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File No. 1077-020

March 6, 2020

Via Email
(commission.secretary@bcuc.com)

Dear Commission Secretary:

Re: BCUC Indigenous Utilities Regulation Inquiry

Please see enclosed Beecher Bay First Nation and Adams Lake First Nation's joint comments on the Panel's Draft Report.

Please contact us if you have any questions.

Yours truly,
JFK Law Corporation

Per: Digitally signed by Erin Theresa Thomson-Leach 3BE8MA
Date: 2020.03.06 15:37:14 -08'00'

Erin Thomson-Leach
ETL/clt

Encl.

Beecher Bay (Sc'ianew) First Nation
and
Adams Lake First Nation

Comments on Draft Report
March 6, 2020

British Columbia Utilities Commission (the "Commission") Indigenous Utilities Regulation Inquiry
Project No. 1598998

Introduction

1. Following their joint written argument, Adams Lake First Nation ("**Adams Lake**") and Beecher Bay First Nation ("**Beecher Bay**") are again collaborating on comments regarding the Panel's November 1, 2019 Draft Report (the "**Draft Report**") for the Indigenous Utilities Regulation Inquiry. As both Nations have provided detailed written evidence, responses to information requests, and a written argument, we do not repeat our submissions here. Rather, the purpose of these comments is to respond to certain aspects in the Draft Report. As the scope of this Inquiry has become quite broad and at time unwieldly, it is not possible to comprehensively address all of the outstanding issues within the time and financial resources available and we look forward to continued dialogue regarding Indigenous Utilities with the Commission and the provincial government more generally.

2. In the community workshops for the Draft Report the Panel invited participants to comment not only on the Panel's draft recommendations, but also whether the Panel has heard and understood our evidence and arguments correctly.[1] As discussed below, while we believe that the Panel has recommended some positive incremental measures respecting the regulation of Indigenous Utilities, we are concerned that the Panel has framed its recommendations narrowly, missing a significant opportunity to advance the recognition of Indigenous Peoples' rights in British Columbia.

3. As many participants in this process have commented, and as we noted in our own Final Argument, for this process to be meaningful to the Indigenous communities that are the subject of this inquiry, the Panel must consider reconciliation as its first task and seriously seek to incorporate Indigenous peoples' perspective. This requires a more robust process than the framework established in Order in Council OIC No. 108.

[1] Inquiry into Indigenous Utilities Regulation, *Community Input Workshop Transcript Volume 13- Prince George, BC* (Vancouver: British Columbia Utilities Commission, 2019) at 684 .

4. The Panel accepted and agreed that the key principles of reconciliation and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) should guide its process, but noted that there were shortcomings in the design of the Inquiry that limited the Panel's ability to fully realize reconciliation principles.[2] While we generally agree that the Panel's recommendation to enable self-regulation for Indigenous Utilities in some circumstances is a positive step, our comments will focus on ways the Panel can move from merely carving out some space for Indigenous Utilities to substantively recognizing Indigenous Peoples' inherent rights and jurisdiction.

5. In light of this, our overarching comment on the Draft Report is that the Panel should specifically recommend that this Inquiry constitute the initial step in developing a regulatory framework for Indigenous Utilities in British Columbia. We note that the Draft Report states both that these recommendations may inform future changes to legislation or policy[3] *and* that they are to serve as the foundation for further government-to-government dialogue between Indigenous Nations and the provincial and federal governments.[4] We urge the Panel to make clear in its final report that any long term changes to legislation and policy changes respecting Indigenous Utilities *must* be done through a collaborative process co-designed with Indigenous Nations.

<u>More than permission – Recognizing inherent rights</u>

6. From the outset, Adams Lake and Beecher Bay assert that we have the right to operate and regulate an Indigenous Utility system based on our inherent jurisdiction over our lands. We have also referred the Panel to examples of federal legislation that affirm specific rights to govern and regulate matters relating to our reserve lands, such as the *First Nations Land Management Act* and the *Indian Act*. This is difficult to reconcile with the Panel's recommendations that Indigenous Nations should be "given the opportunity" to self regulate when it provides services on their own reserve or treaty settlement lands and to "opt out" of BCUC regulation.[5]

7. While the proposition that certain Indigenous governments be exempt from regulation in the same manner of municipalities is a positive first step, it is in no way an acceptable end position. This opt-out approach suggests that the BCUC will play a gatekeeper function, determining which Indigenous Nations receive an "opportunity" to self regulate, with the corresponding implication that the Commission will also determine whether to revoke that opportunity. One aspect of this opt-out approach will require the First Nation demonstrate an appropriate complaint and dispute handling process for ratepayer protection. In the event it cannot do so the Commission will retain

[2] Inquiry into Indigenous Utilities Regulation, *British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry Project No 1598998 Draft Report* (Vancouver: British Columbia Utilities Commission 2019) at 72 [Draft Report].
[3] *Ibid* at p 4.
[4] *Ibid* at p 94.
[5] *Ibid* at p 94-95, see recommendations 3, 4, 7 & 9.

jurisdiction to handle all complaints. Likewise, the Panel recommends that the Commission complaint and dispute handling processes would be available to any ratepayer who wishes to appeal decisions arising out of the First Nation utility's complaint process.[6] This approach undermines the recognition of Indigenous Peoples' self-determination and self-government. The Panel can and should reframe its recommendations to make it clear that rights recognition, and not permission, is the overall objective.

8. We appreciate that recognizing Indigenous rights in this context may require an incremental process and that it may be appropriate to begin with an exemption for certain utility activities on certain Indigenous lands that broadens over time as the capacity for Indigenous Utilities builds. The Panel explicitly recommending an incremental approach will allow all parties to respond to the unique circumstances and objectives of each Nation. Adams Lake and Beecher Bay are an example of the diversity among Indigenous Nations in British Columbia. Beecher Bay, as the Panel is aware, has a specific plan and infrastructure in place for operating and regulating Indigenous Utility specific to the Spirit Bay development on its reserve land. Adams Lake is in the initial planning and visioning stages for an Indigenous Utility. The Panel's recommendations should explicitly recognize the diversity among Indigenous Nations in the province. Note that the Province is already implementing this principle in its Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia.[7]

9. We also recognize that there are many unanswered questions and logistical challenges in delineating jurisdictional boundaries at a territorial level, beyond clearly defined reserve or treaty lands, and so it may be appropriate to start by recognizing jurisdiction over Indigenous Utilities providing services on those lands while territorial services are explored. However – this would be better achieved through an opt-in approach, where Indigenous Nations that wish to use the Commission's existing structures notify the Commission of its intent; rather than the Commission determining which group gets an opportunity to self-regulate. Indeed, instead of requiring Indigenous Nations to prove capacity – the Commission should be looking to work with Nations to develop that capacity and then, as Chief Chipps put it in his oral submissions, step out of the way.[8]

Commission Jurisdiction on reserve or treaty lands is not settled

10. Although the Panel does not make any finding on the question of whether the *Utilities Commission Act* applies on reserve land, it bears repeating that Beecher Bay and Adams Lake do not accept that

[6] *Ibid* at p 94, see recommendation 5.
[7] British Columbia, "Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia" (4 September 2019) at para 31(b). Policy was endorsed by the Principals on September 4, 2019.
[8] Inquiry into Indigenous Utilities Regulation, *Community Input Session Transcript Volume 10- Victoria, BC* (Vancouver: British Columbia Utilities Commission, 2019) at 431 [Victoria Community Input Session Transcript].

the *Act* applies. [9] As each Nation stated in their responses to the Commission's information requests, the constitutional division of powers analysis required to properly answer this question requires a clear reference question, adequate time and focused resources. [10] Responses to information requests, while helpful in framing the question, are not sufficient space to comprehensively and confidently determine a question of constitutional law. Our position that constitutional matters must be addressed in the proper context should not be confused with agreement or acquiescence that the Commission has jurisdiction over First Nation lands.

11. The Panel also notes in the Draft Report that the scope of the Inquiry does not allow it to "examine in a substantive manner the application of UNDRIP principles, principles of reconciliation, or recognition of existing Aboriginal Rights and Title." [11] We agree this is not the proper forum for the explicit recognition of individual Indigenous Nations' specific rights. However, this *is* a forum for recognizing rights in a general way and affirming the need to comprehensively recognize rights as the governments work collaboratively to determine appropriate jurisdiction for Indigenous Utilities. Rights recognition cannot be achieved in a process that starts with the assumption that the Commission holds jurisdiction over Indigenous lands and excludes substantive analysis of reconciliation and rights outright. Indeed, any meaningful discussion regarding the scope of rights and jurisdiction must consider a right to provide and regulate at a territorial level. The fact that this may prove more challenging, or requires Indigenous Governments to work together to address shared territories, does not diminish its legitimacy or importance.

12. The next stages of the process must adopt a broader, collaborative approach with Indigenous Nations to design a regulatory structure for Indigenous Utilities. We respectfully suggest such an approach is required to be consistent with the *Declaration on the Rights of Indigenous Peoples Act* SBC 2019, c 44.

Indigenous Governments balance competing interests:

13. We understand from the Draft Report that one of the Commission's concerns and part of the rationale for recommending that the Commission retain jurisdiction over complaints from ratepayers is the need to balance rate payer interests with the Indigenous right to self-government. This assertion is an impoverished view of reconciliation. Public interest is not at odds with the recognition of Indigenous rights. Rather, the public interest is furthered by actions that seek to reconcile Indigenous Canadians with non-Indigenous Canadians. The fact that reconciliation efforts

[9] Draft Report, *supra* note 2 at p 79.
[10] Beecher Bay (Sc'ianew) First Nation, *Responses to British Columbia Utilities Commission Information Request 1,* (10 September 2019) at p. 5 -6 ; Adams Lake First Nation, *Responses to British Columbia Utilities Commission Information Request 1*, (10 September 2019) at p 4.
[11] Draft Report, *supra* note 2 at p 72.

serve the public interest has been noted in the context of consultation, where the Crown must properly balance the public interest that may be served by approving large infrastructure projects, with the public interest of ensuring Indigenous governments are treated honourably and with respect. In this context, the courts have noted that the constitutionally protected rights of Indigenous Peoples give rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest.[12]

14. The Panel must clarify the relative weight it affords to hypothetical concerns of individual ratepayers. For example, the Panel notes that the process has lacked participation by individual ratepayers as to how their interests may be affected.[13] The Panel also notes that it must consider the potential impacts of Indigenous Utilities on the interests of incumbent utility providers and any impacts on their customers' rates.[14]

15. While we acknowledge that these are important and relevant factors, we believe that in this context, at a time where the provincial government is advancing reconciliation and UNDRIP as key priorities, the greatest weight must be afforded to Indigenous rights recognition. Although protecting ratepayers in a monopolistic scenario is a valid objective, from a practical perspective this objective should not be deployed to limit Indigenous Utilities and Indigenous rights to self-determination.[15] We maintain that there is no valid basis to assume that Indigenous governments will not act fairly in regulating Indigenous Utilities or that they are poorly equipped to respond to potential ratepayer disputes. The primary goal of this Inquiry should be to determine ways to support Indigenous Nations as they continue to reclaim their capacity for regulation of their lands and resources, which may include providing capacity building support to certain Indigenous governments who request assistance in developing best practices related to ratepayers.

16. Adams Lake and Beecher Bay has explained that Indigenous governments want prosperity and to see opportunities coming to their lands. Having unreasonable rates or inadequate dispute mechanisms does not lend itself to drawing lessees or businesses to an area.[16] Although various participants (such as the existing utility providers) and the Panel have described various

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[12] For example, see Tsleil-Waututh Nation v. Canada (Attorney General), 2018 FCA 153 at para 507; although the Federal Court of Appeal considered this in the context of the duty to consult respecting harvesting rights, it equally applies to the right of self government: "… it is important to understand that the public interest and the duty to consult do not operate in conflict. As a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest. In the case of the Board, a project authorization that breaches the constitutionally protected rights of Indigenous Peoples cannot serve the public interest (Clyde River, paragraph 40)."

[13] Draft Report, *supra* note 2 at p 72.

[14] *Ibid* at p 88.

[15] *Ibid* at p 72.

[16] Inquiry into Indigenous Utilities Regulation, *Community Input Workshop Transcript Volume 19- Kamloops, BC* (Vancouver: British Columbia Utilities Commission, 2019) at p 1061;Victoria Community Input Session Transcript, *supra* note 8 at p 444.

hypothetical scenarios as the basis for their concerns, these examples should not form barriers to meaningful reconciliation.

17. Throughout our submissions in this process, we expressed that ratepayers may be protected by a variety of mechanisms, such as First Nation laws and bylaws, Indigenous legal traditions, agreements, and policies. For example in its written evidence, Beecher Bay noted how its *Land Code* is robust and includes processes and procedures to ensure fairness and transparency to ratepayers.[17] Both Beecher Bay and Adams Lake also referred the Panel to their processes for engagement with non-members on taxation on their lands. Ensuring ratepayer protection serves the interest of Indigenous governments, and is an example of an area where Indigenous governments may wish to continue to work with the province.

<u>One size does not fit all</u>

18. At the Victoria workshop on the Draft Report the Panel stated that ratepayers of Indigenous Utilities should receive the same safeguards as ratepayers in other areas of the province. The Panel does not believe that there should be a different regulatory regime for Indigenous Utilities.[18] This statement could be construed as failing to understand that there may be a need for a different regulatory regime for Indigenous governments, based on Indigenous laws and traditions. Although the Panel does state that this is not a comment on who should enforce that regime, or who should be putting that regime in place, we emphasize that there are alternative models of regulation that prove to be better suited to certain Indigenous Utility systems.

19. Given the inherent jurisdiction of Indigenous governments coupled with the authority described in federal legislation, it is more appropriate to allow Indigenous governments to "opt in" to elements of regulation. This will allow Indigenous Nations to collaborate with the Commission, the Ministry, and other relevant parties to design the appropriate management regime for Indigenous Utilities and to ensure they have access to the appropriate resources for their objectives. This is the type of engagement and capacity building required to address the legacies of colonial policies on Indigenous communities and their governments.

20. More work is also required to answer logistical, legal and strategic questions about how the Panel's initial recommendations would come into effect. For example it is not at all clear how the proposed exemption for Indigenous Utilities on reserve or treaty lands would be administered and what criteria will apply. If this process is to have any meaning, and to correspond with the principles of

[17] Beecher Bay Written Evidence at p 7.
[18] Inquiry into Indigenous Utilities Regulation, *Community Input Session Transcript Volume 10- Victoria, BC* (Vancouver: British Columbia Utilities Commission, 2019) at p 887.

UNDRIP and reconciliation, the exemption must be construed broadly and respond to diverse community needs.

Conclusion

21. We close our comments on the Draft Report by offering a vision for the future. As we have already said, Beecher Bay and Adams Lake view this as the first step in what should be a government-to-government collaboration on Indigenous Utilities. In our view, energy security and opportunity is essential to long-term and sustainable socio-economic growth for any community, including Indigenous Nations.

22. Many issues remain outstanding following the release of the Draft Report. The issue of offering utility services beyond the most narrow view of an Indigenous Nation's lands — be it treaty settlement lands or reserve lands — has not been dealt with satisfactorily. We have described how many of the perceived problems raised may be dealt with through comprehensive agreements with other jurisdictions or individuals who wish to benefit from an Indigenous Utility. The Commission should also continue to work with Indigenous communities to arrive at a functional description of an Indigenous Utility. The issue of a new administrative body to assist and support Indigenous Utilities, constituted in accordance with Indigenous knowledge and legal traditions, also requires further review and discussion.

23. As a first step, we think the Panel's recommendation to exempt Indigenous Utilities from the application of the Utilities Commission Act in a manner similar to municipalities is appropriate, with the modifications to better recognize rights as we suggested above. This is particularly critical given the historical context in which the Commission is acting. Many Indigenous governments are still dealing with the legacies of concerted efforts to destroy Indigenous culture, language and governance structures through colonial programs designed to assimilate Indigenous Peoples.

24. *Recognizing* that Indigenous Nations may opt-in to the Commission's process, rather than *allowing* them to opt-out makes all the difference, as it does not start from the premise that an Indigenous Nation must operate from within an ill-fitting box that was not constructed with it in mind. Recognizing that the structure for regulating an Indigenous Utility is the Indigenous Nation's choice demonstrates government-to-government respect and puts into action the principles of reconciliation.

25. Over the long term, we agree with counsel for the Nisga'a Village of Gitwinksihlkw, Merle Alexander, that it is important to look beyond existing colonial based structures to determine the Province's approach to something as foundational as energy, and to determine a framework for a

Constitutional partnership.[19] We believe the narrow focus in the Draft Report reflects the narrow framework of the Inquiry from the outset, which was designed without Indigenous input.

26. We look forward to continuing to work on the issues we have raised, in partnership with BCUC, on a government-to-government level. We are excited about a future where Indigenous governments are recognized as autonomous governments, with the capacity to meet the energy needs of their communities and others who wish to avail themselves of new energy utilities. We urge the panel to consider how the recommendation made to amend the Act may present a tangible display or reconciliation, instead of a reproduction of harmful colonial relations.

[19] Victoria Community Input Session Transcript, *supra* note 8 at p 909-911.