First Nations Leadership Council

Submission to the BC Utilities Commission

Indigenous Utilities Regulation Inquiry

BC Assembly of First Nations
Union of BC Indian Chiefs
First Nations Summit

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Part I – Introduction

A. FNLC Interests in the Inquiry

The First Nations Leadership Council (**FNLC**) is composed of the three Provincial First Nations organizations: the BC Assembly of First Nations (**BCAFN**), the Union of BC Indian Chiefs (**UBCIC**) and the First Nations Summit (**FNS**). The FNLC is mandated by First Nations in BC, through resolutions passed at the respective three organizations, to work as an advocacy body providing a strong and cohesive voice for the implementation, exercise, recognition and advancement of inherent jurisdiction in British Columbia.[1] Resolutions from the organizations call upon BC and Canada to support the development of Indigenous alternative energy economies[2], address the climate emergency[3], and administer all economic, energy and climate plans in full accordance with Indigenous Title, Rights and Treaty Rights.[4] The BC Utilities Commission (BCUC) Indigenous Utilities Regulation Inquiry touches each of these mandates and justifies the involvement of the FNLC as an intervenor in the proceedings.

B. Background

As the original stewards and owners of the land now known as British Columbia, First Nations have unique cultures and ways of life, including systems of economy, governance and law. We have never ceded, surrendered or agreed to abandon our land, our culture, or our jurisdiction and governance systems. These diverse systems include specific laws related to the use and management of natural resources, with whom we live in reciprocity and on which our well-being and our economies are founded. First Nations also established sophisticated economies and trade relationships with other nations. Colonization disrupted these systems and subjected Indigenous peoples to forced dislocation from our lands and economies. For centuries, we were systematically excluded and marginalized as others benefitted from the exploitation of our territories. Hydro-electric dams, transmission lines, capacitor stations, and other electrical utility infrastructure were constructed without consultation or consent of the Title Holders, unjustifiably infringing on our rights. Many of these dams destroyed salmon spawning and migration routes and collapsed fisheries that our Nations depended on. Energy agreements such as the Columbia River Treaty excluded Indigenous peoples, enabling the flooding of our communities and sacred sites while making BC Hydro and US utilities rich. During the renewed Columbia River Treaty negotiations, Canada has granted observer status to a few Nations.[5] While this is commendable, it still falls short of redressing past infringements or recognizing the sovereign decision-making status of Nations as to resource development in our territories.

Resource exploitation and consumption in BC and Canada not only displaced and impoverished First Nations peoples, but contributed to runaway climate change, which also disproportionately impacts us. Canada and BC, through the Paris Agreement, have now committed to reducing

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[1] First Nations Leadership Council. *Terms of Reference.* (2005).
[2] UBCIC Resolution 2019-02; BCAFN Resolution 2019-04; FNS Resolution 0907-12.
[3] UBCIC Resolution 2019-02; BCAFN Resolution 2019-04; FNS Resolution 0616-15.
[4] UBCIC Resolution 2016-06; BCAFN Resolution 2016-30; FNS Resolution 0619-17.
[5] Global Affairs Canada. *Federal government announces Columbia River Basin Indigenous Nations to participate as observers in Columbia River Treaty negotiations*. (2019).

greenhouse gas (GHG) emissions to 40% of 2007 levels by 2030.[6] This involves producing clean energy as well as transitioning BC's use of energy from fossil fuels to renewable sources. First Nations are positioned to take a leadership role in a just transition to a clean fuel economy that meets and exceeds GHG emissions reductions targets, while upholding our constitutionally and internationally recognized Title, Rights, and Treaty Rights. The province's CleanBC strategy fell significantly short of respectful co-creation with First Nations in BC; to rectify this and to respond to the climate emergency, the First Nations Leadership Council is mandated by resolution to develop a Just Transition Plan/First Nations Climate Change Strategy for BC.[7] Yet Canada's off-grid communities, many of which are First Nations, collectively consume between 90 million and 120 million litres of diesel on an annual basis.[8] The unsubsidized cost of diesel is about 1.30 per kilowatt/hour, whereas the average Canadian consumer pays between 7 and 17 cents per kilowatt-hour for energy.[9] In order to make diesel energy affordable to off-grid communities, the government has to heavily subsidize diesel – according to a recent study, $60.5 million a year in Nunavut alone.[10] This makes a community's up-front costs relatively cheap, but dooms it to reliance on dirty fuels and a string of downstream health and social costs for both communities and the government alike. As of 2011, 86 of the 292 remote communities in Canada were in BC, and many of these communities are First Nations communities.[11] The vast majority generate electricity from some form of fossil fuel, usually diesel.[12] A number of recent partnerships and initiatives between the BC government and First Nations have taken steps to focus energy policy on transitioning away from dirty fuels, while recognizing the jurisdiction of First Nations to provide for their own energy independence through renewable energy projects.[13]

Immense opportunities exist for First Nations in BC to develop renewable energy sustainably. Indigenous communities have both the knowledge and ownership of their territories as well as the incentive to transition away from fossil fuel reliance and achieve self-governance goals. As was eloquently stated in the June 12 Inquiry Hearing, First Nations have lived where they've lived since time immemorial "because their ancestors found adequate wind, water, sun and land." However, the growth of renewables in BC is hindered by economic barriers such as high capital costs and fossil fuel subsidies, regulatory barriers that support the economic status-quo, policy barriers such as the cancelling of the Standing Offer Program, and barriers related to human, organizational and knowledge capacity to manage projects. In some cases, First Nations have the interest but not yet the capacity to take full ownership over projects. But this is changing. Renewable energy projects throughout Canada and BC are now equity-owned by First Nations[14], operating generation, transmission, and/or distribution utilities. The regulatory landscape now needs to adjust to the fact that Indigenous-owned and -operated utilities will increasingly be distributing energy directly to consumers in their own communities and beyond.

C. Summary of FNLC's Position

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[6] British Columbia, Ministry of Environment & Climate Change Strategy and Ministry of Energy, Mines & Petroleum Resources. *Regional Indigenous Engagement Sessions on Climate Change and CleanBC*. (2019). cleanbc.gov.bc.ca
[7] BCAFN Resolution 2019-04.
[8] Eryn Fitzgerald and Dave Lovekin. *Renewable Energy Partnerships and Project Economics: Research supporting Indigenous-utility partnerships and power purchase agreements*. (Pembina Institute, 2018)
[9] *Ibid*.
[10] WWF Canada. *Tracking Diesel Fuel Subsidies in Nunavut*. (International Institute for Sustainable Development, (2017).
[11] Canada, Natural Resources Canada. *Status of Remote/Off-Grid Communities in Canada*. (2011). p. 4.
[12] *Ibid* at 6.
[13] BC Indigenous Clean Energy Initiative;
[14] First Nations Major Projects Coalition. *The Role of Indigenous People in Major Project Development: Paths for Indigenous Participation in Electricity Infrastructure.* (2019) at 48 – 50.

The FNLC takes the firm position that First Nations in BC have jurisdiction over energy generation, transmission, and distribution in our territories. This sovereign authority and jurisdiction is undermined by BCUC regulation of Indigenous utilities. Our submission will address both jurisdictional concerns and recommend transitional strategies that address regulatory barriers for Indigenous utilities today.

As part of its international responsibilities towards Indigenous peoples in BC and its climate commitments, BC and the BCUC must ensure that First Nations have every opportunity, unimpeded by undue cost or regulatory constraint, to rebuild self-governance, improve quality of life, mitigate and adapt to climate change, and attain economic independence through renewable energy development. Furthermore, any regulatory amendments or administration of renewable energy programs must occur in accordance with Title, Rights, and Treaty Rights, and in accordance with the *United Nation Declaration on the Rights of Indigenous Peoples* (**UNDRIP**).[15]

Indigenous utilities must, at minimum, be exempted from being regulated as public utilities within the meaning of the *Utilities Commission Act*[16] (UCA), and regulations must be introduced that support the economic viability of First Nations-led renewable energy projects. Specifically, any regulatory body overseeing utilities must be directed to consider the full social, health, and economic costs of energy when approving Indigenous utility rate applications. In addition, the regulatory body must offer a streamlined rate application process that does not unduly burden Indigenous utilities. As a transition plan to full jurisdiction, the FNLC recommends separate legislation to establish an Indigenous Utilities Commission (IUC) with equivalent powers to the BCUC, to act as a quasi-judicial body in accordance with the Indigenous legal orders of the Nations it regulates.

This Inquiry should be seen as a starting place for dialogue, and hopefully will catalyze a process by which First Nations will become fully engaged in regulatory processes regarding utilities. The Inquiry, with its short timeframe for engagement, cannot be considered sufficient for a process of consultation or to meet the standard of free, prior and informed consent articulated in UNDRIP. Once the legislative changes that remove immediate obstacles are addressed, more research and sustained engagement is needed for First Nations to fully articulate the regulatory barriers that impede progress and the implementation of a transition plan to place Indigenous utilities fully within the authority of First Nations.

Part II – Characteristics of an Indigenous Utility

Order in Council No. 108 states that “indigenous utility" is defined as a public utility that is owned or operated, in full or in part, by an indigenous nation. The OIC further defines “indigenous nation” narrowly to mean a band within the meaning of the *Indian Act*, the Westbank First Nation, the Sechelt Indian Band and the Sechelt Indian Government District, treaty first nations, the Nisga’a Nation, or another indigenous community within BC, if the legal entity representing the community is a party to a treaty or land claims agreement subject to Provincial settlement legislation.[17]

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[15] *United Nations Declaration on the Rights of Indigenous Peoples*. (UN General Assembly, 2007).
[16] *Utilities Commission Act,* RSBC 1996, c. 473, s. 5.
[17] BC Order in Council 108.

With respect, this narrow definition already undermines the spirit of the Inquiry and imposes an impoverished and paternalistic definition of nationhood on self-determining First Nations peoples. It is inconsistent with jurisprudence from Canada's highest court stating that matters of group identity and belonging must always be decided by the Aboriginal people concerned.[18] It is never appropriate for the BC government to define indigenous nationhood, especially not in a way that limits nationhood to entities recognized by the Canadian legal framework, such as bands within the meaning of the *Indian Act*[19], or Nations participating in the modern Treaty process or self-government agreements. The FNLC reiterates that Indigenous energy authority does not depend on participation in the BC Treaty Commission (BCTC). Many Nations choose not to participate in the BCTC and instead choose to exercise and uphold their inherent Title and Rights in other ways, such as through consent-based negotiation and agreement-making.

One of the questions in the Inquiry is "what are the defining characteristics of indigenous utilities"? The answers to this question from participants should inform the definition of "indigenous utility" according to First Nations' own self-definition. The regulation of Indigenous utilities needs to take into account the diversity of governance models, inter-tribal agreements, modern treaties, and partnerships at different levels that Indigenous peoples have developed as they rebuild their societies in the wake of colonial violence. A "one-size-fits-all" model does not recognize this distinctiveness and resilience and is inconsistent with BC's commitments towards First Nations.

We submit that if the utility is majority-owned (50.1% or more) or majority-controlled (subject to *BC Corporations Act* and *Securities Regulation*) by the Indigenous Nation (or group of Nations), it is an Indigenous utility. The corporate structure the Nation chooses is within their discretion and should not be the concern of the regulator. However, in many cases First Nations rely on third-party investment to finance projects and might have a minority share in their utilities, at least at the outset of projects, with a plan to transition over time. These minority owners should not be excluded from identifying as an Indigenous utility, as long as the rights and jurisdiction of the Proper Title Holders are respected. After all, Indigenous minority owners are still the original owners and governing authorities of their territories and projects cannot proceed without their involvement. Equity investment preferences as well as ownership of system components will vary greatly among Indigenous Nations and will also evolve as Nations assume greater jurisdiction and leverage their economic power. These choices are all exercises of self-determination and each community must be given the regulatory flexibility to choose their preferred degree of ownership according to their objectives.

Part III – Indigenous Energy Jurisdiction: Legal Framework

The FNLC maintains that Indigenous utilities have authority and jurisdiction over all aspects of energy generation, transmission, and distribution in their territories. The legal framework for this assertion is reviewed in this section, to establish a foundation for a transition plan that will move towards full jurisdiction while addressing current regulatory problems.

A. Indigenous Legal Orders

[18] *Xeni Gwet'in First Nations v British Columbia* 2007 BCSC 1700 at 444. (*Tsilhqot'in Nation*).
[19] *Indian Act*, RSC, 1985, c. I-5.

Indigenous jurisdiction and authority flows, not from Canadian law, but from Indigenous legal orders, which pre-exist Canadian law and extend across the Indigenous nation's territory.[20] Indigenous legal orders are distinct from one another, and encompass distinct areas of law, including laws relating to ownership, access, and management of lands and resources. Equally importantly, they encompass legal procedures related to governance, decision-making and dispute resolution.[21] Sources of law within Indigenous legal orders include, but are not limited to: formal oral histories that record precedent; intellectual property with legal or constitutional status such as stories, songs, dances and crests; patterns of interaction between people and the natural world; and public deliberative processes.[22] Legal principles, procedures, rights and obligations expressed by these sources can inform law-making regarding the regulation of Indigenous utilities.

Indigenous legal orders have in many cases been fragmented by the imposition of colonial law through the *Indian Act*, the reserve system, and provincial laws of general application.[23] However, Indigenous Nations are revitalizing and rebuilding their legal orders within, alongside, and outside of Canadian legislative frameworks. Dialogue and cooperation between First Nations whose laws are informed by the same or similar legal orders is desirable to support coherence and rebuilding of law across territory. The regulation of Indigenous utilities must support these nation and law re-building efforts. By virtue of their pre-existing legal orders, First Nations governments have the jurisdiction to consider how renewable energy development projects and the distribution of energy in their territories are consistent with their laws, and to resolve energy disputes.

B. Canadian Law

Section 35 of the *Constitution Act*, 1982[24], recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. This provision affirms a "full box" of rights, including pre-existing self-governance and legal rights, which the Supreme Court of Canada (SCC) has stated were not extinguished and continued "in full force" despite the extension of colonial law into the territories comprising Canada.[25] The FNLC rejects a "frozen rights" interpretation of section 35 governance rights, or any legal test that would limit or narrow the jurisdiction of Indigenous peoples. Indigenous jurisdiction over energy projects and energy provision in their territories are necessarily a part of self-governance, and this broad interpretation of jurisdiction is reflected in the doctrine of Aboriginal Title.

The SCC in *Tsilhqot'in Nation* has confirmed that Aboriginal Title is a "right in land" that comes with the full suite of governance powers including "the right to the economic benefits of the land; and the right to proactively use and manage the land".[26] The SCC endorsed a territorial view of Title rather than a "postage stamp" view that would limit Title to areas of historically intensive use. Aboriginal Title delineates a sphere of jurisdiction within which Indigenous law is fully

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[20] Michael Coyle. "Indigenous Legal Orders in Canada – a literature review" (2017). Law Publications: 92.
[21] Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent", in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) 45 at 56
[22] John Borrows, "Sources and Scope of Indigenous Legal Traditions" in *Canada's Indigenous Constitution*. (Toronto: University of Toronto, 2010) 23 – 58.
[23] *Supra* note 19
[24] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.
[25] *Mitchell v Minister of National Revenue*, 2001 SCC 33 at 10; *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123.
[26] *Tsilhqot'in Nation* v *British Columbia*, 2014 SCC 44.

operational as a governing authority.[27] The position of the FNLC as well as the interpretation taken by the courts is that Aboriginal Title and Rights are held at the nation level.[28] The holder of asserted Aboriginal Title must be consulted and accommodated when the Crown contemplates decisions that may adversely affect their rights in and to their land.[29] When Title is proven, that standard becomes consent.[30] However, the courts have directed that settlement of claims, including recognition of Aboriginal Title, should occur through honourable negotiation[31], rather than through litigation in which Indigenous groups bear the onus of proof. Consensual decision-making must not be restricted to Nations who have proved Title in court. Accordingly, free, prior and informed consent as set out in UNDRIP is now the international standard for the Crown's engagement with Indigenous peoples towards a meaningful reconciliation.

C. United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted without qualification by Canada in 2016, sets out the minimum standards for the survival, dignity, and well-being of Indigenous peoples, including in British Columbia. One of the overarching principles of UNDRIP is Free, Prior and Informed Consent (FPIC), which sets out the requirement that states "consult and cooperate in good faith…in order to obtain their free, prior, and informed consent" before taking actions that affect Indigenous peoples. Article 19 specifies that states must do this "before adopting and implementing legislative or administrative measures that may affect them".[32] Article 32 specifies that consent must be obtained "prior to the approval of any project affecting their lands or territories and other resources".[33] FPIC recognizes the right of Indigenous self-determination and considers Indigenous peoples as partners in a government-to-government relationship, rather than merely as stakeholders. Implementing FPIC includes improving existing mechanisms for Indigenous participation in decision-making. For the purposes of the present Inquiry, improving processes for BC First Nations to make and shape decisions related to the regulation of energy production, transmission, and distribution in ways that will benefit our economies and societies would be a step towards implementing FPIC. As discussed below, this could involve a regulatory body staffed by First Nations people who have expertise in the specific context of Indigenous utilities as well as in Canadian and Indigenous law.

The following Articles, related to economic and territorial decision-making and administration, are also relevant for Indigenous utilities regulation:

> *Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*
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> *Article 20 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.*

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[27] Brian Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85, Can Bar Rev 255 at p. 270.
[28] *Supra* note 26.
[29] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[30] *Supra* note 18.
[31] *Supra* note 29.
[32] *Supra* note 15.
[33] *Ibid*.

> *Article 23 Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*
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> *Article 26 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupations.*
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> *Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

Although the federal government's Bill C-262, *An Act to ensure that the laws of Canada are in harmony with UNDRIP,* died in the Senate[34], *UNDRIP* has already been incorporated into the Canadian legal landscape as customary international law. The Federal Court has stated that it is an interpretive aid to domestic law, including Aboriginal rights, administrative manuals directed towards Aboriginal peoples, and Canadian human rights legislation.[35] In the *First Nations Child & Family Caring Society* case, the Canadian Human Rights Tribunal stated that "national legislation...must be interpreted so as to be harmonious with Canada's commitments expressed in international law including the *UNDRIP*."[36] *UNDRIP* is a convention of Canadian law and places legal as well as moral and political obligations upon governments. BC, in partnership with First Nations organizations, is currently drafting legislation to align provincial laws with *UNDRIP*. When this bill becomes law, it will further elevate UNDRIP's legal status in the province and require changes to legislation across all sectors, including the energy sector.

D. Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls

The 2015 Truth and Reconciliation Commission (TRC) Final Report found that Canada committed cultural genocide against our peoples[37]; this was affirmed in the recent Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls[38] (MMIWG). This genocide has economic components as well as physical and cultural ones. For this reason, the TRC Commission Calls to Action include calls for economic reconciliation, beginning with obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects and ensuring that Aboriginal communities gain long-term sustainable benefits from these projects.[39] The TRC calls for the full implementation of *UNDRIP*. The MMIWG Report includes Calls to Justice directed toward governments and industry with regards to resource development, and point out the devastating effect that resource development can have on Indigenous women, girls, and 2LGBTQQIA people when undertaken

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[34] https://globalnews.ca/news/5417286/parliament-summer-bills-passed/
[35] *Nunatukavut Community Council Inc v Canada*, 2015 FC 981.
[36] *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada*), 2018 CHRT 4.
[37] *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. (2015).
[38] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. (2019).
[39] *Truth and Reconciliation Commission of Canada: Calls to Action*. (2015)

without the full involvement of Indigenous communities, and specifically Indigenous women. Indigenous women need a defined role within the new renewable energy economy, and should be offered leadership positions that reflect their historic role as political and governance authorities.

E. Commitment Document & Consent-Based Decision-Making

In recognition of the TRC Calls to Action, *UNDRIP*, and the reality of Aboriginal Title after *Tsilhqot'in Nation*, the BC government is working towards a new relationship with Indigenous peoples, which the FNLC urges must prioritize FPIC and consent-based decision making. The Commitment Document recognizes *UNDRIP* and commits BC to jointly develop provincial legislation to establish *UNDRIP* as the foundation for Crown-Indigenous relations, including aligning provincial law and policy with the international standards it sets out. The Commitment Document establishes the Province's position that section 35 rights include self-government rights, stating that "Indigenous Nations and peoples pre-existed and continue to exist today and have their own laws, governments, political structures, social orders, territories and rights inherited from their ancestors. This inherent right of self-government is an Aboriginal right recognized and affirmed under the Constitution."[40] Inherent self-government includes defining energy policy and infrastructure within our territories.

Part IV – Regulation of Indigenous Utilities

A. Current Regulatory Barriers

Under the UCA, Indigenous utilities in BC are regulated as public utilities, which the FNLC asserts is an infringement of Aboriginal Title and Rights and yet another unwanted imposition of Canadian law into our inherent jurisdiction. Practically, it has the effect of discriminating against First Nations by hampering their efforts to attain self-determination. It does this by setting up administrative barriers under Part 3 of the UCA, such as lengthy rate application processes, and by applying a cost-benefit analysis that effectively excludes small utilities. The UCA has been criticized for adopting a narrow, economic-only analysis when considering rate-payer applications.[41] Indigenous utilities may need to charge higher rates initially to reflect their small size and high start-up costs of renewable energy projects that do not benefit from the same subsidies as do the fossil fuel industry, or the economies of scale that large public utilities enjoy. The common difficulty faced by small power proponents or utilities subject to public regulation is that regulators are unlikely to approve a higher purchase price because they do not want to expose ratepayers to increased costs.[42] Regulatory approval processes tend to restrict increases in electricity rates, which limit the deployment of renewable energy or smaller, community-based projects that could support self-sufficiency for a First Nation. Rate applications are analyzed for their economic implications without consideration for social, environmental, governance or other implications. For the purposes of this Inquiry, it is important to reframe the role of the regulator from one of restricting rate increases to overseeing more prudent decision-making that encompasses more than economic decisions.[43]

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[40] British Columbia and First Nations Leadership Council. *Joint Agenda: Implementing the Commitment Document, Concrete Actions: Transforming Laws, Policies, Processes and Structures*. (2018).
[41] *Supra* note 8.
[42] *Ibid* at 58.
[43] *Ibid*.

BCUC exists as a quasi-judicial body to make decisions that balance the needs of all Canadians, including First Nations peoples and future generations. Its role is to ensure fairness and a healthy economic environment for all. Decisions must ensure substantive equality to be truly fair and in accordance with the Constitution.[44] The BCUC, if it is to regulate Indigenous utilities for any future length of time, should be mandated to apply a broad range of criteria to make fair decisions that will contribute to substantive equality and economic reconciliation, in accordance with Title and Rights and with *UNDRIP*.

Currently, by categorizing Indigenous utilities in the same way as public utilities, the regulations fail to operate in alignment with the principles of FPIC in UNDRIP, and fail to consider the distinctiveness of BC First Nations. As discussed, First Nations in BC have unique legal orders. These legal orders have different requirements for decision-making and dispute resolution processes, environmental assessment (EA), and territorial access. In many cases, Nations such as the Secwepemc and the Tsleil-Waututh have developed their own EA processes according to their own laws that already regulate industry in their territories.[45] These EA processes, as expressions of Indigenous law, show that Indigenous utilities may be accountable to a wider range of stakeholders and have broader responsibilities than a public or a conventional private regulator – for example, they may have legal obligations to steward territory and maintain reciprocal relationships with other forms of life. Their accountability is wider than accountability to shareholders or to government. Their first priority may not be profit-maximization, but instead sustainability and predictability of energy supply. In addition to responsibilities beyond an economic bottom line, Indigenous legal orders often contain decision-making processes that are consent-based. Legitimate decisions require a deliberative community process that reflects Indigenous forms of democracy, which tend to be relational and discursive rather than based on majority vote.[46] The current regulatory framework does not take these distinctions into account when regulating Indigenous utilities and makes it more difficult for First Nations to conduct viable economic development in accordance with their own laws.

B. Regulatory Frameworks in Other Jurisdictions

Northern territorial jurisdictions are working towards solutions to assist diesel-powered remote communities to transition to renewable energy. Off-grid remote First Nations are de facto generation, transmission, and distribution utilities for their communities. Energy clustering, or development of micro-grids, is an option for remote communities that wish to achieve energy independence. Yukon's Independent Power Producer (IPP) policy and accompanying regulations, enacted January 2019, exempt micro-generators from being public utilities.[47] This is meant to facilitate non-utility entities to sell electricity to publicly owned utilities. An Order-in-Council directs the Yukon Utilities Board on rates for purchasing electricity from these IPPs. It is unclear to what extent these IPPs have the opportunity to distribute power directly to consumers and still be exempt from public regulation. Yukon has explicitly framed its IPP policy as a way to support inclusive economic development, rather than as a move towards ideological privatization.[48]

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[44] *Andrews v Law Society of British Columbia*, 1 SCR 143.
[45] Tsleil-Waututh Nation, Treaty, Lands & Resources Department*. Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal.* (2015); St'kemlupsemc te Secwepemc Nation, *SSN Panel Recommendations Report for the KGHM Ajax Project at Pipsell*. (2017).
[46] *Supra* note 21.
[47] Government of Yukon, *Yukon's Independent Power Production Policy*. (2018).
[48] *Ibid*.

Communities in Alaska have developed a cooperative model that allows remote villages, largely Indigenous, to develop and operate renewable power production and distribution on a regional, more cost-effective scale. Some of the largest utilities in Alaska operate this way. For example, the Alaska Village Electric Cooperative (AVEC), a non-profit electric utility, is owned and operated by the people in the 58 villages it serves.[49] Some of these cooperatives have voted not to be regulated by the Regulatory Commission of Alaska and instead regulate themselves through internal governance structures.[50] This is enabled through a deregulation election process under the Alaska Public Utilities Regulatory Act (APURA) and the Alaska Admin Code.[51] For those that remain regulated under the APURA, the regulations set out simplified rate filing procedures for cooperatives.[52]

As discussed at the July 4, 2019 Inquiry Hearing, the First Nations Major Projects Coalition has connected with 27 self-governing Tribes in the United States who service consumers living within and between their reserves.[53] Each of the Tribes, federally recognized as a sovereign authority, operates its own utilities. The US Department of Energy's Tribal Energy Program is enacted through legislation[54] and supports the regulatory sovereignty of these Tribes. Tribal utility associations are non-profit organizations established to "increase Tribal control over natural resources, the creation of renewable energy…and give Indian Tribes a voice in energy policy and legislation".[55] Tribal utility associations provide technical support, group procurement and access to legal-type services for tribal members. The US context differs from Canada in that US states allow for private market competition between utilities. Few tribal utilities have a regulated rate structure, relying on the private market to set competitive rates. More research is needed to understand how this model could inform the BC context in light of the outstanding need to recognize First Nations territorial jurisdiction over our unceded lands.

Transition Plan: Regulatory Innovation Supporting Self-Determined Indigenous Utilities

The FNLC echoes the First Nations Major Projects Coalition and others in their calls for recognition of full First Nations jurisdiction over energy infrastructure and utilities, as set out earlier in this submission. As articulated, tinkering with legislation is premature while fundamental jurisdictional questions remain unresolved. However, we also heard the Commissioners' urge for a transition plan that will offer solutions to the regulatory problems that Nations are facing today. In this section, we offer recommendations for a transition plan. Based on the current landscape, there seem to be four broad possible approaches to regulating Indigenous utilities.

1. Offer case-by-case exemptions from the regulations for Indigenous utilities (current model).
2. Change the criteria with which regulatory approvals are made to enhance the economic viability of Indigenous utilities.

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[49] Alaska Village Electric Cooperative. https://avec.org/about/our-cooperative/
[50] Regulatory Commission of Alaska. http://rca.alaska.gov
[51] *Alaska Administrative Code*, 3 AAC 49.010. Deregulations.
[52] *Alaska Administrative Code*, 3 AAC 48.700. Simplified Rate Filing Procedures for Electric Cooperatives.
[53] BC Utilities Commission, *Indigenous Utilities Inquiry Engagement Session*. July 4, 2019.
[54] *Energy Policy Act*, 2005, Title V.
[55] U.S. Department of Energy. *Tribal Authority Process Case Studies: The Conversion of On-reservation Electric Utilities to Tribal Ownership and Operation*. (2010).

3. Create a new category of exemptions for Indigenous utilities such as is done for municipalities.
4. Establish a distinct Indigenous Utilities Commission, with its own enabling legislation, for the purpose of supporting self-governed regulation of Indigenous utilities.

Identifying these four possibilities does not preclude the likelihood of future regulatory innovations proposed by Indigenous peoples and communities after a sustained process of research and community engagement.

1. Offer case-by-case exemptions from the regulations for Indigenous utilities

Currently, the primary way for Indigenous utilities to avoid being regulated as public utilities is to request an exemption from the relevant sections of the UCA. This process is time-consuming, legally expensive and administratively burdensome to small Indigenous utilities, and does not always lead to success. It is also a piecemeal approach that is an inefficient use of the provincial government's resources, and that does not accord Indigenous governments with the special constitutional recognition they have under section 35. One of the purposes of this Inquiry is to find alternatives to this approach.

2. Change the criteria with which regulatory approvals are made to allow Indigenous utilities to be economically viable.

If Indigenous utilities are to continue being regulated by the UCA and under the supervision of the BCUC for any length of time, new decision-making criteria must be introduced to support their viability. The BCUC must look at the full cost of electricity by taking into account externalized costs such as long-term health, environmental, climate, and economic impacts of fossil fuel reliance, and also the health and economic impacts of poverty. Regulations that privilege an exclusively economic bottom line to protect rate-payers do not take these costs into account, making it prohibitive for smaller Indigenous renewable energy utilities to operate. Rate approval criteria must take into account the benefits of fostering community capacity and resilience. Precedent exists for this kind of shift in the regulator's decision-making criteria. In 2015, the Ontario Ministry of Energy issued a directive to the regulator to consider the social benefits of a renewable energy project to Whitesand First Nation. As a result, Whitesand was able to negotiate a favourable PPA rate above the marginal cost of diesel.[56] Consensus must be built about how to calculate the true cost of energy so that regulators, utilities, and consumers alike have a shared foundation for understanding prices.

3. Create a new category of exemptions for Indigenous utilities as is done for municipalities.

Under the UCA, a municipality that generates or distributes energy within its own boundaries is not considered a public utility, and, therefore, is not regulated by the Commission.[57] Entities providing services only to employees or tenants for a limited term, such as stratas, may also exempt. The reasoning behind these entities being exempted from the regulations is that they have their own dispute resolution mechanisms within which ratepayers may seek recourse. For example, citizens may appeal to their municipal governments with concerns. Thus, municipal ratepayers are not in the same need of protection from a public regulator body such as the BCUC. Furthermore, municipalities have governmental powers and play important roles in

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[56] *Supra* note 8 at 70.
[57] BC Utilities Commission. *A Participant's Guide to the BC Utilities Commission.* https://www.bcuc.com/Documents/Guidelines/Participant_Guide.pdf

energy management and land use planning. It makes sense for them to have independent jurisdiction over the generation and provision of energy.

In the July 4 Inquiry Hearing, we heard First Nations say that they are just as capable of running private utilities as municipalities are. Indigenous utilities generating or providing electrical power to their own citizens as well as other consumers within their jurisdictions should be exempted from the definition of "public utilities" on a similar basis: First Nations have governmental authority as well as their own dispute resolutions processes that can be put into place to protect ratepayers. The crucial legal difference between municipalities and First Nations is that municipalities operate under delegated authority from the province, whereas Indigenous governmental authority is inherent, sovereign, and not delegated from legislation. Scholars and Indigenous Nations have criticized approaches to Crown-Indigenous relations that treat First Nations like municipalities.[58] Scholars have also commented that Aboriginal Title is an interest in land that resembles provincial more than municipal jurisdiction.[59] Accordingly, exempting Indigenous utilities from regulation on the same basis as municipalities would require careful discussion and support to ensure that Nations' Title and Rights are upheld, Indigenous governance and legal processes are respected, and at the same time ensure that viable dispute resolution and appeal procedures are available to ensure Indigenous ratepayers' interests are protected.

A question that arises in this analysis is what constitute the boundaries within which an Indigenous utility provides service. The FNLC maintains that to be consistent with Title and Rights, as well as for economic viability, the boundaries must reflect a territorial approach rather than be limited to reserve. This territorial approach means Indigenous utilities must be empowered to determine their customer base, which reasonably would extend to non-Indigenous people and non-band members residing within the service area of an Indigenous utility. To allow otherwise would provide for a patchwork of electricity provision in our territories and ultimately undermine the right of self-government of First Nations. A flexible approach that works with each Indigenous utility's specific needs and context should be adopted. Flexibility should also be applied to allow Indigenous utilities to provide service to industrial and commercial operations within our territories, at reasonable market rates to facilitate our economic viability.

In determining rates, the Indigenous utility would engage with relevant stakeholders to consider appropriate rates which would then be submitted to the governance arm of the Indigenous Nation for review and approval. This approach would enable Indigenous governments to develop or utilize their own internal governance models to provide recourse to rate-payers. For example, the Nisga'a Lisims Government has a sophisticated judicial process that operates in accordance with Nisga'a law as part of their Treaty.[60] Other Nations with self-governance agreements would have these procedures built-in, while others may be in a process of revitalizing their legal orders and decision-making procedures. Ideally, Nations in this situation would not be without support in their governance re-building work. The regulations should contain directives for the Province to fund Nations to develop the proper dispute resolution structures to support their own Indigenous utility should they so wish, in accordance with their laws and their needs.

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[58] Kent McNeil. "Self-Government and the Inalienability of Aboriginal Title." (2002). 42 McGill Law J at 473. See also Hayden King and Shiri Pasternak. Canada's Emerging Indigenous Rights Framework: A Critical Analysis. Yellowhead Institute, 2018.
[59] *Supra* note 27.
[60] Wilp Si'ayuukhl Nisga'a/Nisga'a Lisims Government. *Nisga'a Administrative Decisions Review Act* 2000-04.

The BCUC could retain a complaints-based or appeal body role wherein Indigenous utilities would be regulated under the UCA should their Nation's dispute resolution procedures be exhausted. Alternatively, a separate First Nations regulatory body could be developed to act in this appeal role on an opt-in basis. This option is explored further below, as part of a transition plan from ultimate provincial regulation over Indigenous utilities to implementation of full First Nations jurisdiction over energy services.

4. **Establish a province-wide Indigenous Utilities Commission, with its own enabling legislation, for the purpose of supporting self-determined regulation of Indigenous utilities.**

The FNLC recommends the research and development of legislation creating an independent Indigenous Utilities Commission (IUC), led and directed by First Nations organizations, to provide expert guidance to Indigenous utilities in BC as well as acting as a quasi-judicial body with similar functions to the BCUC – with key differences. Along with a mandate to protect ratepayers and establish a fair price for utilities, the IUC would have a diversified mandate to consider the unique circumstances of Indigenous utilities and to support First Nations decision-making and dispute resolution structures according to their own legal orders. The Commitment Document sets out the goal of establishing an Indigenous commission to provide a dispute resolution, governance building, and law-making role that First Nations may opt-in to use, "in accordance with First Nations respective laws, customs, and traditions".[61] A specialized IUC could build on this model, with the energy expertise to provide case-by-case guidance and parameters on utility service rates in consultation with Indigenous utilities and communities. Alternatively, it could act as an appeal body in case of disputes. More consultation is needed to understand to what extent these regulatory structures should be available on an opt-in basis, and to what extent they should be binding on Indigenous utilities. The approach must be distinctions-based to provide flexibility for the different circumstances of different First Nations-owned and/or operated utilities in their unique territories.

The IUC should operate independently from government. The Province could and should remain in an advisory role, but the IUC would need to be empowered with the full jurisdiction that BCUC currently has by statute. Furthermore, it should not be subject to direction by the Province, which would distinguish it from the BCUC under its enabling legislation. A plan should be made, with the urgency reflective of a climate crisis, to move the funding that the province currently puts towards subsidizing fossil fuel dependency towards the IUC's operations and associated training and capacity building in First Nations communities.

Precedent exists for shared-governance public institutions that provide specialized infrastructural, administrative, and legal support to diverse First Nations. The following section will analyze the legal and governance structures of a few of these precedents. The First Nations Tax Commission (FNTC) operates under the federal *First Nations Fiscal Management Act*[62] (FNFMA) and section 83 of the *Indian Act*. Nine of its Commissioners are appointed by the Governor-in-Council, and one by the Native Law Centre of Canada. The FNTC is mandated by legislation to ensure the integrity of First Nations taxation through the creation of national standards and procedures, law and by-law review, and strategies for taxpayer relations and appropriate dispute resolution as an alternative to formal complaints and litigation.[63] It exists to ensure transparency and credibility within the First Nations tax system. This is similar to the

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[61] *Supra* note 40.
[62] *First Nations Fiscal Management Act*, SC 2005, c 9.
[63] First Nations Tax Commission. https://fntc.ca/en/fntc-services/

need to ensure utility service rate transparency and maintain the confidence of utility consumers. However, there are important differences between the FNTC and a proposed IUC. First, the FNTC only applies to on-reserve taxation, whereas we are proposing a Utilities Commission that would oversee territorial utility service areas. Second, the IUC should have all of its Commissioners appointed by Indigenous organizations and governments reflecting the regional differences in BC. Finally, FNTC by statute must review every local revenue law for approval.[64] This would be in excess of the role of an IUC, which would exist to support the self-governing structures of First Nations and provide support where needed.

The First Nations Finance Authority (FNFA), also empowered by the FNFMA, is a non-profit Aboriginal government owned and controlled institution to provide all First Nations and Aboriginal governments with the same finance instruments available to other levels of government in Canada.[65] A winner of the 2018 Governor General's Innovation Award, the FNFA is not a Crown corporation and is governed solely by the First Nations communities that join as Borrowing Members. It provides access to long-term loans with preferable interest rates as well as capital planning advice. The FNFMA sets out the regulations that provide oversight and default regimes for FNFA borrowing. Again, this is not reflective of full jurisdiction but is a transitional mechanism for ensuring consistency and opportunity for exercises of economic self-determination.

Another instructional example of a First Nations institution with wide jurisdiction is the First Nations Health Authority (FNHA). In 2013, the FNHA assumed responsibility for the programs and services formerly handled by Health Canada's First Nations Inuit Health Branch – Pacific Region.[66] It is responsible for planning, management, service delivery and funding of health programs, in partnership with First Nations communities in BC and in coordination with provincial health services. Rather than a creation of statute, the FNHA came into being with the BC Tripartite Framework Agreement on First Nations Health Governance, which created a new Health Governance Structure in the province.[67] Under section 4.2 of the Agreement, the FNHA is established as a non-profit legal entity representative of and accountable to BC First Nations, reflecting a structure developed by BC First Nations through a community engagement process.[68]

As discussed, several BC First Nations have developed EA processes according to their own laws that already regulate industry in their territories, in many cases complementing and enhancing provincial environmental legislation. The new BC *Environmental Assessment Act*[69] articulates a process that seeks to secure consent from First Nations on project decisions through a legislation-enabled dispute resolution process "consistent with Indigenous approaches to governance".[70] First Nations participation in EAs will no longer be driven by reference to strength of title claim, but First Nations will self-select and identify themselves for participation. The legislation recognizes specific decision points where, should consensus not be reached between the participating Nations and the province, the dispute resolution process mechanism would be triggered. The framework for the process is set out in the legislation, but

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[64] *Supra* note 62, section 31(1).
[65] First Nations Finance Authority website. https://fnfa.ca
[66] First Nations Health Authority. http://www.fnha.ca/about/fnha-overview
[67] *BC Tripartite Framework Agreement on First Nations Health Governance*. (2011). http://www.fnha.ca/Documents/framework-accord-cadre.pdf
[68] *Ibid*, section 4.2.
[69] *Environmental Assessment Act*, SBC 2018, c 51.
[70] British Columbia, Ministry of Environment and Climate Change Strategy. *Environmental Assessment Revitalization Intentions Paper*. (2018).

the details are subject to further engagement[71], and this engagement could be instructional for the development of an IUC as well. This process has advantages in its inclusivity, yet it is vital that the dispute resolution processes be led by and reflect the legal orders and jurisdiction of the Title Holders. Recognizing Indigenous law means recognizing who the authoritative decision-makers are. One of the purposes of the revitalized EA legislation is to create a climate of investment security through a process of reconciliation[72], and this must always be done in accordance with Title and Rights, without diluting the jurisdiction of the Proper Title and Rights Holders. Notably, the legislation also contains provisions for an Indigenous Nation to conduct the entire assessment on behalf of the Province provided certain conditions are met. However, the Minister still retains final decision-making authority on projects.[73]

Research and consultation is required to assess the advantages and disadvantages of each of the existing models that recognize First Nations jurisdiction and enable its implementation. These models are useful in that they provide a platform for Indigenous peoples to assume our rightful role in administrating our own lives and communities. Yet they too should be understood as transition plans toward the ultimate goal of true nation-to-nation relationships and full jurisdiction under Indigenous legal orders. Similarly, an IUC enabled by statute would assist in transitioning our Nations towards full jurisdiction over energy services consistent with our sovereignty.

Part V – Conclusion

The FNLC maintains that First Nations in BC have full authority and jurisdiction over energy services in their territories, including the jurisdiction to determine utility rates for their own citizens as well as other consumers living within their territories. Currently, this jurisdiction and the ability to develop utilities is infringed by the regulatory process under the UCA. Government needs to signal a new approach to catalyze dialogue and ultimately transformation on the true cost of energy and the need to prioritize the viability of Indigenous-led, renewable, and community-scale energy projects.[74] Regulatory innovation and leadership is needed to jumpstart this process and move BC towards meaningful economic reconciliation, in order to meet Canada's international commitments to Indigenous peoples and on the climate emergency. The opportunity to align Indigenous utilities regulation with Title, Rights, and *UNDRIP* does both at once. The FNLC urges the BCUC and the province to remove regulatory barriers and recognize the distinctiveness of Indigenous utilities, supporting self-governance and economic independence. As a transition plan to full jurisdiction, the FNLC recommends the creation of an IUC to operate independently from government and support Nations to provide every level of utility service within their territories should they so wish.

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[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] *Supra* note 8.