



May 10, 2019

Sent via eFile

BCUC INDIGENOUS UTILITIES REGULATION INQUIRY EXHIBIT A-5

**Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998
Additional Scope Questions**

Good afternoon:

Background

On March 11, 2019, by Order in Council (OIC) No. 108,¹ made pursuant to section 5(1) of the *Utilities Commission Act* (UCA), the Lieutenant Governor in Council (LGIC) directed the British Columbia Utilities Commission (BCUC) to advise the LGIC respecting the regulation of Indigenous utilities in accordance with the terms of reference set out in section 3 of that OIC. Pursuant to that direction and by Order G-62-19 issued March 19, 2019, the BCUC established this inquiry into the regulation of Indigenous utilities (Inquiry).

Terms of Reference and Additional Scope Questions

The terms of reference for the Inquiry state that in the final report to be issued on January 31, 2020, **the BCUC must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities.** The terms of reference also outline several questions, to which the BCUC must provide responses in the Inquiry's final report, which are outlined in bold in Appendix A of this letter. In the Inquiry, the BCUC is inviting submissions on the questions included in the terms of reference from Indigenous governments and community members, government, utility owners and operators, and the public.

In addition to each of the main questions outlined in Appendix A, the BCUC suggests a number of additional questions within the scope of the terms of reference, which may be helpful for participants to consider in their written or oral submissions. Participants are encouraged to provide responses to any areas that are of interest to them. Participants are also welcome to address any other matters not listed that are relevant to the terms of reference. The Inquiry Panel will consider all written and oral evidence before it in the preparation of its interim and final reports.

For clarity, under the terms of reference **Question i.**, the BCUC seeks information about both current operating utilities and future planned utilities.

¹ http://www.bclaws.ca/civix/document/id/oic/oic_cur/0108_2019

Definition of a Public Utility under the *Utilities Commission Act*

The *Utilities Commission Act* (UCA) defines a “public utility”. Broadly speaking, at present most entities that provide electricity, natural gas or heat to customers would be classified as a public utility, and therefore subject to regulation under the UCA.²

Under the UCA, “**public utility**” means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation.

“**Compensation**” means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it.

Municipalities and entities providing services only to employees or tenants (provided the tenancy is for a term of five years or less) are **exceptions** from the definition of “public utility”.

As part of this Inquiry, the BCUC will be issuing further documents that provide more information to explain public utilities and regulation. For more information, please visit the [Inquiry website](#), or contact the Commission Secretary at commission.secretary@bcuc.com or telephone at 604 660 4700.³

Previous BCUC Proceedings Addressing the Need and Form of Regulation

The following principles, which are based on previous BCUC reports and findings, may provide useful context for participants in addressing the questions posed in this Inquiry.

Principles:

- i. Regulation should not impede competitive markets and should only be used if:
 - natural monopoly characteristics are present and there is a need to regulate to protect the public interest; and/or
 - legislation (such as the *Utilities Commission Act* or the *Clean Energy Act*) requires an activity to be regulated;⁴
- ii. The form of regulation should:
 - provide adequate customer protection in a cost effective manner;
 - consider administrative efficiency;
 - consider the level of expenditure, the number of customers, the sophistication of the parties involved and the track record of the utility in undertaking similar projects; and
 - require the provision of sufficient information to allow the BCUC to assess the new business activity, and any rates to be set, against BC’s Energy Objectives and the requirements of the *Utilities Commission Act* and the *Clean Energy Act*.⁵

² Note that the BCUC does not regulate other utility services, such as water or sewage.

³ <https://www.bcuc.com/ApplicationView.aspx?ApplicationId=669>.

⁴ Inquiry Into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives (AES Inquiry) Final Report, pp. 6-7, retrieved from https://www.bcuc.com/Documents/Decisions/2012/DOC_33023_G-201-12_FEI-AES-Inquiry-Report_WEB.pdf.

BC Hydro Standing Offer Program

Please note that in the Inquiry, the BCUC will not be seeking evidence or making recommendations regarding the suspension of BC Hydro's Standing Offer Program (SOP). The Government of British Columbia will be conducting its own engagement with Indigenous communities regarding the SOP, with further information available at: <https://engage.gov.bc.ca/sopengagement/>

Sincerely,

Original signed by:

Patrick Wruck
Commission Secretary

PS/ad
Enclosure

⁵ AES Inquiry Final Report, p. 18

Appendix A – Inquiry Terms of Reference and Additional Scope Questions

Pursuant to Order in Council No. 108, "**Indigenous utility**" means a public utility that is owned or operated, in full or in part, by an Indigenous nation.

"**Indigenous nation**" means any of the following:

- a) a band within the meaning of the Indian Act (Canada);
- b) the Westbank First Nation;
- c) the Sechelt Indian Band and the Sechelt Indian Government District established under the Sechelt Indian Band Self-Government Act (Canada);
- d) a treaty First Nation;
- e) the Nisga'a Nation and Nisga'a Villages;
- f) another Indigenous community within British Columbia, if the legal entity representing the community is a party to a treaty and land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982 that is the subject of Provincial settlement legislation;

In its final report to Government on January 31, 2020, **the BCUC must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities, and must provide responses to the following questions:**

i. What are the defining characteristics of Indigenous utilities, having regard to:

A. the nature of the ownership and operation of Indigenous utilities,

Suggested questions to consider:

- *What role does the structure of the utility play? For example, utility assets could be:*
 - *wholly or partly owned by the Indigenous nation/band that the utility serves*
 - *owned by a corporation wholly or partly owned by the Indigenous nation/band that the utility serves*

Further, partners could be other indigenous persons or non-indigenous persons.

- *Should there be a minimum threshold to the percentage of ownership of the utility by one or more Indigenous nations in order for it to qualify as an "Indigenous utility"?*
- *If there are partners in the utility what, if any, are the implications of the ownership split?*
- *Who operates the utility?*
- *How are decisions made regarding the running of the utility? Who participates in decision making?*

B. the types of services provided by Indigenous utilities,

Suggested questions to consider:

- *Does the utility produce and/or supply electricity/gas/heat? From what energy source?*
 - *Does the utility resell or distribute energy provided by another utility?*
- *Is the utility involved in the generation or distribution of energy, or both?*
- *What are the objectives of the utility?*
- *Does the utility provide services directly to customers? Do customers of the utility services pay for the service? If so, how and by whom are the rates determined?*
- *Does the service provided by the Indigenous utility compete with or displace other services that are currently provided by third parties?*
- *Is energy resold to another utility or third party? If so, under what arrangement?*

C. the persons to whom services are provided by Indigenous utilities, and

Suggested questions to consider:

- *Are the customers of the utility Indigenous nation/ band members only?*
- *Does the utility serve both Indigenous nation/ band members and non-members?*
- *Are the customers residential/ commercial/ industrial? If there is a mix, do all customers pay the same rates? If not, how and by whom will the appropriate rates to be charged to each group be determined?*

D. the geographic areas served by Indigenous utilities.

Suggested questions to consider:

- *Does the Indigenous utility provide service solely on reserve; Indigenous nation/band-owned lands; treaty lands; traditional territory?*
- *Does the Indigenous utility provide service on other lands?*
- *Does the Indigenous utility operate where there is another utility service (e.g. BC Hydro, FortisBC)? If so, please describe the nature of other utility service, and whether the Indigenous utility is integrated with or dependent on the latter system.*

ii. Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?

Suggested questions to consider:

- *What are the reasons for Indigenous utilities to be regulated or unregulated?*
 - *What are the benefits to regulation?*
 - *What are the costs or barriers created by regulation?*
 - *If Indigenous utilities were unregulated, how would customers be protected to ensure they receive fair rates and safe, reliable service?*
 - *Should an Indigenous nation or band be considered similar to a municipality for the purposes of utility regulation? Why or why not?*
 - *Should there be a different approach to the regulation of different Indigenous utilities? What characteristics of Indigenous utilities, or other factors, would justify different regulatory approaches?*
- *What would be the alternative to regulation by BCUC?*
 - *What is the role and authority of Indigenous governance structures in overseeing Indigenous utilities? What experience and expertise are needed and/or available to oversee the activities of Indigenous utilities?*
 - *What other safeguards are available to ensure that Indigenous utilities protect the customer and the public?*
 - *Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body?*
 - *What is the role of other legislation with respect to Indigenous utilities, such as the Clean Energy Act and the Greenhouse Gas Reduction Regulation?*

iii. If it is appropriate to regulate Indigenous utilities under the UCA, is there any matter under the UCA in respect of which indigenous utilities should be regulated differently from other public utilities, and, if so, how should that matter be regulated?

Suggested questions to consider:

- *Should Indigenous utilities be exempt from some sections of the UCA but not all? What would be the reasons for continuing to regulate, or exempting from, sections of the UCA that address:*
 - *safety, standards and reliability (25-26, 37-38);*
 - *obligation to serve (28-30, 34-35, 39);*
 - *duty to obey orders, provide information and keep records (42-44, 49);*
 - *construction of new projects (45-46);*
 - *setting of rates (59-61);*
 - *energy supply contracts (71); and*
 - *complaints (83).*

- *Is there a role for “light touch” regulation?*
- *Would there be any impacts upon other utilities if Indigenous utilities were regulated differently?*

iv. If it is not appropriate to regulate Indigenous utilities under the UCA but is appropriate to regulate indigenous utilities in some manner, how should indigenous utilities be regulated?

Suggested questions to consider:

- *What is the role of Indigenous government structures in regulating Indigenous utilities?*
 - *What relationship, if any, should Indigenous government structures have with the BCUC?*
- *Are there entities other than or in addition to the BCUC that could or should have a role in regulation?*

v. If an Indigenous utility is not regulated under the UCA, would the utility become subject to the UCA on ceasing to be an Indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the UCA on ceasing to be an Indigenous utility?

Suggested questions to consider:

- *If Indigenous ownership of a utility were to be sold to non-Indigenous ownership, would an application to the BCUC (or another regulatory authority) be required to authorize the sale?*
- *What about the sale of an Indigenous utility from one Indigenous nation to another Indigenous nation – should an application to the BCUC (or another regulatory authority) be required to authorize the sale?*