COASTAL FIRST NATIONS
GREAT BEAR INITIATIVE

BCUC File 63031
Batch 59998

March 6, 2020

British Columbia Utilities Commission
Suite 410, 900 Howe Street, Vancouver, B.C.
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Attention: Mr. Patrick Wruck, Commission Secretary

Dear Mr. Wruck:

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

Pursuant to the referenced Inquiry, Coastal First Nations – Great Bear Initiative ("CFN-GBI") respectfully submits the attached comments on the Commission's Draft Report. Our comments are organised to be responsive to the Commission's questions, as set out in the Draft Report.

Sincerely,

Paul Kariya
Sr Policy Advisor

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

CFN-GBI has concerns about the Commission's proposed recommendations from two perspectives.

First, we believe that the "opt out" model for regulation on reserve, when coupled with the proposed on-going role for the Commission even when a First Nation does opt out, is: (a) insufficiently responsive to the evidence in this proceeding about First Nations' expectations of autonomy on their reserve land; and (b) is administratively unworkable, as it creates, in effect, two layers of regulation, with a strong likelihood of conflict between them.

Second, and more troubling to CFN-GBI, we believe that the Commission has drawn too narrow a set of recommendations in its Draft Report, given the breadth of issues arising from the Terms of Reference and the evidence adduced in this inquiry. In particular, the Commission's recommendations are not responsive to the strong message delivered throughout this inquiry: that as part of the reconciliation process, First Nations are looking for productive ways to enhance their participation in the energy sector, and that achieving that result will require both policy and regulatory changes.

We believe that this inquiry has the opportunity to consider how First Nations might seek to participate in the energy business, and to address, in light of those participation objectives and models, how a regulatory regime could be designed that fostered real opportunity.

We believe that Government supports First Nations' objectives in this regard and, indeed, sees such participation as an important element of, among other things, its electrification goals as part of CleanBC. Indeed, CFN-GBI has worked extensively with government on developing a Northern Power Authority: a First nation owned utility aimed at expanding utility infrastructure to serve industrial development on the north coast. Similar initiatives are underway in the northeast gas fields.

As a practical matter, there are likely few instances where aboriginal utilities will be economic serving on-reserve customers from on-reserve generation. That is not where economic opportunity lies for First Nations, and we respectfully suggest it is not where reconciliation will be found. Yet that is where the substance of the Commission's recommendations of broad application is focussed in the Draft Report.

We respectively believe that the Commission needs to step back to the comments it heard in this proceeding (and reported in Section 4 of its Draft Report) about creating real economic opportunity for First Nations, and imagine how regulation fits into that commercial construct. CFN-GBI believes that is where the value in this inquiry is best found.

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

CFN-GBI submitted in its evidence that any regulatory model needs to protect customers from monopoly abuse. The Commission's report agrees with this position (Section 5.2.1).

We are concerned, however, that the premise of the question suggests that ratepayer protection is somehow compromised by First Nations' self-governance. Or, more exactly, that a balance between these objectives needs to be sought, because by adding self-governance, one is inherently subtracting ratepayer protection.

First Nations self-governance can be, and should be, entirely consistent with ratepayer protection. This can happen without the Commission's recommendation that it continue to act as a super-regulator, even when First Nations' utilities "opt out" of Commission regulation. The Commission must not conflate the idea of ratepayer protection with the idea of Commission oversight.

CFN-GBI agrees that ratepayer protection is essential, and should not be compromised. We object to the idea that this is somehow in tension with First Nations self governance.

c) What might an appropriate complaints and dispute resolution process look like and should there be minimum safeguards? Should the BCUC have a role as an appeal body in resolving complaints or disputes?

CFN-GBI set out in its evidence the narrow role it recommends for the Commission in adjudicating complaints; that is, protecting certain customers from possible discrimination in cases where the Aboriginal utility had no political accountability to these customers.

We drew this recommended process very narrowly for two reasons.

First, because we saw no reason to believe that First Nations regulation would be any less effective at constraining monopoly power than would either Commission regulation, or political regulation in municipalities or regional districts, so a broader role was not necessary.

Second, because it is simply impractical to have one regulator broadly overseeing the decisions of another regulator. This is true for a host of reasons, but the most apparent is that many regulatory matters are zero-sum – what one doesn't collect from customer A, for example, must either be collected from customer B or put to the account of the utility itself. As such, regulation of a complaint quickly becomes regulation of the entire economic construct of the utility.

This is why, for example, the UCA makes discrimination the sole purview of the Commission, and not subject to review. It is also one reason why courts are reluctant to reach in to overturn regulatory decisions.

CFN-GBI respectfully submits that the Commission's proposed role as a super regulator is both founded on a faulty premise – that First Nations cannot do an adequate job of protecting customers without Commission backstop – and likely to lead to serious inefficiency – if not simply being unworkable.

d) Are their specific areas which should not be exempt, such as safety and reliability? If so, what are those specific areas and which body/bodies should regulate those areas?

CFN-GBI recommended in its evidence that the only area where the Commission should retain jurisdiction over an Aboriginal utility it is otherwise not regulating is Mandatory Reliability Standards, since these are, by definition, uniform and not subject to local variance.

CFN can imagine no reason to suggest that First Nations are not fully capable of regulating safety and reliability (or any other issue) to the same standards as any other regulatory agency, municipality, or regional district.

e) Conversely, should the scope of the proposed exception be expanded to include specific areas/situations such as the following:

- **A utility's assets are owned by a corporation of which the First Nation/Band council is a shareholder or the sole shareholder;**

If we are speaking only about the narrow case of First Nations serving customers on reserve, then "yes", assuming that the political accountability that underpins the logic of this position is maintained. That is, in cases where the political body is the "mind and management" of the utility.

Where the First Nation is not the "mind and management" or the utility (perhaps it is a majority shareholder in name only, but has no material management rights, potential monopoly abuse is not constrained by political accountability, so exemption becomes untenable.

In a broader sense, CFN-GBI has expressed concern in its evidence that corporate structuring to give the appearance of First Nations ownership, but where the First Nations derive little benefit, should not be considered Indigenous utilities, as this model is being shown to be both pervasive and unhelpful in other areas, such as favourable procurement within Impact Benefit Agreements or the like.

- **A utility's assets are owned by a partnership of which the First Nations/Band Council is a partner, a limited partner or a general partner;**

CFN-GBI believes that the same substantive issues apply here as in the shareholding case.

- **The utility's assets are owned by a third-party, but the First Nations/Band Council has granted a franchise agreement, a licence, and/or has enacted enabling bylaws to facilitate the construction and operation of the utility;**

Again, the primary issue is one of "mind and management". If the franchise contract (or similar) does not provide Council with adequate governance to achieve this result, then de-regulation is likely to fail the ratepayer protection test. On the other hand, if the "mind and management" is retained by Council, then the economic or corporate construct is likely irrelevant to the question of exemption.

- **The utility's assets are owned by a First Nations/Band Council but are operated by a third party;** Again, this is a "mind and management" question.

- **The First Nation/Band Council, by agreement with the utility owner, sets or approves the setting of rates for the utility.**

As the question implies, where the "mind and management" of the utility remains with the politically accountable body, the case for deregulation by the Commission becomes stronger.

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?

CFN-GBI's evidence argues that to be economic, Indigenous utilities would likely need to expand beyond the boundaries of their reserves. We suggested a narrow complaint role for the Commission to protect from discrimination those off-reserve customers that do not enjoy political franchise.

This model works equally well for the case described in this question. The question of whether these customers without political franchise are First Nations or otherwise is not material.

CFN-GBI notes that the model discussed in this question likely requires wheeling on BC Hydro (or Fortis) lines. As CFN-GBI observes in its evidence, it would be very useful to the reconciliation objective of this inquiry if the Commission spoke about how access to that wheeling can be practically facilitated. As we set out in our evidence and in answer to information requests, the current wheeling model is not practical for small users, even if it is notionally available. This issue must be addressed if retail access is to be a relevant consideration, as set out in the following questions.

g) **Suppose that an exempt utility wishes to sell energy to a different reserve or First Nation and must use 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?**

In principle, yes. But as we have discussed (here and in our evidence), simply reinstating retail access is not going to make it viable. New rules related to open access transmission service and ancillary services would also be required to make retail access viable.

Put more broadly, if the goal is to create real economic opportunity for First Nation utilities, it is not simply a matter of declaring that retail access is now available. To reach that goal, the Commission needs to think more broadly about the barriers facing potential First Nations' utilities, and the solutions to lowering those barriers. In other words, the Commission needs to take the broader perspective we have argued in our evidence, and in the answer to the first of these Draft Report questions.

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 resect to the sales of energy to non-Indigenous customers within an incumbent utility's territory?**

As noted above, removing the nominal barrier to retail access is a necessary, but far from sufficient, condition to create opportunity for First Nations utilities looking to provide service beyond their reserve lands.

We know this, because we have had retail access in BC, and it was not used. And we know why it was not used. Wheeling was a problem. So too were the low BC Hydro rates with which marginal generation could not compete. With respect, focussing on retail access to the exclusion of other opportunity-constraining issues is taking too narrow a perspective.

In addition, when this question is read with Question f, the Commission seems to be drawing a regulatory distinction between whether the off-reserve customer (as distinct from the utility) is Indigenous. We see no reason for this distinction, and believe that it is not appropriate.

i) Should the exempt utility be free to sell its energy to members of its Nation/Band wherever they reside in the Province?

On the political accountability theory, yes. But as a practical matter, this scenario is somewhat abstract. It is conceivable that BC Hydro could set up some form of contract for differences arrangement (virtual wheeling) and unique billing to facilitate this outcome, but it seems unlikely that the benefits of this idea warrant the complexity and costs of implementing it.

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 the contract price is comparable to the 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.

CFN-GBI is not sure that if fully understands the context in which the question is being asked. However, if the Commission is wondering if there should be some broader public policy considerations that it should take account of when regulating Indigenous Utilities contracts for sales to BC Hydro or Fortis, (which we note is not the same as regulating the utilities themselves, which would not be regulated in that case) then CFN believes the answer to be "yes".

However, CFN-GBI notes that the Commission's description of the public interest test for energy supply contracts is actually too narrow. Section 71 of the UCA requires the Commission to consider the relevant energy objectives from the Clean Energy Act. These reach beyond whether BC Hydro needs the power and is getting it at a market price.

It would be entirely appropriate for BC to include within the UCA (directly or by reference) new "reconciliation objectives" that are analogous to BC's energy objectives. to guide a range of Commission decisions as they relate to Indigenous Utilities. These objectives might reasonably pertain to, for example, granting First Nations CPCNs to operate merchant transmission lines, or to set rates that facilitate First Nations utilities retaining economic benefits they secured from governments. Many of these issues are discussed in CFN-GBI's evidence.

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

The Commission heard in this proceeding that First Nations feel excluded from its processes. The breadth of issues raised in this respect cannot be meaningfully addressed in the response to one overarching question in this proceeding.

CFN-GBI respectfully submits that the Commission needs to undertake a focussed consultation on this issue, and dig deeply into how everything, from its enabling legislation to its policies, practices, staffing, and operations can be modified to be inclusive for First Nations seeking to operate in the regulated energy sector.

No summary response here would do justice to the scope of the issues that have been described by the entirety of the evidence in this proceeding.