a southern part of the Northwest Territories. In particular, Treaty 8 provides:

> AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: (emphasis added)

Treaty 8 covers an area larger than Alberta. Approximately one-third of the treaty lands are located in British Columbia. The following map, taken from the report filed by BC Hydro in environmental assessment for the Site C Clean Energy Project, depicts the area covered by Treaty 8.

[15] See, for example, *R. v. Badger*, [1996] 1 SCR 771; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.



In exchange for the surrender of land, the Crown promised to provide Indigenous signatory groups with reserves (among other entitlements) and importantly, guaranteed a right to hunt, trap, and fish on the surrendered lands, subject to certain restrictions. As a historic treaty, Treaty 8 is recognized under section 35 of the *Constitution Act, 1982* and the treaty rights it confers are constitutionally protected.

Second, unlike modern treaties, Treaty 8 does not include an express right for an Indigenous adherent/signatory to operate a utility, or indeed, a right to do so throughout the entirety of the lands surrendered under Treaty 8 or the group's asserted traditional territory.

Third, the location of the western boundary of Treaty 8 is currently subject to ongoing litigation, creating further uncertainty with respect the geographic limits of any Indigenous utilities operating with the Treaty 8 area. In 2017, the Supreme Court of British Columbia (BCSC) agreed with the position of Canada and a number of Treaty 8 First Nations,[16] declaring the Treaty 8 western boundary to be the height of land along the continental divide between the Arctic and Pacific watersheds (the solid red line as shown in the above map).[17] That decision has been appealed, and the parties await a decision from the British Columbia Court of Appeal. It is likely that, whatever the result, it will ultimately be decided by the Supreme Court of Canada.

[16] These Indigenous Nations included: West Moberly First Nations, Halfway River First Nation, Saulteau First Nations, Prophet River First Nation and Doig River First Nation.

[17] See *West Moberly First Nations v British Columbia*, 2017 BCSC 1700, para. 4.

Moreover, should the decision of the BCSC be upheld on appeal, the geographic area of Treaty 8 will include Indigenous groups that are not treaty signatories and do not have treaty rights thereunder (e.g., Tsay Keh Dene Nation and Kwadacha Nation). If the BCUC intends for Recommendations 3-6 to apply to the entire geographic territory covered by Treaty 8, then these Indigenous groups could be disadvantaged as compared to Treaty 8 First Nations as a result of differing but overlapping self-regulated service areas.

Many of the underlying issues identified with respect to operating beyond reserve or modern treaty lands also arise in the context of operating on historic treaty lands. See Section 4.1 above for a discussion of these issues.

The upshot of the points above is that extending Recommendations 3-6 to the entirety of the Treaty 8 area would give rise to substantial uncertainty for consumers and the Indigenous groups within the Treaty 8 area. By contrast, applying the BCUC's recommendations to reserve lands (including reserves within the boundaries of Treaty 8) and modern treaty areas would represent a significant step to facilitate participation of Indigenous groups in the energy sector in the near-term.

4.3 *BCUC'S PROPOSED RECOMMENDATIONS REFLECT THE SPIRIT AND INTENT OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT*

The BCUC has asked participants in the Inquiry to consider how and to what extent the implementation of DRIPA should impact the BCUC's recommendations.

The BCUC's proposed recommendations are the result of months of engagement with Indigenous participants across British Columbia – a period of consultation and collaboration that reflects the spirit and intent of DRIPA.

As noted by the Honourable Scott Fraser (Minister of Indigenous Relations and Reconciliation), in drafting DRIPA the government understood that the change it contemplated would take time:[18]

> This work will be expected to take time bringing laws into alignment with the UN declaration. It won't happen overnight. It will be generational work.

While there is more work to be done with reconciliation, the BCUC's proposed recommendations would represent a substantive change to public utility regulation that would benefit Indigenous groups across British Columbia. They also have the potential to be implemented over a relatively short time horizon. More thought and engagement than is possible in this forum would be necessary before considering broader steps (such as those discussed in Sections 4.1 and 4.2) that would diminish or eliminate the BCUC's jurisdiction over large areas of British Columbia and much of British Columbia's population and industry.

[18] Hansard (dated November 26, 2019), p. 10806, Online: https://www.leg.bc.ca/content/hansard/41st4th/20191126pm-Hansard-n299.pdf.

5. DISPUTE RESOLUTION FUNCTIONS CAN BE DESIGNED TO BE FLEXIBLE AND TRANSPARENT (BCUC QUESTION (C))

The BCUC has asked, in question (c), what "an appropriate complaints and dispute resolution process [would] look like" and whether "there [should] be minimum safeguards" for consumers. As noted in the table above with respect to Recommendation 4, it is in the best interest of consumers for the BCUC to ensure that appropriate complaint and dispute resolution handling processes are in place before allowing an Indigenous group to "opt out" of BCUC regulation. The required processes should provide meaningful and impartial recourse commensurate with the number of customers served by the utility and the type or complexity of service(s) being offered. Particular attention should be given to how those customers who have no direct say in governance of the First Nation are protected. Recourse mechanisms can be implemented in a flexible manner, without imposing undue burden on an Indigenous group.

- For example, if an Indigenous utility were to serve a large commercial customer, an appropriate complaint and dispute resolution handling process could be the inclusion of an arbitration clause within a service agreement. This scenario involves a commercial relationship between sophisticated parties, and the amounts at issue are considerably larger than a typical residential or small commercial customer. In this case, a dispute might be meaningfully remedied through arbitration, while avoiding a court process.
- In contrast, if an Indigenous utility were to serve predominantly individual residential and small commercial customers, an arbitration process designed for larger, commercially sophisticated parties would not be appropriate. Meaningful recourse could take the form of a formal complaints mechanism to a body independent from the Indigenous utility and the associated Indigenous Nation.

The BCUC should be addressing the appropriateness of recourse mechanisms on a case-by-case basis, rather than making a blanket determination in advance. This flexible approach recognizes that each Indigenous group has unique needs, goals and community capacity, and that diversity of this kind is likely to result in a variety of Indigenous utilities and related service offerings. For instance, some presenters at the Workshops indicated a desire to retain BCUC oversight.

The principles applied in the determination of rates and access to service are also important determinants of customer protection. FortisBC considers there to be sound basis to require that a dispute resolution mechanism enshrine three fundamental principles of utility regulation:

- ***Just and reasonable rates:*** The principle of just and reasonable rates allows for consideration of cost recovery and providing an opportunity to earn a fair return. It places limits on the allowed return. This latter principle serves as protection for all Indigenous utility customers, as well as for non-members who would be paying utility rates without the potential of seeing benefits from social programs funded by the return on investment flowing to the First Nation.

- ***Avoiding undue discrimination or preference***: It is a fundamental principle of utility regulation that utilities must set rates that are free from "undue discrimination or preference". Undue discrimination or preference in the rate setting context occurs when two similarly situated customers are treated differently in the absence of an accepted rate-making rationale. Generally speaking, the default principle of rate-making is that rates should be cost based, but there are a variety of rate-making principles that can also be considered. Some Indigenous groups in this Inquiry raised the potential of charging non-Indigenous people more than Indigenous people so as to advance social objectives. While the social objectives are valid, there is also value in upholding the longstanding regulatory principle. At a minimum, an Indigenous Nation intending to depart from this principle should be required to articulate its intentions to customers/potential customers in advance as part of its governance structures.
- ***The duty to serve on reserve / treaty / self-governing lands:*** The duty to serve is an important element of utility regulation. It arises in the context of new connections, and disconnections of existing customers. These principles, which are embedded in the UCA, ensure that a utility cannot exert monopoly power by refusing an important service without reasonable justification.

6. THE BCUC SHOULD RETAIN JURISDICTION WITH RESPECT TO SAFETY AND SERVICE RELIABILITY (BCUC QUESTION (D))

The BCUC has asked, in question (d), whether there are "specific areas which should be exempt, such as safety and service reliability". FortisBC submits that the BCUC should retain jurisdiction with respect to safety and service reliability, and that Indigenous utilities, like other utilities, should be regulated in accordance with the applicable provisions of the UCA governing these issues.

There is an intrinsic value to having a single approach to the regulation of safety and service reliability across British Columbia. FortisBC places considerable value on the safety and reliability of its utility systems, and considers that anything less than a universal approach to safety and reliability produces an undesirable regulatory patchwork that potentially adds to the challenge of protecting consumers and the public generally. The existing municipal utility exemption already poses a challenge in this regard, and FortisBC believes that we should avoid extending the current regulatory patchwork to other areas of the province.

Based on comments received from workshop participants, there appears to be some uncertainty regarding the practical implications of the BCUC retaining jurisdiction over safety and service reliability. Concerns in this regard are understandable given the inherent risk involved in the distribution of electricity and natural gas, and questions about who would be responsible for maintaining or upgrading utility systems if safety and reliability were to be neglected.

As it stands, the regulation of safety and service reliability is a shared responsibility between the BCUC and other regulators (e.g., Technical Safety BC and the Oil and Gas Commission). In the event that the BCUC recommends that it retain jurisdiction over safety and service reliability,

FortisBC respectfully suggests that it would be beneficial for the BCUC to provide clarification with respect to how it sees its role in these regards.

The BCUC retaining jurisdiction with respect to safety and service reliability will ultimately preserve regulatory harmonization across British Columbia, thereby promoting reliable service and the safety of the general public.

7. SOME OWNERSHIP / OPERATING SCENARIOS LACK THE NECESSARY CUSTOMER CONTROL FOR SELF-REGULATION (BCUC QUESTION (E))

The BCUC has asked, in question (e), whether "the scope of the proposed exception [should] be expanded" to include certain listed situations. The table below provides FortisBC's responses to the hypothetical scenarios canvassed by the BCUC.[19] FortisBC's position is informed, in broad terms, by whether the utility customers retain the ability to exercise control over the utility's governance and operations. In the absence of this direct relationship, some consumers may be exposed.

BCUC's Affiliation Structure Scenarios	FortisBC's Position
1) A utility's assets are owned by a corporation of which the First Nation/Band Council is a shareholder or the sole shareholder	As noted above, the opportunity to self-regulate should be preconditioned on the First Nation/Band Council[20] having a controlling interest in the Indigenous utility. Assuming normal principles of corporate governance are in play, ownership of more than 50% of the voting shares would likely meet this test. However, it is conceivable that control could be exercised in another manner, so a case-by-case review is appropriate. In the absence of a controlling interest, there may or may not be a rationale for a section 88 exemption, or light-handed regulation. The same incentive does not exist where the First Nation/Band Council is not the controlling shareholder, and being able to vote in a local election may have little practical value as recourse for a customer if the First Nation/Band Council is not in full control of the utility assets. It is important for the BCUC to examine the specific circumstances.
2) A utility's assets are owned by a partnership of which the First Nation/Band Council is a partner, a limited partner or a general partner	There are many different partnership structures that could be employed by a First Nation/Band Council to involve a third party in the provision of utility service. Again, for the reasons described in response to scenario 1 above, the key factor is the extent to which the First Nation/Band Council retains control over the utility operations under this structure. It is important for the BCUC to examine the specific circumstances.

[19] See also Exhibit C4-3, BCUC-FortisBC IR 1.4.2 for further discussion of what constitutes a controlling interest.

[20] We have used this terminology to accord with the BCUC's scenario. We recognize that there exists the potential for various governance structures to exist within an Indigenous Nation that would allow for customers of an Indigenous utility to have an effective say in the direction taken by the utility.

BCUC's Affiliation Structure Scenarios	FortisBC's Position
3) The utility's assets are owned by a third party, but the First Nation/Band Council has granted a franchise agreement, a licence and/or has enacted enabling bylaws to facilitate the construction and/or operation of the utility	Under section 45 of the UCA, "a privilege, concession or franchise" is of no force and effect unless the BCUC grants a Certificate of Public Convenience and Necessity (CPCN) approving it. Regardless of how an agreement is characterized, if it is in substance purporting to grant rights to a utility to operate within a reserve it requires BCUC approval.[21] Under this scenario, the First Nation/Band Council is likely to lack the necessary element of control over the utility's operation. The grant of franchise would instead undermine that control by allowing a third party – whether Indigenous owned or not – to control the day-to-day provision of service. The potential exists for non-Indigenous utilities to "game" the existing regulatory framework. The CPCN requirement for franchises exists for good reason, and the requirement should remain in place for this scenario. Regulation by the BCUC is required as the First Nation/Band Council does not own the utility assets, and is effectively outsourcing the provision of utility services through mechanisms that prescribe the scope of its operation. This is an inadequate substitute for regulatory oversight.
4) The utilities' assets are owned by a First Nation/Band Council but are operated by a third party	The definition of "public utility" captures both the First Nation/Band Council owner of utility assets and the private sector operator in the circumstances of this scenario. There is likely a spectrum of agreements that fall within this scenario. On one end of the spectrum, a simple services agreement could leave full authority over day-to-day operations in the hands of the First Nation/Band Council owner. A more comprehensive agreement conferring full responsibility for day-to-day utility operations is, in substance, a concession, which is akin to scenario 3. There may or may not be a rationale for a section 88 exemption, or light-handed regulation in such circumstances. BCUC regulation of the third-party operator would likely be appropriate where the First Nation/Band Council, despite owning the underlying utility assets, does not have any involvement in the provision of utility services. Without regulation, the third-party would be shielded from BCUC oversight through the private contract and the BCUC would have no authority to make orders to, among other things, ensure safe and reliable service at reasonable rates. At the same time, the ability to vote in a local election has no practical benefit as a means of protection. The absence of regulation would create significant potential for third-party companies to "game" the existing regulatory framework to escape regulation.
5) The First Nation/Band Council, by agreement with the utility owner, sets or approves the setting of rates for the utility	The utility owner is a public utility under the UCA. The First Nation/Band Council is not a public utility in any event, because it is not actually providing the utility service under this scenario, Rather, the First Nation/Band Council is effectively acting as a regulator for limited rate-setting purposes.

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[21] 45(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

8. CONSUMER PROTECTION RATIONALE REMAINS RELEVANT WHEN INDIGENOUS UTILITY SELLS TO OTHER FIRST NATIONS (BCUC QUESTION (F))

The BCUC has asked in question (f):

> (f) If an exempt utility sells energy to a neighbouring First Nation, what regulatory regime, if any, should apply to the sale of energy on the lands of the second First Nation?

With respect to how to regulate an Indigenous utility that provides service to another First Nation, we only note that the scenario involves a utility providing service to people who have no say in the governance of the utility. FortisBC sees this as raising consumer protection concerns in much the same way as when an Indigenous utility serves non-Indigenous customers who have no vote. Similar principles apply to those outlined above in FortisBC's response to BCUC question (a). FortisBC notes that similar considerations would apply with one municipal utility serving another municipality, which would currently be subject to regulation by the BCUC.

9. SALE OF ENERGY BY INDIGENOUS UTILITIES TO OTHER PARTS OF THE PROVINCE IS ALREADY PERMITTED IN SOME INSTANCES (BCUC QUESTION (G), (H), (I))

The BCUC has asked in questions (g), (h) and (i):

> (g) Suppose that an exempt utility wishes to sell energy to a different reserve or First Nation and must use the BC Hydro's transmission system to transport the energy (Retail Access). This activity is currently not allowed. Should the BCUC recommend that changes be made?
>
> (h) As a result of the proposed recommendations, an exempt utility could sell energy to a municipality. However, if BC Hydro's transmission system is required to transport the energy, the Retail Access prohibition applies. Should the prohibition be changed? What effects, if any, should be considered with respect to sales of energy to non-Indigenous customers within an incumbent utility's territory?
>
> (i) Should the exempt utility be free to sell its energy to members of its Nation/Band wherever they reside in the province?

FortisBC will address these questions together, as they all address sales to other parts of British Columbia.

The following discussion highlights that the scenarios contemplated by the BCUC in these questions could unfold in different ways, that some do not involve "Retail Access", and that the regulatory framework applicable to natural gas and electricity differ.

- In the case of electricity service:
    - **Wheeling:** Where power generated by an Indigenous utility in (e.g.) "Location A" needs to be delivered to "Location B" (e.g., a distant reserve associated with the same First Nation, a reserve of another First Nation, or a municipal utility), the scenario would require the Indigenous utility to wheel power across the system of another utility (likely BC Hydro or FBC) that owns the infrastructure in between the two areas to a single delivery point (interconnection) at Location B. The Indigenous utility would then distribute the electricity from the Location B delivery point to the end users. Wheeling in this manner is currently offered on the FBC electric system.[22] There is a sound regulatory rationale for allowing wheeling across transmission systems throughout British Columbia, whether by Indigenous Groups or otherwise, as it respects the widely accepted principle of open access. The BCUC does, and should, retain oversight of any wheeling of power across a non-Indigenous utility system.
    - **Indigenous Utility direct purchases from BC Hydro or FBC:** Where the Indigenous utility is purchasing electricity from the surrounding larger utility (e.g., BC Hydro or FBC), the fact that its service area is non-contiguous (e.g., Reserves A and B are separated geographically) should have no bearing on the ability of the Indigenous utility to provide service in both locations. An Indigenous utility can take service from BC Hydro or FBC at multiple delivery points under the existing tariffs of FBC and BC Hydro.
    - **Delivery directly to end consumer (Retail Access):** The term "retail access" typically relates to sales directly to an end user, as opposed to sales to another utility. An Indigenous utility selling to individual end users outside of its service territory requires retail unbundling. The unbundling of vertically integrated electric utilities would represent a fundamental departure from how electric utilities have always operated in the province, and the introduction of retail access could be expected to have major impacts on all electricity consumers in the province (including because it would fundamentally change how system costs are allocated and recovered).

- In the case of natural gas service, FEI offers unbundled service (meaning that the commodity can be purchased from a third party upstream of FEI's system and the customer can purchase transportation or delivery service separately from FEI). This model is potentially capable of accommodating any of the following scenarios:
    - The Indigenous utility purchases bundled delivery and natural gas commodity service from FEI to effect delivery at metered interconnection points with the Indigenous utility's various non-contiguous distribution systems (e.g., FEI delivers natural gas to the Indigenous utility infrastructure on Reserve A and then does the same with Reserve B). In this case, each reserve is effectively a bundled service customer of FEI, much like a hospital or university would be;

[22] The provision of wheeling related services is governed by FBC tariff rate schedules 100 to 109 inclusive.

- The Indigenous utility acquires natural gas from elsewhere (e.g., from Station 2 on the Enbridge system), purchases transportation service from FEI, and FEI delivers the commodity to delivery points at the interconnections with each of the Indigenous utility's non-contiguous service areas (e.g., Reserves A and B); and
- The entity owned by the Indigenous group sells to individual Indigenous people living within FEI's service territory, in which case it is acting as a gas marketer (not a utility). The BCUC has already approved residential and commercial gas marketing rules.

FortisBC understands that Pacific Northern Gas also offers transportation services to small commercial, large commercial and industrial customers.

10. PUBLIC INTEREST TEST FOR ACCEPTING ENERGY PURCHASE AGREEMENTS ALREADY ACCOMMODATES CONSIDERATION OF INDIGENOUS INTERESTS (BCUC QUESTION (J))

BCUC has asked in question (j):

> (j) The test for acceptance of an EPA is that it must be in the public interest. In particular, applicants should demonstrate that BC Hydro needs the energy and that the contract price is comparable to market price. Should the BCUC consider public interest issues particular to First Nations in approving Energy Purchase Agreements involving Indigenous utilities? On what basis might the BCUC do so, and what might those public interest issues entail?

While this question appears to be directed to purchases by BC Hydro, FortisBC will provide comments from the perspective that it is a potential purchaser of electricity and renewable natural gas. FortisBC has an overarching interest in ensuring that its customers have access to cost-effective energy. However, it is clear that customers are increasingly attuned to where their energy is coming from.

The public interest test applied by the BCUC under the UCA is a broad concept and leaves room for the BCUC to consider the fact that an Indigenous utility or First Nation is involved in the development of a project. It is one of a number of factors that can be considered. Section 71 of the UCA requires the BCUC to apply "British Columbia's energy objectives". The *Clean Energy Act* defines "British Columbia's energy objectives" to include: "(l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources". As such, this is one of the factors, among others, that the BCUC must consider in the course of every determination under section 71.

These same objectives are considered in the context of the public interest determination for a utility's long-term resource plan.

11. STREAMLINED FRAMEWORK FOR SMALL UTILITIES WILL REDUCE THE REGULATORY BURDEN (BCUC QUESTION (K))

The BCUC has asked in question (k):

> (k) "What should the BCUC do to assist in Indigenous utility regulation, reduce the regulatory burden, and improve the accessibility of its regulatory processes for First Nations that choose to remain under its jurisdiction?"

FortisBC believes that an overarching framework for scaled regulation that is applicable to all small utilities will be beneficial. FortisBC addressed this in its initial submissions in this Inquiry.[23]

12. HAVING MULTIPLE RATE REGULATORS FOR A SINGLE UTILITY IS UNDESIRABLE

While the BCUC has not explicitly identified it as a topic for discussion, FortisBC wishes to express strong agreement with the BCUC's assessment that it is not in the interest of consumers for a particular utility (e.g., FBC or FEI) to be regulated by multiple rate regulators, depending on where assets and customers are located within the province. As noted in the Draft Report:[24]

> …regulation of utilities by numerous authorities requires careful and on-going coordination between jurisdictions and with utilities. Unless there is common regulation, any utility that operates in more than one jurisdiction or in areas with overlapping jurisdictions is likely to find it overly onerous. **This could have the effect of increasing costs to ratepayers.** [Emphasis in original]

FortisBC submits that the BCUC should continue to regulate all of FortisBC's operations, regardless of whether or not they are located on reserve land.

13. CONCLUSION

FortisBC appreciates the opportunity to provide further comments and will respond to the submissions of other parties in accordance with the regulatory timetable.

[23] Exhibit C4-2, Section 4.5.
[24] Exhibit A-43, p. 90.