



Nisga'a Lisims Government

**BCUC INDIGENOUS UTILITIES REGULATION INQUIRY
EXHIBIT C21-7**

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By Email: Commission.Secretary@bcuc.com

British Columbia Utilities Commission

Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck, Commission Secretary and Manager, Regulatory Services

Dear Mr. Wruck:

Re: British Columbia Utilities Commission ("BCUC") – Indigenous Utilities Regulation Inquiry – Project No. 1598998 – Nisga'a Nation – Comments on BCUC's Draft Report

The Nisga'a Nation, as represented by the Chief Executive Officer of Nisga'a Lisims Government, respectfully submits the attached comments on the BCUC's draft report for the above noted matter.

If you have any questions regarding the foregoing, please contact the undersigned.

Yours truly,

NISGA'A LISIMS GOVERNMENT

A handwritten signature in blue ink, appearing to read 'Collier Azak'.

Collier Azak
Chief Executive Officer

cc: Eva Clayton, President, Nisga'a Lisims Government
Corinne McKay, Secretary Treasurer, Nisga'a Lisims Government
Brian Tait, Executive Chairperson, Nisga'a Lisims Government
Cheryl Moore, Executive Director, Nisga'a Lisims Government
Mansell Griffin, Director of Lands and Resources, Nisga'a Lisims Government
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**BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE UTILITIES COMMISSION ACT**

British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry

Project No. 1598998

Nisga'a Nation

**WRITTEN COMMENTS ON THE BRITISH COLUMBIA UTILITIES
COMMISSION'S DRAFT REPORT ISSUED ON NOVEMBER 1, 2019**

6 March 2020

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1 **1 INTRODUCTION**

2 1. The Nisga'a Nation, as represented by Nisga'a Lisims Government, submits these
3 written comments on the British Columbia Utilities Commission's ("**BCUC**") draft report
4 issued on November 1, 2019 (the "**Draft Report**") and the recommendations made by the
5 BCUC in the Draft Report on the regulation of Indigenous utilities (the "**Draft**
6 **Recommendations**").

7 2. On March 11, 2019, the Lieutenant Governor in Council directed the BCUC to
8 advise on the regulation, if any, of Indigenous utilities (the "**Inquiry**"). Order in Council
9 No. 108 (the "**OIC**") established the Inquiry and outlined the terms of reference for the
10 Inquiry.¹

11 3. The Nisga'a Nation submitted Written Evidence,² responses to Information
12 Requests from the BCUC and other interveners,³ and Final Argument⁴ in the Inquiry
13 (collectively, the "**Nisga'a Nation Submissions**").

14 4. As explained in the Nisga'a Nation Submissions, the regulation of utilities within
15 Nisga'a Lands is of great interest to the Nisga'a Nation because of the Nisga'a Nation's
16 rights and broad jurisdiction, which includes principal law-making authority for Nisga'a
17 Lands under the Nisga'a Final Agreement (the "**Nisga'a Treaty**"). The Nisga'a Nation
18 Submissions sought to clearly summarize the Nisga'a Nation's authority under the Nisga'a
19 Treaty to draw down legislation regulating, among other things, utilities, owned or
20 operated, in whole or in part, by the Nisga'a Nation on Nisga'a Lands (a "**Nisga'a Utility**").

21 5. We have organized this submission as follows:

22 a) Comments on the Draft Report and the Draft Recommendations

¹ Order in Council No. 108, dated March 11, 2019.

² Exhibit C21-3.

³ Exhibits C21-4, C21-5 and C21-6.

⁴ Nisga'a Nation's Final Argument dated October 4, 2019.

1 b) Additional information on the Nisga’a Nation’s proposed exception to the
2 *Utilities Commission Act* (the “UCA”)

3 c) Responses to the BCUC's questions to the Nisga’a Nation set out in the
4 Draft Report and Guidance for Final Written Comments document⁵ (the
5 “**Guidance Document**”), and asked during the Draft Report Workshops

6 6. We intend the capitalized terms used in this submission to have the same meaning
7 as in the Nisga’a Treaty.

8 7. This submission is only intended to apply to a Nisga’a Utility and to the sections of
9 the Draft Report, including the Draft Recommendations and questions, that affect the
10 Nisga’a Nation.⁶

11 **2 COMMENTS ON THE DRAFT REPORT AND THE DRAFT** 12 **RECOMMENDATIONS**

13 **2.1 Draft Recommendation 7**

14 8. In sections 5.3.2.1 and 7.1 of the Draft Report, the BCUC sets out Draft
15 Recommendation 7 with respect to the Nisga’a Nation. In Draft Recommendation 7, the
16 BCUC proposed the following:

17 *7. That the Nisga’a Nation be given the opportunity to self regulate, as do*
18 *municipalities and regional districts, when it provides utility service on its own*
19 *lands.*

20 9. In order to more accurately reflect the legal landscape and the analysis in the Draft
21 Report, the Nisga’a Nation proposes that Draft Recommendation 7 be amended to the
22 following:

⁵ Exhibit A-48.

⁶ The Nisga’a Nation recognizes that this submission may generally apply to other modern treaties. However, the Nisga’a Nation is not authorized to make submissions on behalf of other modern treaty nations in the province. The Nisga’a Nation’s submission is therefore limited to the Nisga’a Nation and the provisions of the Nisga’a Treaty.

1 *That the Nisga'a Nation and Nisga'a Villages be expressly excluded from the*
2 *definition of "public utility" in the Utilities Commission Act when the Nisga'a*
3 *Nation and Nisga'a Villages provide utility services on Nisga'a Lands.*

4 10. In section 5.3.2.1 of the Draft Report, the BCUC recognizes the Nisga'a Nation's
5 authority to self-regulate, including the authority to regulate safety and reliability
6 standards, other than Mandatory Reliability Standards ("MRS").⁷ The BCUC also
7 generally agreed with the Nisga'a Nation's recommendation that the Nisga'a Nation and
8 Nisga'a Villages be excluded from the UCA,⁸ to ensure that the Nisga'a Nation is free to
9 regulate a Nisga'a Utility within Nisga'a Lands and to provide regulatory certainty in
10 respect of the regulation of a Nisga'a Utility within Nisga'a Lands.

11 11. The Nisga'a Nation agrees with the BCUC's analysis on these issues in the Draft
12 Report. However, the Nisga'a Nation is of the view that the current wording of Draft
13 Recommendation 7 does not accurately reflect this analysis. In particular, the current
14 wording of Draft Recommendation 7 states that the Nisga'a Nation "be given the
15 opportunity to self regulate". The foregoing language gives the impression that the results
16 of the Inquiry and the amendments to the UCA being proposed will *provide* the Nisga'a
17 Nation with the power to self-regulate, but, as the Draft Report accurately notes, the
18 Nisga'a Nation's ability to self-regulate derives from the authority set out in the Nisga'a
19 Treaty.⁹ The proposed amendments to the Draft Recommendation 7 would more accurately
20 reflect the balance of the Draft Report and the current legal landscape.

21 12. As explained in the Nisga'a Nation Submissions, and as further explained in
22 sections 3 and 4.1 below, the Nisga'a Nation's recommendation to specifically exclude the
23 Nisga'a Nation and Nisga'a Villages from the UCA definition of "public utility" is to
24 respect the Nisga'a Nation's jurisdiction on Nisga'a Lands, and to assist in providing
25 regulatory certainty on Nisga'a Lands. The exclusion would respect the Nisga'a Nation's

⁷ Draft Report, Section 5.3.2.1 at pp. 83-85.

⁸ Draft Report, Section 5.3.2.1 at p. 84.

⁹ Draft Report, Section 5.3.2.1 at pp. 83-84.

1 jurisdiction to organize its own affairs, including the flexibility in determining the structure
2 and services to be provided by a Nisga'a Utility.

3 13. This exclusion would be similar to the exclusion for municipalities and regional
4 districts in the UCA definition of "public utility", but it has a separate legal and
5 constitutional basis. Unlike municipalities, the Nisga'a Nation has inherent jurisdiction and
6 constitutionally protected rights, as set out in the Nisga'a Treaty. Municipalities and
7 regional districts, in contrast, are statute-based entities that must act within the legislative
8 constraints the province has imposed on them. This point will be further addressed in
9 sections 3 and 4.1, below.

10 14. The amendments to the Draft Recommendation 7 proposed above would more
11 accurately reflect the Nisga'a Nation's lawmaking authority on Nisga'a Lands and the
12 Nisga'a Nation's authority to regulate, among other things, a Nisga'a Utility, without
13 changing the substance of the recommendation.

14 **2.2 Draft Recommendation 8**

15 15. In sections 5.3.2.1 and 7.1 of the Draft Report, the BCUC sets out Draft
16 Recommendation 8 with respect to the Nisga'a Nation. In Draft Recommendation 8, the
17 BCUC proposed the following:

18 *8. Notwithstanding the Nisga'a's authority over their own lands, we recommend*
19 *that the BCUC retain jurisdiction over Mandatory Reliability Standards, because*
20 *of the interconnected nature of the North American bulk electric system.*

21 16. The Nisga'a Nation is of the view that Draft Recommendation 8 is unnecessary and
22 should therefore be deleted.

23 17. Under section 125.2(2) of the UCA, the BCUC "has exclusive jurisdiction to
24 determine whether a reliability standard is in the public interest and should be adopted in
25 British Columbia", with the UCA defining "reliability standard" to mean "a reliability
26 standard, rule or code established by a standard-making body for the purpose of being a

1 mandatory reliability standard for planning and operating the North American bulk electric
2 system, and includes any substantial change to any of those standards, rules or codes”.

3 18. The BCUC’s specific and “exclusive” jurisdiction over MRS under the UCA is not
4 related to the BCUC’s general jurisdiction over “public utilities”, and the BCUC’s
5 jurisdiction over MRS is not therefore dependent upon whether or not an entity is otherwise
6 regulated as a “public utility”.

7 19. Indeed, the Nisga’a Nation observes that the legislature did not determine it was
8 necessary to expressly retain the BCUC’s jurisdiction over MRS in respect of any other
9 class of entities currently excluded from the definition of “public utility” under the UCA.

10 20. As the Nisga’a Nation’s proposed exclusion from the definition of “public utility”
11 in the UCA has no relationship to the issue of the BCUC’s jurisdiction over MRS, the
12 Nisga’a Nation is of the view that Draft Recommendation 8 should be deleted.

13 **2.3 Draft Recommendation 14**

14 21. In sections 5.4 and 7.1 of the Draft Report, the BCUC recommends that the
15 definition of “Indigenous utility” as defined in the OIC be further explored and that
16 consideration be given to any further context in which the definition of “Indigenous utility”
17 is required.

18 22. As explained in the Nisga’a Nation Submissions, the OIC definitions of
19 “Indigenous utility” and “Indigenous nation” are too general, since they do not recognize
20 the important jurisdictional, constitutional and governance distinctions between the
21 Nisga’a Nation, as a modern treaty nation, and other Indigenous groups referenced in the
22 definitions of “Indigenous nation” in the OIC.

23 23. Moreover, the Nisga’a Nation should not be confined in structuring a Nisga’a
24 Utility in the same way as other Indigenous groups must structure their utilities to meet the
25 characteristics, and definition, of an Indigenous utility for the purpose of self-regulation as

1 recommended by the BCUC.¹⁰ This would be inconsistent with the BCUC’s general
2 recognition that the Nisga’a Nation and Nisga’a Villages should be exempt from the UCA
3 because of the Nisga’a Nation’s authority to self-regulate under the Nisga’a Treaty.
4 Excluding the Nisga’a Nation and Nisga’a Villages from the definition of “Indigenous
5 utility” would respect the Nisga’a Nation’s broad lawmaking authority to regulate a
6 Nisga’a Utility, including the ability to determine the structure of, and the services provided
7 by, a Nisga’a Utility.

8 24. The Nisga’a Nation should therefore be excluded from any definition of
9 “Indigenous utility” adopted by the BCUC in the final report. The practical effect of this
10 exclusion would be that the Nisga’a Nation would be excluded from any regulatory regime
11 proposed by the BCUC for an “Indigenous utility”, which would be consistent with the
12 BCUC’s findings in the Draft Report.

13 **3 PROPOSED AMENDMENT TO THE UCA**

14 25. In the Nisga’a Nation Submissions, and in the proposed amendments to Draft
15 Recommendation 7, the Nisga’a Nation proposed an amendment to the UCA to expressly
16 exclude the Nisga’a Nation and Nisga’a Villages in a manner similar to the exclusion for
17 municipalities and regional districts in the UCA.

18 26. As explained in the Nisga’a Nation Submissions, this recommendation is merely
19 for convenience on the basis of the current wording of the UCA. The exclusion from the
20 UCA requested by the Nisga’a Nation has a different purpose, and has a separate legal and
21 constitutional basis, than the UCA’s current exclusion in respect of municipalities and
22 regional districts.

23 27. The Nisga’a Nation does not need an exclusion from the UCA to have the power to
24 regulate a Nisga’a Utility within Nisga’a Lands. This power is codified in the Nisga’a
25 Treaty – the Nisga’a Treaty recognizes Nisga’a Lisims Government’s power to enact laws

¹⁰ See the BCUC’s Draft Recommendation 13, which states that “if a utility ceases to meet the definition of an Indigenous utility it becomes subject to regulation under the UCA”. Draft Report, Section 5.4 at pp. 88-89 and Section 7.1 at p. 96.

1 regulating utilities on Nisga’a Lands, and the Nisga’a Nation may choose to draw down
2 legislation regulating, among other things, a Nisga’a Utility. Moreover, the Nisga’a Nation
3 does not need an exclusion from the UCA to have relevant Nisga’a laws prevail over any
4 inconsistent or conflicting provisions of the UCA. This is also provided in the Nisga’a
5 Treaty.

6 28. The Nisga’a Nation proposed that it be expressly excluded from the UCA to ensure
7 regulatory certainty. As stated in the Nisga’a Nation Submissions, the Nisga’a Treaty has
8 “been carefully crafted to respect constitutional principles and to fit into the wider
9 constitutional fabric of Canada”,¹¹ and sets out subject matters where Nisga’a laws will
10 prevail over any inconsistent or conflicting provincial laws, and conversely, subject matters
11 where provincial laws will prevail over Nisga’a laws to the extent of any conflict. Given
12 the breadth of subject matters regulated under the UCA, there is a risk that its application
13 on Nisga’a Lands will result in a patch work of prevailing provisions of Nisga’a laws and
14 the UCA, resulting in regulatory uncertainty. Therefore, an exclusion from the definition
15 of “public utility” in the UCA would assist in providing regulatory certainty on Nisga’a
16 Lands.

17 29. In reviewing the current wording of the UCA, the Nisga’a Nation came to the
18 conclusion that the easiest way to accomplish this goal was to amend the UCA to expressly
19 exclude the Nisga’a Nation and Nisga’a Villages in a manner similar to the exclusion for
20 municipalities and regional districts. This recommendation was for legislative drafting
21 convenience, and it was not because the Nisga’a Nation is in the same legal or
22 constitutional position as municipalities and regional districts.

23 30. The Nisga’a Nation will address the BCUC’s questions in respect of the ongoing
24 Inquiry into the Regulation of Municipal Energy Utilities¹² (the “**Municipal Inquiry**”) in
25 section 4.1 below.

¹¹ *Sga’nism Sim’augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49 at para. 49.

¹² British Columbia Utilities Commission - An Inquiry into the Regulation of Municipal Energy Utilities, Project No. 1599027.

1 31. In light of the concerns raised by the BCUC in respect of the uncertainty concerning
 2 the scope of the municipal exception currently being explored in the Municipal Inquiry and
 3 to reflect the different purpose of the exception requested by the Nisga'a Nation, the
 4 Nisga'a Nation would slightly alter its proposed amendment to section 1 of the UCA.
 5 Rather than amending paragraph (c) of the definition of "public utility" in the UCA to add
 6 the Nisga'a Nation and Nisga'a Villages to the existing municipal and regional districts
 7 exclusion, the Nisga'a Nation proposes to add a new paragraph (h) as follows:

8 *(h) the Nisga'a Nation or a Nisga'a Village in respect of services provided by the*
 9 *Nisga'a Nation within Nisga'a Lands or a Nisga'a Village within Nisga'a Village*
 10 *Lands.¹³*

11 32. This slight alteration to the Nisga'a Nation's proposal would accomplish the
 12 substantive goal of Draft Recommendation 7, while at the same time avoiding some of the
 13 concerns raised by the BCUC in respect of the previously proposed municipal and regional
 14 district exclusion.

15 **4 SPECIFIC QUESTIONS FROM THE BCUC**

16 **4.1 Municipal Exclusion in the UCA**

17 33. In section 5.3.2.1 of the Draft Report, the BCUC notes the following with respect
 18 to the municipal exclusion in the UCA and the Municipal Inquiry:

19 However, we note that there remains some uncertainty concerning the scope of the
 20 municipal exception and that there is currently a process underway to further
 21 consider this issue. In particular, that inquiry is considering the following issues:

¹³ Section 29.2(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides definitions of "Nisga'a Nation", "Nisga'a Village", and "Nisga'a Lands" that apply to all enactments. If the above amendment is recommended, the UCA would also have to include a definition of "Nisga'a Village Lands", and in this regard, could adopt the definition at Chapter 1 – Definitions of the Nisga'a Treaty.

1 Whether a utility affiliated, in some way, with a municipality or regional
 2 district is considered a public utility as defined by section 1 of the UCA.
 3 Forms of affiliation include, but may not be limited to:

4 a. The utility's assets are owned by a corporation of which the municipality
 5 or regional district is a shareholder or the sole shareholder;

6 b. The utility's assets are owned by a partnership of which the municipality
 7 or regional district is a partner, a limited partner or a general partner;

8 c. The utility's assets are owned by a third party, but the municipality or
 9 regional district has granted a franchise agreement, a licence and/or has
 10 enacted enabling bylaws to facilitate the construction and/or operation of
 11 the utility;

12 d. The utilities' assets are owned by a municipality or regional district but
 13 are operated by a third party; and

14 e. The municipality or regional district, by agreement with the utility owner,
 15 sets or approves the setting of rates for the utility.

16 If the language suggested by the Nisga'a Nation is adopted, the ambiguities
 17 listed above would apply and require resolution. In the previous Section, we
 18 listed a number of issues related to the exemption of First Nations owned
 19 utilities. We recommend that the Nisga'a consider that broader list of issues in
 20 the context of the recommendation we are proposing and provide their thoughts
 21 during the workshop and comment period.

22 34. In light of the separate legal and constitutional basis of the exclusion requested by
 23 the Nisga'a Nation, as set out above, the Nisga'a Nation does not believe that the outcome
 24 of the Municipal Inquiry should have any bearing on the exclusion proposed by the Nisga'a
 25 Nation from the UCA, except to the extent that the legislative language on how the Nisga'a
 26 Nation and Nisga'a Villages are excluded from the UCA may be affected by any proposed

1 legislative wording that results from the Municipal Inquiry. To address these concerns, the
2 Nisga'a Nation has slightly altered the language in its proposed amendment to section 1 of
3 the UCA, set out in paragraph 31 above.

4 35. As we have noted, unlike municipalities which are created by statute, the Nisga'a
5 Nation has the authority, set out in the Nisga'a Treaty, to regulate, among other things, a
6 Nisga'a Utility. This includes the authority to determine the corporate structure of a
7 Nisga'a Utility and the types of services it will provide.

8 36. The fundamental element that would define the utility as a Nisga'a Utility is that
9 the Nisga'a Nation is providing the service, either directly or through contractors, within
10 Nisga'a Lands. Ultimately, the Nisga'a Nation is directing the service. Therefore, the
11 Nisga'a Nation is not, and should not be, confined in structuring a Nisga'a Utility in the
12 same way as municipalities must structure utilities to be exempt from regulation.

13 37. As such, the issues being considered in the Municipal Inquiry are not relevant to
14 these Treaty issues, and so the outcome of that Municipal Inquiry should not affect whether
15 the BCUC in this Inquiry recommends that the Nisga'a Nation and Nisga'a Villages be
16 exempt from the UCA.

17 38. We therefore encourage the BCUC to recognize the legal and constitutional
18 differences in the exemption being requested by the Nisga'a Nation and the exemption for
19 municipalities in the UCA.

20 **4.2 Regulation of Other Utilities on Nisga'a Lands**

21 39. The BCUC requested that the Nisga'a Nation provide information on its authority
22 or jurisdiction to regulate other utilities, for instance, BC Hydro or Fortis BC, on Nisga'a
23 Lands.

24 40. The Nisga'a Nation Submissions comment specifically on utility services provided
25 by a utility owned and operated by the Nisga'a Nation (a Nisga'a Utility) on Nisga'a Lands.
26 We note that the Nisga'a Nation's authority in respect of the regulation of other utilities
27 does not fall within the scope of the current Inquiry.

1 41. However, public utilities on Nisga'a Lands are generally regulated through a
2 combination of provincial law, federal law, applicable provisions of the Nisga'a Treaty,
3 and in particular the Roads and Rights of Way Chapter of the Nisga'a Treaty, applicable
4 Nisga'a laws, and the terms of any licences of occupation granted by the Nisga'a Nation.

5 42. The Nisga'a Nation has not enacted laws specifically regulating utilities within
6 Nisga'a Lands. However, utilities providers are subject to the provisions of the Nisga'a
7 Treaty, and in particular the Roads and Rights of Way Chapter, applicable Nisga'a laws,
8 and the terms of any licences of occupation or rights of way granted by the Nisga'a Nation.

9 **4.3 Jurisdiction of a Nisga'a Utility Outside of Nisga'a Lands**

10 43. The BCUC requested that the Nisga'a Nation provide information on the regulation
11 of a utility providing services to customers outside of Nisga'a Lands.

12 44. The Nisga'a Nation has broad lawmaking authority within Nisga'a Lands, as set
13 out in the Nisga'a Treaty. Moreover, and as stated above, the fundamental element that
14 would define the utility as a Nisga'a Utility would be that the Nisga'a Nation is providing
15 the service, either directly or indirectly through contractors, within Nisga'a Lands.

16 45. The Nisga'a Treaty generally provides that the UCA would apply outside of
17 Nisga'a Lands and the BCUC would have jurisdiction over the utilities services provided
18 by a utilities provider outside of Nisga'a Lands.

19 46. As noted in the Nisga'a Nation Submissions, to date, the Nisga'a Nation has not
20 chosen to exercise its lawmaking authority to regulate a Nisga'a Utility. However, if the
21 Nisga'a Nation did draw down legislation in respect of a Nisga'a Utility, and there was a
22 demand for a Nisga'a Utility to provide utilities services to Nisga'a citizens or non-Nisga'a
23 residents living outside of, but in proximity to, Nisga'a Lands, the Nisga'a Nation would
24 suggest that the Nisga'a Nation and the BCUC discuss the best regulatory approach to
25 providing services to such customers, recognizing that the UCA and the BCUC's
26 jurisdiction would apply off Nisga'a Lands. This could take the form of an agreement
27 between the BCUC and the Nisga'a Nation in respect of such customers.

1 **4.4 BCUC's Questions in Section 7.2 of the Draft Report**

2 47. The Nisga'a Nation provides the following responses to the BCUC's questions set
3 out in section 7.2 of the Draft Report.

4 **4.4.1 What are your views on the BCUC's proposed recommendations?**

5 48. The Nisga'a Nation's submissions in sections 2, 3 and 4 address the BCUC's
6 question.

7 **4.4.2 Do the proposed recommendations strike the right balance between the need
8 for ratepayer protection and the rights of First Nations to self governance?**

9 49. Given the BCUC's findings in section 5.3.2.1, the Nisga'a Nation is of the view
10 that this question does not apply to the Nisga'a Nation.

11 **4.4.3 What might an appropriate complaints and disputes resolution process look
12 like and should there be minimum safeguards? Should the BCUC have a role
13 as an appeal body in resolving complaints or disputes?**

14 50. Given the BCUC's findings in section 5.3.2.1, the Nisga'a Nation is of the view
15 that this question does not apply to the Nisga'a Nation.

16 **4.4.4 Are there specific areas which should not be exempt, such as safety and
17 service reliability? If so, what are those specific areas and which body/bodies
18 should regulate those areas?**

19 51. The Nisga'a Nation's submissions in sections 2 and 3 address the BCUC's question.

20 **4.4.5 Conversely, should the scope of the proposed exception be expanded to
21 include specific areas/situations such as the following [...]**

22 52. The Nisga'a Nation's submissions in sections 2, 3 and 4.1 address the BCUC's
23 question.

1 **4.4.6 If an exempt utility sells energy to a neighbouring First Nation, what**
 2 **regulatory regime, if any, should apply to the sale of energy on the lands of**
 3 **the second First Nation?**

4 53. The Nisga'a Nation wishes to only comment on the regulation of a Nisga'a Utility
 5 within Nisga'a Lands. As the Nisga'a Nation has not drawn down legislation regulating a
 6 Nisga'a Utility within Nisga'a Lands, answering this question would require the Nisga'a
 7 Nation to speculate, and the Nisga'a Nation respectfully declines to do so.

8 **4.4.7 Suppose that an exempt utility wishes to sell energy to a different reserve or**
 9 **First Nation and must use the BC Hydro's transmission system to transport**
 10 **the energy (Retail Access). This activity is currently not allowed. Should the**
 11 **BCUC recommend that changes be made?**

12 54. The Nisga'a Nation refers the BCUC to the Nisga'a Nation's response in section
 13 4.4.6.

14 **4.4.8 As a result of the proposed recommendations, an exempt utility could sell**
 15 **energy to a municipality. However, if BC Hydro's transmission system is**
 16 **required to transport the energy, the Retail Access prohibition applies.**
 17 **Should the prohibition be changed? What effects, if any, should be**
 18 **considered with respect to sales of energy to non-Indigenous customers**
 19 **within an incumbent utility's territory?**

20 55. The Nisga'a Nation refers the BCUC to the Nisga'a Nation's response in section
 21 4.4.6.

22 **4.4.9 Should the exempt utility be free to sell its energy to members of its**
 23 **Nation/Band wherever they reside in the province?**

24 56. The Nisga'a Nation refers the BCUC to the Nisga'a Nation's response in section
 25 4.3. The Nisga'a Nation has broad lawmaking authority within Nisga'a Lands, as set out
 26 in the Nisga'a Treaty. As stated above, the fundamental element that would define the
 27 utility as a Nisga'a Utility would be that the Nisga'a Nation is providing the service, either

1 directly or indirectly through contractors, within Nisga'a Lands. Therefore, a Nisga'a
2 Utility would not be exempt in providing utility services to Nisga'a citizens outside of
3 Nisga'a Lands, subject to any agreement entered into with the BCUC, as stated in section
4 4.3.

5 **4.4.10 The test for acceptance of an EPA is that it must be in the public interest. In**
6 **particular, applicants should demonstrate that BC Hydro needs the energy**
7 **and that the contract price is comparable to market price. Should the BCUC**
8 **consider public interest issues particular to First Nations in approving**
9 **Energy Purchase Agreements involving Indigenous utilities? On what basis**
10 **might the BCUC do so, and what might those public interest issues entail?**

11 57. The Nisga'a Nation respectfully declines the opportunity to comment on this
12 question.

13 **4.4.11 What should the BCUC do to assist in Indigenous utility regulation, reduce**
14 **the regulatory burden, and improve the accessibility of its regulatory**
15 **processes for First Nations that choose to remain under its jurisdiction?**

16 58. Given the BCUC's findings in section 5.3.2.1 and the Nisga'a Nation's proposed
17 exclusion to the UCA, including the Nisga'a Nation's proposed amendments to Draft
18 Recommendation 7, the Nisga'a Nation is of the view that this question does not apply to
19 the Nisga'a Nation.

20 **4.5 BCUC's Questions in Exhibit A-48**

21 59. On February 19, 2020, the BCUC issued the Guidance Document for final written
22 comments for the Inquiry.¹⁴

¹⁴ Exhibit A-48.

1 **4.5.1 Regulation of Indigenous utilities on traditional territory**

2 60. With respect to the questions in section 1 of the Guidance Document on the
 3 regulation of Indigenous utilities on traditional territory, the Nisga’a Nation submits that
 4 these questions do not apply to the Nisga’a Nation. The Nisga’a Nation owns, in fee simple,
 5 Nisga’a Lands and has principal lawmaking authority within Nisga’a Lands, as set out in
 6 the Nisga’a Treaty. The Nisga’a Nation has rights in Treaty-defined areas (Nass Area and
 7 the Nass Wildlife Area), as set out in the Nisga’a Treaty, but does not own these areas in
 8 fee simple. As stated in section 4.3, the Nisga’a Nation has authority to regulate, among
 9 other things, a Nisga’a Utility within Nisga’a Lands, and that this authority would not apply
 10 outside of Nisga’a Lands.

11 61. Nonetheless, the Nisga’a Nation would like to submit comments on the BCUC’s
 12 question with respect to how and the extent to which the implementation of the *Declaration*
 13 *on the Rights of Indigenous Peoples Act*¹⁵ (“**DRIPA**”) should impact the BCUC’s
 14 recommendations. Article 37 of the *United Nations Declaration on the Rights of*
 15 *Indigenous Peoples*¹⁶ (“**UNDRIP**”) states that Indigenous peoples have the right to the
 16 recognition, observance and enforcement of treaties, and that nothing in UNDRIP can be
 17 interpreted as diminishing rights contained in treaties. The purpose of DRIPA is to, among
 18 other things, affirm the application of UNDRIP to the laws of British Columbia and
 19 contribute to the implementation of UNDRIP.¹⁷ Pursuant to DRIPA, the government must
 20 also take “all measures necessary to ensure the laws of British Columbia are consistent
 21 with” UNDRIP.¹⁸

22 62. BCUC recommendations that support the proposed exclusion to the UCA for the
 23 Nisga’a Nation and Nisga’a Villages as well as the Nisga’a Nation’s proposed amendments
 24 to the BCUC’s Draft Recommendations 7, 8 and 14 would respect Article 37 of UNDRIP
 25 and the rights contained in the Nisga’a Treaty. Moreover, the express exclusion from any

¹⁵ S.B.C. 2019, c. 44.

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly, 2 October 2007, A/RES/61/295.

¹⁷ *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, art. 2.

¹⁸ *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44, art. 3.

1 regulatory regime recommended by the BCUC in respect of an “Indigenous utility” and the
2 exclusion from the current UCA regulatory regime would respect the Nisga’a Nation’s self-
3 government rights as set out in the Nisga’a Treaty and therefore, Article 37 of UNDRIP.
4 This would further respect and uphold the government-to-government relationship Nisga’a
5 Lisims Government shares with its Treaty partners.

6 **4.5.2 Economic opportunities from Indigenous utilities**

7 63. With respect to the question set out in section 2 of the Guidance Document, the
8 Nisga’a Nation submits that, considering the BCUC’s general agreement with the Nisga’a
9 Nation’s recommendation that the Nisga’a Nation and Nisga’a Villages be excluded from
10 the UCA, this question does not apply to the Nisga’a Nation.

11 **5 CONCLUSION**

12 64. The Nisga’a Nation appreciates the opportunity to engage in this Inquiry and thanks
13 the BCUC for its thoughtful consideration of the Nisga’a Nation Submissions. The Nisga’a
14 Nation encourages the BCUC to recognize the constitutional basis and the purpose for the
15 proposed exception to the UCA for the Nisga’a Nation and Nisga’a Villages.

16 65. All of which is respectfully submitted on behalf of the Nisga’a Nation, as
17 represented by Nisga’a Lisims Government.