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July 15, 2019

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

Written Evidence of the FortisBC Group of Companies[1] (collectively FortisBC or the Companies)

By Order G-62-19, the BCUC established the Inquiry and by Order G-71-19 established the regulatory timetable, which includes the provision of written evidence from participants.

FortisBC respectfully submits the attached evidence for the BCUC's consideration on the appropriate nature and scope of the regulation of indigenous utilities.

If further information is required, please contact the undersigned.

Sincerely,

on behalf of FORTISBC

Original signed:

Doug Slater

Attachment

cc (email only): Registered Parties

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[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

Evidence

of

FortisBC Group of Companies

July 15, 2019

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1. INTRODUCTION:

The following is the evidence of the FortisBC Group of Companies – FortisBC Energy Inc. (FEI), FortisBC Inc. (FBC), FortisBC Alternative Energy Services Inc. (FAES), and Mt. Hayes Limited Partnership (MHLP) (collectively referred to as FortisBC or the Companies) – on the matters outlined in the Inquiry terms of reference and the additional scope questions articulated by the BCUC in Exhibit A-5.[1]

FortisBC includes the two largest regulated investor owned public utilities in British Columbia, one providing electricity (FBC) and the other (FEI) providing natural gas. FEI and FBC have been providing regulated utility service to British Columbians for decades. FortisBC's gas and electricity infrastructure provides service to 56 Indigenous communities. FAES provides smaller-scale thermal energy solutions, typically under the BCUC's "Stream A" light-handed form of regulation for small utilities. MHLP owns the Mt. Hayes LNG facility, which is integrated with FEI's system and is operated by FEI.

In the normal course of business, FortisBC engages, and works in partnership with, Indigenous groups throughout its service territories. In accordance with its Statement of Indigenous Principles, FortisBC provides opportunities for Indigenous contractors and individuals. Our interaction with Indigenous groups has included commercial arrangements. MHLP is a notable example of that – although FEI is the General Partner and owns the majority of the Limited Partnership units, MHLP is an "indigenous utility" under the Terms of Reference by virtue of the limited partnership units held by two First Nations. FEI also recently obtained BCUC approval for its proposed acquisition of an "indigenous utility" from the Prophet River First Nation. We anticipate that our involvement with Indigenous communities and "indigenous utilities" will continue to evolve and create new opportunities to work together.

In this Evidence, FortisBC focusses on the following points:

- **FortisBC's perspectives in this Inquiry:** The Companies bring several different perspectives to this Inquiry – (i) the perspective of large-scale regulated investor owned utilities; (ii) the perspective of small-scale utilities that operate in a competitive environment and are subject to effective light-handed regulation; and (iii) (given how broadly the term is defined) the perspective of majority owners of an "indigenous utility".
- **Defining an "indigenous utility":** The Terms of Reference define "indigenous utility' so broadly that it would encompass everything from a micro-utility owned by a First Nation providing on-reserve service, to a utility like MHLP, all the way to a major traditional utility that has sold a single non-voting share to an "indigenous nation" (as defined in the Terms of Reference). This breadth of the entities captured within the term "indigenous utility" demonstrates that the phrase is too broad to be useful in a practical sense when it comes to determining the appropriate approach to regulation. More nuance is required.

[1] Exhibit A-5, Appendix A.

- **Determining the appropriate approach to regulation:** In general, an "indigenous utility" should be regulated similarly to a non-"indigenous utility". That is, the form of regulation (i.e., full or light-handed) in a particular case should be dependent on the level of oversight required to achieve the underlying purpose of utility regulation – ensuring safe and reliable service is maintained at a price that reflects the nature and quality of service provided and a fair return on the utility's investment.

In the absence of regulation, an "indigenous utility" (given that term's broad definition) is no less capable than a non-"indigenous utility" of allowing service quality and reliability to decline or of charging excessive rates to a captive consumer. The key is to assess whether market forces or governance mechanisms exist to provide an effective substitute for BCUC oversight. It is also critical for the BCUC to avoid a regulatory approach to "indigenous utilities" that, however well-intentioned, effectively opens the door for monopoly providers of energy services to circumvent effective oversight at the expense of consumers.

2. FortisBC Brings several Perspectives to This Inquiry:

In this section, FortisBC outlines some examples of how the Companies engage with Indigenous groups in the provision of energy solutions. Our involvement encompasses interaction [engagement, accommodation (where applicable), Impact Benefit Agreements, etc.], co-ownership of a public utility, as well as other commercial ventures with First Nations.

2.1 We Provide Service to Indigenous Communities

Although FEI and FBC are not "indigenous utilities" as defined in the Terms of Reference, the Companies serve Indigenous communities. FortisBC provides service to 56 Indigenous communities.

As "public utilities" under the *Utilities Commission Act* (UCA), the BCUC regulates our electric and gas services. The BCUC's oversight has a number of advantages for energy consumers. These advantages are equally applicable to Indigenous consumers. Notably:

- The utilities are subject to a duty to provide service;
- Rates must be presented in a transparent tariff or rate;
- Rates must be in all respects fair, just and reasonable. This means
    - the Companies' costs are subject to scrutiny before they can be recovered in rates;
    - the BCUC prescribes an allowed rate of return;
    - service quality must be maintained; and
    - the Companies cannot, without BCUC approval, discontinue service or sell assets.

- The UCA provides individual customers and businesses in Indigenous communities with recourse, in the form of a complaint to the BCUC, in the event that they consider rates to be unreasonable for the nature of the service they receive.

Managing complex utility systems requires a wide variety of professional and trades skillsets and tools to operate and maintain pressurized gas and high-voltage electric systems, maintain a high quality of customer service, and ensure energy supplied is at the lowest reasonable cost.

FortisBC has developed the required business functions pertaining to the operation of their utilities over many years. Examples include:

- Asset life cycle management, including planning, design, procurement, fabrication, construction, commissioning and handover, operation, maintenance, upgrading and other changes, as well as deactivation and abandonment;
- Field operations including new service requests, crew dispatch and 24-hour Emergency Operations Centre capabilities;
- Occupational Health & Safety program development and governance;
- Professional engineering oversight and involvement in technical matters (e.g., system planning, design, material selection, development of technical specifications for procurement, installation and testing, maintenance planning, etc.);
- Use and maintenance of varied information systems, data and analysis tools (e.g., load-flow analysis for system capacity, reliability-centered maintenance analysis for optimization of maintenance programs, asset investment planning to ensure prioritization of asset work);
- Energy supply operations and optimization plans, including the procurement/generation, transmission and storage of commodities; and
- Customer service and billing programs and processes required to maintain a high level of customer service.

In addition, FortisBC has developed specific regulatory expertise related to not only the BCUC but multiple other regulators (e.g., Technical Safety BC, Measurement Canada, etc.).

FortisBC also deliver benefits to customers associated with economies of scale. The costs associated with managing various utility systems are spread over a large customer base. FortisBC is also able to use a province-wide workforce for the benefit of smaller communities or systems where the workload for a specific skillset may not warrant a full-time individual. In addition, we have service quality and performance metrics to ensure we provide appropriate performance and response times.

2.2 We Have Ongoing Engagement with Indigenous Groups

While not specifically related to the question of how “indigenous utilities” should be regulated, we believe it is important to underscore our ongoing work with Indigenous groups in the ordinary course of our business. FortisBC gas and electricity infrastructure crosses more than 150 Indigenous traditional territories. We provide service to 56 Indigenous communities. FortisBC is

guided by a Statement of Indigenous Principles[2], which helps us conduct business in a manner that respects the social, economic and cultural interests of Indigenous peoples.

Last year, for instance, FEI submitted 137 projects to the BC Oil and Gas Commission (OGC) that required some degree of consultation. FortisBC is also working in partnership with the Lower Similkameen Indian Band (Smalqmix) and Osoyoos Indian Band to site a DC Fast Charger in each Band community. Both Indigenous communities approached FortisBC with interest in hosting a site as a means to extend the opportunity for economic development and tourism in their communities.

2.3 We Co-own and Operate an "Indigenous Utility" – MHLP

FEI owns the majority interest in, and operates, an "indigenous utility", as that term is defined by the Terms of Reference.

Since 2011, MHLP has owned the Mt. Hayes liquefied natural gas (LNG) storage facility near Chemainus on Vancouver Island. The ownership structure of MHLP is as follows:

- FEI own 84.999 percent of the units of the limited partnership (LP Units).
- Two First Nations, the Chemainus Indian Band and the Cowichan Tribes partners, own 15 percent of the LP Units (7.5 percent each).
- The remaining 0.001 percent interest is held by the general partner, Mt. Hayes (GP) Ltd, which is owned and controlled by FEI.

FEI manages the Mt. Hayes LNG storage facility as part of its overall operations, pursuant to agreements with MHLP.

The Mt. Hayes LNG storage facility would be integral to the FEI system and important to FEI's customers irrespective of whether or not MHLP is characterized as an "indigenous utility". The facility is directly connected to FEI's transmission pipeline system and is an integral gas supply resource to serve customers during shorter-duration cold weather events and emergency situations. Therefore, the Mt. Hayes LNG storage facility benefits FEI's system and customers by providing security and diversity of supply, system reliability, operational flexibility, and peak-load demand management. More recently, the facility has also helped serve the growing demand of natural gas for transportation (NGT) customers. Given how integral the facility is to the gas system in BC, and how it supports the maintenance of reliable service for consumers, BCUC oversight of MHLP and its agreements with FEI is appropriate.

The example of MHLP, which for all intents and purposes functions like a component of BC's largest natural gas utility (FEI), underscores how important it is for the BCUC to remain cognizant of the purpose of utility regulation when determining the form of regulation for an "indigenous utility" – just as it would for a non-"indigenous utility".

[2] https://www.fortisbc.com/in-your-community/indigenous-relations/statement-of-indigenous-principles.

2.4 We Are Purchasing the Prophet River First Nation Utility System

FEI has recently obtained BCUC approval for its proposed acquisition of utility system infrastructure owned by the Prophet River First Nation.

Prophet River First Nation is located approximately 100 km south of Fort Nelson and is within FEI's Fort Nelson Service Area. The Prophet River First Nation owns and operates a gas distribution system, which was constructed by FEI's predecessor in 1989, and serves 53 residential and six commercial customers through a single meter. The single gas meter and the regulator station is owned and operated by FEI and is located less than 200 meters away from the Prophet River First Nation. Currently, the Prophet River First Nation does not request payment from its members for the use of the system, and the properties serviced by the system do not have individual meters installed.

In February of 2016, the Prophet River First Nation approached FEI to assume ownership of their gas distribution system in order to accommodate anticipated future growth and expansion, while ensuring the existing system would be maintained safely and reliably.

In March 2019, the BCUC granted FEI a Certificate of Public Convenience and Necessity (CPCN)[3] for an extension to its distribution system in the Fort Nelson Service Area resulting from its purchase of the gas distribution assets of the Prophet River First Nation, subject to finalization and filing of the Asset Purchase Agreement once executed.

The Prophet River First Nation, based on its service model, would not have met the definition of "indigenous utility". It was not itself a public utility under the UCA because it did not charge customers for service.

2.5 Fortis Inc. Partners with First Nations in Wataynikaneyap Power LP

FortisBC operates under a broader umbrella of companies owned by Fortis Inc. Fortis Inc. has shown its commitment to partnering with First Nations in other jurisdictions as well, notably via Wataynikaneyap Power LP. Wataynikaneyap Power LP is a licensed transmission company equally owned by 24 Ontario First Nations communities (51 percent), in partnership with Fortis Inc. (49 percent). The 24 First Nations communities retain an option to increase their ownership to 100 percent over time.

3. THE DEFINITION OF "INDIGENOUS UTILITIES":

This section of FortisBC's evidence addresses the following question posed in the Terms of Reference:

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

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

[3] BCUC Decision and Order G-48-19.

B. the types of services provided by Indigenous utilities,

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

D. the geographic areas served by Indigenous utilities.

FortisBC discusses below why identifying the appropriate regulatory framework will require more nuance than is provided by the term "indigenous utility".

The Terms of Reference define "indigenous utility' as follows: "a public utility that is owned or operated in full or in part, by an indigenous nation". This definition is so broad that it would encompass:

- everything from a micro-utility owned, in whole or in part, by a First Nation for on-reserve service, to a utility like MHLP, all the way to a major investor-owned utility that happens to have sold a single non-voting share to an "indigenous nation";
- a company that provides, for compensation, any of the types of service referenced in the definition of "public utility", including natural gas, electricity, or thermal energy;
- a company that serves Indigenous peoples or non-Indigenous peoples; and
- a company that operates entirely on a Reserve, as well as a utility that covers the entire province.

The following table provides additional examples that demonstrate the breadth of the definition of "indigenous utility".

Table 1 – Hypothetical examples of utilities that would meet the definition of "indigenous utility"

Geographic scope	Ownership	Number of Indigenous ratepayers	Number of non-Indigenous ratepayers	"indigenous utility" under definition?
Reserve only	Indigenous Nation 100%	100	0	Yes
Reserve only	Indigenous Nation only 0.01%	100	0	Yes
Reserve only	Indigenous Nation 0% but operates	100	0	Yes
Reserve and one other building off-reserve	Indigenous Nation 100%	100	1	Yes
Reserve and one other building off-reserve	Indigenous Nation 100%	1	100	Yes
Reserve and one other building off-reserve	Indigenous Nation only 0.01%	100	1	Yes
Reserve and one other building off-reserve	Indigenous Nation only 0.01%	1	100	Yes

Geographic scope	Ownership	Number of Indigenous ratepayers	Number of non-Indigenous ratepayers	"indigenous utility" under definition?
Reserve and one other building off-reserve	Indigenous Nation 0% but operates	1	100	Yes
Large portion of BC	Indigenous Nation 100%	10,000	1.5 million	Yes
Large portion of BC	Indigenous Nation only 0.01%	10,000	1.5 million	Yes
Large portion of BC	Indigenous Nation 0% but operates	10,000	1.5 million	Yes

The breadth of entities (which only vary by geographic scope and ownership) captured within the term "indigenous utility" demonstrates that the phrase is too broad to be useful in a practical sense when it comes to determining the appropriate approach to regulation.

Rather than developing a regulatory scheme tied to the definition of "indigenous utility" in the Terms of Reference, the BCUC should focus on the presence or absence of the underlying policy rationale for public utility regulation. We discuss this in the next section.

4. THE APPROPRIATE REGULATORY MODEL(S):

This section of our evidence addresses the following three issues identified in the Terms of Reference:

> *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?*
>
> *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?*
>
> *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?*

The appropriate approach to public utility regulation for an "indigenous utility" will reflect the consumer protection rationale underlying public utility regulation generally – that of ensuring safe and reliable service is maintained at a price that reflects the nature and quality of service provided and a fair return on the utility's investment. In general, an "indigenous utility" should be regulated similarly to an equivalent non-"indigenous utility", with the nature of regulation (i.e., full

or some form of light-handed regulation) dependent on what is required to achieve the purpose of regulation.

4.1 Constitutional Considerations: UCA, a Law of General Application, Applies to Reserve Lands

A threshold question when considering the appropriate form of regulation is whether there are any Constitutional limitations on the jurisdiction of the BCUC. In the context of this Inquiry, the question is whether the UCA applies to Reserve lands or is barred by such a limitation.[4] The analysis below, which was prepared by FortisBC's legal counsel, demonstrates that the UCA and the jurisdiction of the BCUC extends to the regulation of compensable utility services provided on Reserve lands. The BCUC's analysis in the Spirit Bay Utilities Decision reflects the same conclusion.

As a general proposition, provincial legislatures have the jurisdiction to regulate land within the province. The foundation for this power lies in section 92(13) of the *Constitution Act, 1867* granting the province authority over "property and civil rights in the province". Provincial legislatures also have authority over "local works and undertakings" granted under section 92(10). However, provincial jurisdiction to regulate Reserve lands is limited by section 91(24) which gives the federal Parliament exclusive legislative jurisdiction over "Indians, and lands reserved for the Indians".

Section 91(24) reflects, in particular, the concern that the broad application of provincial laws could undermine Aboriginal and treaty rights, and the Crown's fiduciary obligation to Indigenous peoples.[5] Even so, the courts have made it clear that Reserve lands are not "enclaves" presumptively immune from provincial jurisdiction.[6] Generally, where provincial legislatures enact laws in relation to matters assigned to them under the *Constitution Act, 1867*, those laws apply both on and off reserve. Provincial legislatures may also enact laws which result in minor encroachments on federal jurisdiction when the law's "pith and substance" relates to matters within provincial jurisdiction.[7]

Section 88 of the *Indian Act* provides an additional mechanism through which provincial laws of general application[8] (that would otherwise be inapplicable (*ultra vires*)) may apply to what the Act defines as "Indians".[9] In practice, laws with a general scope and content but that also have the effect of regulating "Indians" (an effect that has been referred to "affecting the core of

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4 According to the BC Treaty Commission, Reserve lands comprise approximately 0.4 per cent of British Columbia's land base.

5 Robert Reiter, *The Law of First Nations* (Canada: Juris Analytica, 1996) at 191; see also *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 183 and *R. v. Sioui*, [1990] 1 SCR 1025 at 1065.

6 *Cardinal v Alberta (Attorney General*) (1973), [1974] SCR 695 (SCC); *Four B Manufacturing Ltd v UGW* (1979), [1980] 1 SCR 1031 (SCC).

7 This is termed the "doctrine of incidental effects: see *Paul v British Columbia (Forest Appeals Commission),* 2003 SCC 55 at para 14; *Rogers Communications Inc v Châteauguay (Town)*, 2016 SCC 23 at para 36.

8 See *Kruger and al. v. The Queen*, [1978] 1 SCR 104 (SCC) at p. 110 for a discussion of the essential elements of a law of general application.

9 Section 88 of the *Indian Act* states: "Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts."

Indianness")[10], and thereby encroaching on the federal Parliament's jurisdiction under section 91(24), are "invigorated" and extend to apply to "Indians".

On the other hand, provincial laws that regulate the *use* of Reserve lands (i.e., laws concerning, for example, the manner of landholding or disposition of land-based interests) are likely inapplicable. Section 88 of the *Indian Act* does not explicitly refer to "lands reserved for the Indians" and has to date been interpreted not to apply to laws regulating land.[11] Provincial laws with this character therefore remain inapplicable on Reserve lands.

The BCUC addressed the applicability of the UCA to Reserve lands in the Spirit Bay Utilities proceeding. It determined that any utility providing service for compensation on Reserve lands was still subject to the UCA and BCUC regulation as a "public utility":

> The Panel finds that the UCA applies to the Energy Services proposed by Spirit Bay Utilities. If Spirit Bay Utilities were to provide the proposed Energy Services to the Spirit Bay Community for compensation it would be a public utility as defined by the UCA.
>
> Spirit Bay Utilities is of the view that the Beecher Land Code, enacted pursuant to the First Nations Land Management Act provides Beecher FN with authority to regulate and provide utility services. The Panel disagrees.
>
> Section 88 of the Indian Act states that "provincial laws of general application continue to apply in respect of Indians in the province unless those laws are inconsistent with the provisions of the Indian Act." The FNLMA is enacted pursuant to the Indian Act and it allows a First Nation to opt out of 32 sections of the Indian Act on the enactment of a First Nation Land Code, but section 88 is not one of those sections. Therefore, there is nothing inconsistent between the UCA and the Indian Act. The UCA is a provincial law of general application and, as such, applies to the proposed utility services.[12]

As the discussion above evidences, the extent to which provincial laws apply to Reserve lands ultimately depends on their scope and content. However, the regulation of *activities* on Reserve lands (as opposed to the *use* of land) through a provincial law of general application such as the UCA likely only incidentally interferes with section 91(24). Therefore, the UCA and the jurisdiction of the BCUC extends to the regulation of compensable utility services provided on Reserve lands. The BCUC's analysis in the Spirit Bay Utilities Decision reflects the same conclusion.

4.2 The Rationale for Utility Regulation is Consumer Protection and Efficient Delivery[13]

In the Alternative Energy Solutions (AES) Inquiry Report[14], the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to

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[10] See Jack Woodward, Native Law, looseleaf (Toronto: Carswell, 2018), 3§270.
[11] Jack Woodward, Native Law, looseleaf (Toronto: Carswell, 2018), 3§390-400.
[12] Order G-175-16, Decision, p. 4.
[13] Aspects of this section involve consideration of legal concepts and were prepared with legal counsel.
[14] BCUC Report in the Matter of the FortisBC Energy Inc. Inquiry Into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives dated December 27, 2012: https://www.ordersdecisions.bcuc.com/bcuc/decisions/en/367235/1/document.do.

regulate to protect the public interest…". The potential for a utility to exert monopoly power over consumers exists for "indigenous utilities", just as it does non-"indigenous utilities".

A natural monopoly exists when, in broad terms, it is more cost-effective to have services provided by one entity and where there are barriers to entry. In other words, the public interest is better served by one utility, with one set of utility infrastructure, providing a certain service. However, the absence of competition creates the potential for abuse. Regulation of natural monopolies is intended to replace the safeguards inherent in competition.

In the AES Inquiry, the BCUC stated:

> The Commission Panel agrees that the purpose of the UCA is to regulate natural monopolies and protect consumers from the exercise of economic power. The Commission Panel is of the view that a reasonable interpretation should consider the market context within which the proposed service or facility will exist, the degree to which natural monopoly characteristics are present and whether the consumer requires protection. The Commission Panel finds that in general, a provider of services which meets the definition of a public utility in the UCA, and where natural monopoly characteristics are present and consumers require protection, will be subject to regulation.

4.3 Approach to Indigenous Utility Regulation Can Be Usefully Considered in Relation to Five Groupings

The BCUC could approach these questions by distinguishing among the following five groupings, which address the underlying rationale behind the UCA and utility regulation more generally. The primary distinctions among the groupings are whether the customers receiving service has some other recourse for protection – either by having a choice of providers (competition) or another form of oversight or participation in governance.

Grouping	Description	FortisBC Position	Rationale
1	An "indigenous nation"[15] provides unmetered service to members only, without compensation.	Not subject to the UCA.	This service is not "public utility" service if there is no compensation payable.
2	Public utility with controlling interest owned by an "indigenous nation", serving only Indigenous peoples who have a say in the governance of the "indigenous nation".	Section 88(3) exemption from Part 3 of the UCA.	Similar to municipalities, where consumer protection is provided by the ability to vote for municipal government.

[15] In this table, "indigenous nation" refers to the defined term in the Terms of Reference.

Grouping	Description	FortisBC Position	Rationale
3	Public utility with controlling interest owned by an "indigenous nation"; serving one or more customers who don't have a say in the governance of the "indigenous nation"[16]	Regulated by BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates. The nature of regulation (i.e. whether light-handed or not) should depend on the extent of consumer vulnerability and proportionality of regulatory burden.[17]
4	Public utility with non-controlling interest owned by an "indigenous nation"; serving one or more customers who don't have a say in the governance of the "indigenous nation".[18]	Regulated by BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates. Necessary to avoid gaming. An investor owned public utility should not be able to avoid regulation by the BCUC, simply by granting a non-controlling interest to an "indigenous nation".
5	Public utility owned either by "indigenous nation", other non-Indigenous investors, or both; "indigenous nation" is contracted operator;	The owner is a public utility, regulated by the BCUC. A contractor may or may not be a public utility regulated by the BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	A contractor may or may not be a public utility regulated by the BCUC, depending on the extent of delegation of the owner's rights and obligations. The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.

[16] These customers could be non-Indigenous people, Indigenous people without voting rights or companies owned by either of these groups.

[17] This is reflected, in the case of small thermal energy utilities, in the Thermal Energy System Regulatory Framework Guidelines.

[18] These customers could be non-Indigenous people, Indigenous people without voting rights or companies owned by either of these groups.

4.4 The Five Groupings Align With the Rationale for Utility Regulation

In the sections below, we explain how the five groupings outlined above align with the rationale for utility regulation. Aspects of this section involve consideration of legal concepts that were prepared by FortisBC in conjunction with legal counsel.

4.4.1. Group 1 – "Indigenous Nation" Provides Free Service on Reserve

Group 1 is an "indigenous nation" providing unmetered service to members only, without compensation. In this scenario, the "indigenous nation" is not a "public utility" or an "indigenous utility"– which both require the exchange of compensation for service. The absence of regulation makes sense in such circumstances, since people are not being charged for service. Imposing obligations on a provider of a free service is more difficult to justify.

4.4.2. Group 2 Indigenous Utilities – Exempted Where Alternative Protection Exists for All Customers

As discussed above, the rationale for regulation is to protect the public from the exercise of monopoly power. If monopoly characteristics are not present, or are somehow mitigated, then an exemption from regulation under the UCA may be warranted. In this group, the alternative protection justifying an exemption comes from every customer having a say in the governance of the utility owner. This is consistent with the exclusion of municipal utilities from the UCA and the approach the BCUC has taken in previous exemption applications.

<u>Municipal Utilities Are Excluded Due to Voting Rights of Residents</u>

The definition of "public utility" in the UCA excludes "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries…".[19] The logic behind this exclusion is that these bodies have in place governance structures that allow all ratepayers to hold the municipality accountable. Residents of a municipality can exercise the right to vote if they object to how service is provided. The qualifier "within its own boundaries" ensures that all recipients of the service can avail themselves of that right to vote.

The BCUC articulated this policy rationale underlying the UCA as follows in its decision regarding SSL-Sustainable Services Ltd. (SSL)[20]:

> The Panel finds that SSL is not entitled to the benefit of the Municipal exclusion and is therefore a public utility as defined in the UCA. SSL is subject to regulation by the BCUC and not the City. The Panel agrees with FEI that the object of the UCA is the protection of the public interest by regulating public utilities to ensure that they provide safe and reliable service at reasonable prices. Public utilities tend to operate in monopolistic circumstances which could lead to monopolistic abuse of ratepayers. The BCUC regulates public utilities to ensure that the prices

[19] See UCA, section 1.
[20] G-104-18, Decision p. 9 https://www.ordersdecisions.bcuc.com/bcuc/orders/en/310921/1/document.do.

they charge to customers, who are often captive, are reasonable for the level of service provided.

The scheme of the UCA acknowledges that there may be circumstances where an entity is caught by the definition of public utility yet the rationale for regulation is not compelling because the public utility has little or no ability to exercise monopolistic behaviour to the detriment of ratepayers and the public interest. In those situations, the UCA allows the BCUC, with the advance approval of the responsible Minister, to grant exemptions in whole or in part from regulation under the statute.

Strata Corporations Are Exempt Because Strata Owners Have Other Recourse

A Thermal Energy System (TES) owned by a Strata Corporation that exclusively serves that Strata Corporation's Strata Unit Owners is exempt from active regulation by Commission Order G-120-14. The BCUC explained the rationale for this exemption as follows:

> A Strata Corporation that owns the TES and provides energy exclusively to its Strata Unit Owners is subject to the *Strata Property Act*, which offers recourse and consumer protection to Strata Unit Owners. Accordingly, customers can find recourse under the Strata Property Act, and not through the Commission under the UCA.[21]

Utility Owned by Indigenous Nation Still Subject to Regulation Due to Absence of Adequate Recourse for Some Customers

The BCUC considered its jurisdiction and the scope of appropriate oversight in respect of an "indigenous utility" in the *Spirit Bay Utilities Application for Section 88(3) Exemption or Section 72 Declaration (2016).*[22] The Decision underscores that the exclusion of municipalities and regional districts from the definition of "public utility" only applies to entities that are municipalities and regional districts under the *Interpretation Act*. It also highlighted the importance of all customers having suitable recourse if an exemption from the UCA is to be considered.

Spirit Bay Utilities Ltd. (Spirit Bay Utilities) proposed to provide utility services including a heated or cooled fluid produced by an ocean thermal energy system, gaseous propane and electricity, delivered through local distribution systems to the Spirit Bay Community. It is located on Beecher Bay First Nation (Beecher FN) Reserve lands. The Beecher FN owns a 51 percent share of Spirit Bay Utilities, with the remainder owned by a company called Omnibus. It planned to become wholly owned by the Beecher FN.[23]

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[21] Order G-27-15, Appendix A, p. 6: https://www.bcuc.com/Documents/Proceedings/2014/DOC_42027_G-127-14_BCUC-TES-Framework-Guidelines.pdf (TES Guidelines).
[22] https://www.ordersdecisions.bcuc.com/bcuc/orders/en/212630/1/document.do.
[23] Order G-175-16, Decision, p. 1.

Beecher FN manages its Reserve lands and resources pursuant to the *First Nations Land Management Act* and the Framework Agreement on First Nation Land Management, and enacted the *Beecher Bay Land Code* as of May 25, 2003 (Beecher Land Code). Pursuant to the Beecher Land Code, the Beecher FN allows for 99-year leases to the general public within the Economic Development Zone and has created zoning laws, registry laws and property taxation laws. [24]

The BCUC rejected Spirt Bay's argument that it was, in substance, a municipality and exempt from the UCA: (p. 6)

> Thus the exclusion to the definition of public utility in the UCA that applies to "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries" only applies to municipalities and regional districts that meet those definitions in the *Interpretation Act*. Beecher FN does not meet either of these definitions and thus the Panel cannot find it to be a municipality or regional district for the purposes of the UCA.
>
> The evidence shows that Spirit Bay Utilities is a corporation and is therefore not a municipality and is also not excluded from the definition of public utility in the UCA. The Panel also notes that Spirit Bay Developments is a limited partnership and is therefore not a municipality.
>
> The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council. [Emphasis added.]

The BCUC went on to deny an exemption request: (pp. 8-10)

> When considering whether an exemption is warranted, we consider the reasons for decision issued for the Canal Plant Agreement Exemption, where the Commission laid out an appropriate test for an exemption order: "a section 88(3) exemption order should be issued, with the advance approval of the LGIC, when such exemption serves the objects and purposes of the [UCA] and it is in the public interest to do so."
>
> In the AES Inquiry Report, the Commission concluded that regulation is required when "natural monopoly characteristics are present and there is a need to regulate to protect the public interest…" We agree with this public interest consideration and find it to be an appropriate public interest test. Therefore, if monopoly characteristics are not present, or are somehow mitigated, for example

[24] Order G-175-16, Decision, p. 1.

by an alternative regulatory body, an exemption from regulation under the UCA may be warranted.

Under the proposed Beecher Bay Spirit Bay Utilities Law the Beecher FN grants Spirit Bay Utilities the exclusive right to provide utility services to all premises within the Economic Development Zone. By their very nature, propane, electricity and thermal distribution systems have elements of a natural monopoly. Further, Spirit Bay Utilities is proposing mandatory connection to, and mandatory end-use of, Energy Services provided by Spirit Bay Utilities. Mandatory connection and mandatory use extend that natural monopoly into a "legal" monopoly. In this Application, the onus is on the applicant to demonstrate that these monopolistic elements have been mitigated, and in this case they have failed to do so. In addition, the exemption scheme proposed by Beecher FN, which is the majority owner of Spirit Bay Utilities, has the effect of making the regulator the owner of the utility. For these reasons, the Panel finds that there is a potential for abuse of monopoly power and therefore exemption from regulation does not serve the objects and purposes of the UCA and is not in the public interest.

The Panel disagrees with Spirit Bay Utilities' comparison of its own circumstances to those of Templeton LP. Recitals F and G to Order G-131-15 state:

> F. Templeton LP proposes to resell electricity to its Lessees using a rate setting mechanism whereby the selling price will not exceed the price which BC Hydro would have charged, if the Lessee were a customer of BC Hydro (Rate Cap). This Rate Cap is in accordance with the provisions of BC Hydro Electric Tariff Section 9.2 – Resale of Electricity. The proposed rate setting mechanism and the Rate Cap are explained within the lease agreements to be signed by Lessees;
>
> G. Templeton LP proposes that if it is exempted from certain provisions within Part 3 of the UCA such that it is able to supply electricity to the Lessees on a non-metered basis, the costs of installing meters will be avoided;

The rate cap mitigates concerns about monopoly abuse, thereby providing justification for granting an exemption to Templeton LP. In the Spirit Bay Utilities' application, there is insufficient evidence concerning the rate and how the utility intends to set it. These circumstances distinguish the Templeton LP exemption from the exemption applied for by Spirit Bay Utilities.

With regard to Spirit Bay Utilities' argument that complaints are subject to voluntary arbitration and ultimately to the courts, the Panel notes that generally speaking regulated utilities are expected to manage their own complaint processes. In addition, complainants have access to the Commission's complaint resolution process. Ultimately, complainants have recourse to the courts in the event that they feel their complaint has not been dealt with fairly by the utility and

> the Commission. For Spirit Bay Utilities to state that a dispute resolution process is in place and that civil remedies are available through the courts does not distinguish Spirit Bay Utilities from any other regulated utility in the province, except that it underlines that there is no independent regulator to whom complainants can turn.

4.4.3. Group 3 Indigenous Utilities – "Indigenous Nation" Has Controlling Interest

Group 3 "indigenous utilities" are public utilities with a controlling interest owned by an "indigenous nation", serving one or more customers who do not have a say in the governance of the "indigenous nation". This is the situation that the BCUC considered in the Spirit Bay proceeding, discussed above. These "indigenous utilities" should be regulated because the rationale for an exclusion akin to municipalities is absent. Some customers (i.e., non-indigenous customers or corporations) would have no meaningful recourse in the event of inadequate service or excessive rates.

For example, as a municipality, the City of Nelson is excluded from the definition of a public utility with respect to energy sales within its own boundaries. However, the Commission does regulate the City of Nelson's sales with respect to customers in the surrounding area.[25]

4.4.4. Group 4 Indigenous Utilities – "Indigenous Nation" Has Non-Controlling Interest

Group 4 "indigenous utilities" are the same as Group 3, except that the "indigenous nation" has a non-controlling interest in this case. The rationale or regulation remains the same as for Group 3.

There is an additional consideration: avoiding gaming. An investor owned public utility should not be able to avoid regulation by the BCUC, simply by granting a non-controlling interest to an "indigenous nation". The potential for gaming would be significant because it would be possible for a public utility to grant an ownership interest to an "indigenous nation" without obtaining BCUC approval. Approval of this kind is only required under section 54 in the event that the acquisition of shares results in a reviewable interest, which is defined as follows:

> (4) For the purpose of this section, a person has a reviewable interest in a public utility if
>
> (a) the person owns or controls, or
>
> (b) the person and the person's associates own or control,
>
> in the aggregate more than 20% of the voting shares outstanding of any class of shares of the utility.

[25] TES Guidelines, p. 2.

In other words, a utility could become an “indigenous utility” by selling a single non-voting share to an “indigenous nation”. Obtaining approval from the BCUC would not be required for transactions where up to 100% of any non-voting class of shares, or up to 19.99% of voting shares, were sold.

4.4.5. Group 5 Indigenous Utilities – “Indigenous Nation” as Contracted Operator

Under the UCA, a person / company can be a public utility by virtue of being an “operator”. Group 5 is where an “indigenous nation” is a contracted operator (the owner could be either an “indigenous utility” or “non- “indigenous utility”).

A contractor may or may not be a public utility regulated by the BCUC, depending on the extent of delegation of the owner’s rights and obligations. For instance, a contractor that remains answerable to, and subject to, direction by the owner should not be a public utility because the owner is answerable to customers and the regulator for the actions of the contractor. In contrast, a passive owner with complete delegation to a contractor may result in the contractor having the market power vis-a-vis customers and would, therefore, warrant regulatory oversight.

4.5 Small “Indigenous Utilities” May Merit Light-Handed Regulation Similar to Other Small Utilities

There are many potential forms of regulation of public utilities, including “indigenous utilities”. At one end of the spectrum is what could be referred to as “full” regulation, which is applied to FEI and FBC. At the other end of the spectrum is “light-handed” regulation, which could involve as little BCUC intervention as inquiring only upon customer complaint.

In the AES Inquiry Report the BCUC described this spectrum as follows: (p.18)

> Once an activity is found to require regulation, the appropriate form of regulation must be determined. Regulation itself runs a spectrum from what could be considered full and more onerous regulation, which is often based on the fully allocated cost of service of the utility, or rate base/rate of return “earnings” regulation, to the most light-handed form of regulation, being forbearance and/or regulation by complaint. The form of regulation is not dependent on the business structure through which the regulated activity is to be delivered. The Panel finds that the form of regulation to be used should be driven by the principles and guidelines set out below.
>
> **Key Principles:**
>
> i) Where regulation is required use the least amount of regulation needed to protect the ratepayer.
>
> ii) The benefits of regulation should outweigh the costs.
>
> **Guidelines:**
>
> - 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 Commission 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.

The BCUC's Guidelines for Thermal Energy Systems (TES Guidelines) provide an example of scaled regulation.

4.6 It Will Be Important to Avoid Creating Loopholes that Would Allow Utilities to Avoid Scrutiny

This section addresses the following question posed in the Terms of Reference:

> *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?*

FortisBC's view is that "indigenous utilities" should generally be regulated in a similar manner to non-"indigenous utilities". In that case, a change in ownership should not result in the need to change the form of regulation. The same test governing a share disposition should apply (UCA, section 54).

In the event that less oversight were to be applied to all "indigenous utilities", this would create an opportunity for abuse unless the BCUC scrutinized changes of ownership more rigorously in the case of a sale to an "indigenous nation" than is currently contemplated under section 54. The sale of any share (even a single share) to an "indigenous nation" would have to be scrutinized to avoid the potential for abuse. It should not be possible for utilities to avoid oversight by the BCUC (or any other regulatory body), simply by selling a share of the utility to an "indigenous nation".

4.7 Additional Considerations Relevant to the Regulatory Framework

Some presenters in the BCUC's town hall meetings have expressed support for the creation of a new regulator for "indigenous utilities". FortisBC believes that energy consumers in British Columbia, whether Indigenous or non-Indigenous, are best served by the BCUC continuing to regulate all public utilities in British Columbia. This would be irrespective of whether or not those utilities are "indigenous utilities". The BCUC has considerable expertise with public

utilities. There are advantages to having consistent application of decisions, based on established regulatory principles and policy.

There is also a cost associated with staffing a new regulatory agency. Based on the approach taken with tribunals like the BCUC and BC Ferry Commission, those costs end up being allocated out to the entities subject to regulation. The allocated costs are, in turn, recovered from energy consumers through regulated rates. There are cost advantages to having a single regulator of public utilities, particularly for small utilities. Most of the BCUC's costs (approximately $13 million in 2017/18) are allocated to the largest utilities – BC Hydro and FortisBC.

While not a perfect comparison, the costs of the Ferry Commission (which only regulates BC Ferries) provide an indication of the potential costs involved in establishing a small regulatory agency to handle the regulation of "indigenous utilities". Its budget is $892,250 for FY 2020 (i.e., April 1, 2019 to March 31, 2020). Costs of that magnitude may be very difficult for customers of a handful of small "indigenous utilities" to absorb.