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July 15, 2019

VIA ELECTRONIC MAIL

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

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

Dear Sirs/Mesdames:

Re: Indigenous Utilities Regulation Inquiry

We are counsel to the Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalco First Nation and B.C. First Nations Clean Energy Working Group (the "**Collective First Nations**"). Attached please find the Collective First Nation's Submission with respect to the above-noted matter.

If you have any questions about the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

STIRLING LLP

*a Law Corporation
/rr

Encl.

SUBMISSION ON BEHALF OF

NUU-CHAH-NULTH TRIBAL COUNCIL, COWICHAN TRIBES, GITANYOW FIRST NATION, HOMALCO FIRST NATION and B.C. FIRST NATIONS CLEAN ENERGY WORKING GROUP

BRITISH COLUMBIA UTILITIES COMMISSION
INDIGENOUS UTILITIES REGULATION INQUIRY

JULY 15, 2019

Introduction

This submission ("*Submission*") to the British Columbia Utilities Commission's ("*BCUC*") Indigenous Utilities Regulation Inquiry ("*Inquiry*") is made by Nuu-chah-nulth Tribal Council, Cowichan Tribes, Gitanyow First Nation, Homalco First Nation and B.C. First Nations Clean Energy Working Group ("Collective *First Nations*").

The following two passages from the "*Summary of the Final Report of the Truth and Reconciliation Commission of Canada*[1] ("*Truth and Reconciliation Commission*") help frame this submission:

> *"Canada denied the right to participate fully in Canadian political, economic and social life to those Aboriginal people who refused to abandon their Aboriginal identity."*
>
> *"In terms of the economy, that means participating in it on their own terms. They want to be part of the decision-making process. They want their communities to benefit if large-scale economic projects come into their territories. They want to establish and develop their own businesses in ways that are compatible with their identity, cultural values and world views as Indigenous peoples."*

In making its recommendations to the B.C. Government the BCUC must be prepared to go beyond its traditional role as a utility regulator and advance reconciliation with First Nations[2].

This Submission contains a:

- Background Section that highlights the constraints that First Nations in general have faced in forming public utilities as this term is defined in the Utilities Commission Act (B.C.) ("UCA").

- Summary of the BCUC's decision in "Spirit Bay Utilities Ltd. – Application for Exemption pursuant to section 88(3) of the UCA"[3] ("*Spirit Bay Decision*")

- Responses to the questions set out in section 3(1) of B.C. Order in Council No. 108[4] and additional questions posed by the BCUC in Appendix A of Exhibit A-5.

Background – Constraints

Many First Nations are involved in the clean energy industry in British Columbia from revenue sharing to owning projects. Most want to expand their involvement in the industry but cannot because of BC Hydro's suspension of the Standing Offer Program ("SOP"). In a survey of 102 BC First Nations, 98% were involved in the clean energy industry or wanted to be[5].

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[1] Pages 2 and 305

[2] The term "Indigenous" includes First Nations, Metis and Inuit. The Collective First Nations do not represent Metis and Inuit but for convenience, the terms "First Nation" and "Indigenous" will be used interchangeably in this Submission

[3] Order Number G-175-16 dated December 1, 2016

[4] Dated March 11, 2019

[5] https://dspace.library.uvic.ca/handle/1828/7919. The survey report is a notable source of additional information about First Nation participation in the clean energy industry

The Clean Energy Act (B.C.)[6] states:

> *"2. The following comprise British Columbia's energy objectives:*
>
> *… (l) to foster the development of first nation and rural communities through the use and development of clean or renewable resources; …"*

The suspension of the SOP means that the B.C. Government is not living up to its own objectives. The Spirit Bay decision in relation to Spirit Bay Utilities Ltd. ("Spirit Bay Utilities" [7]) adds further constraints on First Nation's ability to create jobs and revenues for their communities.

The Universal Declaration of Indigenous Rights also needs to be taken into consideration as both the Federal and Provincial governments have committed to implementing this declaration[8]. Article 5 states:

> ***"****Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."*

Article 26 states:

> "*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 occupation or use, as well as those which they have otherwise acquired.*
>
> *3. State shall give legal recognition and protection to those lands, territories and resources. Such recognition shall be conducted with due respect the customs, traditions and land tenure systems of the indigenous peoples concerned. "*

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[6] Section 2(l) of the objectives

[7] At the time of the Application, all the utility assets were owned by the Spirit Bay Developments Limited Partnership ("Spirit Bay Developments") an entity owned 51 percent by the Beecher Bay First Nation (Sc'ianew) and 49 percent by a third party. These assets would have been transferred to the Spirit Bay Utility whose ownership would have mirrored that of Spirit Bay Developments in return for financial consideration. The plan was for the Beecher Bay First Nation to eventually own 100% of the Spirit Bay Utility.

[8] https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples See in particular:"UN declaration has been adopted by 148 nations, including the Government of Canada, which has drafted 10 principles to guide the implementation of UN declaration across Canada." and "On July 18, 2017, Premier John Horgan tasked all government ministers with fully adopting and implementing UN declaration, and the calls to action of the Truth and Reconciliation Commission (TRC)."

In addition and consistent with the findings of the Truth and Reconciliation Commission, First Nations in general and the Collective First Nations in particular have never had an equal opportunity in British Columbia to participate in the[9]:

> *"(a) the production, generation, storage, transmission, sale, delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or …"*

with the exception of participating by various means in some electrical generating projects of varying sizes. Collectively the contents of sub-paragraph (a) will be defined in this Submission to be "*Utility Services*".

The immediately above broad sweeping provision in the UCA is the first part of the definition of what constitutes a "*public utility*" and consequently an "*indigenous utility*"[10]. It is a public utility that is owned or controlled by an indigenous nation ("*Indigenous Utility*"). "P*ublic utilities*" are subject to regulation by the BCUC. And unlike those engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances, or that are a municipality or regional district providing energy within their own boundaries, Indigenous Utilities fall within the definition of "public utility" in the UCA and are not exempt from regulation[11].

If the Collective First Nations can find the resources to go into the Utility Service business, these businesses will be subject to the same BCUC regulation as the long establish incumbent public utilities who have had this access to the Utility Service markets from the day they went into business.

With respect to the generation, transmission and distribution of electrical energy by BC Hydro in the majority of the Province, the matter of BCUC regulation is complex. In some cases this regulation has been and is an on again off again proposition including the exemption from regulation of certain types of activities depending on the desires of its owner, the Province of B.C. This same owner provides BC Hydro with access to debt and equity financing on very favorable terms. It also appoints the quasi-judicial regulator – the BCUC. In total this represents a formidable barrier to entry for an Indigenous Utility in the electrical sector.

After being denied the right to participate fully in the Canadian economy, the Collective First Nations' businesses that provide Utility Services will now be treated as if they weren't denied this right. And in some cases even worse because for example they will not be free from the additional cost of regulatory oversight like municipalities or regional districts or "modified" regulation like BC Hydro.

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[9] Utilities Commission Act (B.C.) Section 1, definition of "public utility"

[10] In B.C Order in Council 108, dated March 11, 2019 the term "indigenous utility" means a public utility that is owned or operated, in full or in part by an indigenous nation. The assumption is that the term "public utility" has the same meaning in this Order in Council as in the UCA.

[11] Public utilities, including Indigenous Utilities that generate electricity that is sold to BC Hydro or Powerex are exempt from regulation under the UCA

Summary of Spirit Bay Decision

The BCUC's decision in relation to Spirit Bay Utilities'[12] application for an exemption pursuant to section 88(3) of this Act ("Application") from regulation under the UCA provides an outline of some of the matters to be considered when Indigenous Utilities attempt to provide Utility Services on "reserve", as this term is defined in the Indian Act (Canada)[13] in British Columbia.

The Application was made with respect to the proposed provision of electricity, propane delivered by a system of interconnected pipes and heat and cooling through an ocean based district energy system by Spirit Bay Utilities to the Spirit Bay residential community ("*Spirit Bay Community*"). This utility would have also provided water and sewer services which under no circumstances would be subject to BCUC oversight. No exemption was sought with respect to section 42 of the UCA in relation to safety orders issued by the BCUC.

The Spirit Bay Community is being developed on reserve lands by the Beecher Bay First Nation ("*Beecher FN*") through a limited partnership owned 51% by the Nation and the remainder owned by a third party. These lands have not been surrendered as that term is defined under the Indian Act. They remain under the control and governance of the Beecher FN in accordance with the comprehensive Land Code described below and are available to third parties under long term prepaid leases.

The basis for the exemption request was that the Beecher FN would exercise its legal authority under the First Nations Land Management Act, Framework Agreement on First Nations Land Management and the comprehensive Beecher FN land code enacted in 2003 ("*Beecher Land Code*") and regulate the Utility Services provided by Spirit Bay Utilities. All in accordance with Federal legislation.

The following process would have been available in the event of a complaint or dispute by a utility customer:

1. The complaint or dispute would be brought to the Beecher FN administration or Beecher FN Council;

2. If the customer did not find the result to be satisfactory, and all the parties to the dispute agreed to the process, they could apply for dispute resolution under Part 8 of Beecher Land Code;

3. The customer could appeal a decision rendered under the Beecher Land Code to the Federal Court of Canada; and

4. The complainant, instead of applying for dispute resolution under the Beecher Land Code could seek civil remedies directly through the courts.

In the alternative Spirit Bay Utilities requested that the BCUC make a direction pursuant to section 72 of the UCA that the Beecher FN is a municipality or regional district for the purpose of the UCA. Spirit Bay

[12] At the time of the Application, all the utility assets were owned by the Spirit Bay Developments Limited Partnership ("Spirit Bay Developments") an entity owned 51 percent by the Beecher Bay First Nation (Sc'ianew) and 49 percent by a third party. These assets would have been transferred to the Spirit Bay Utility whose ownership would have mirrored that of Spirit Bay Developments in return for financial consideration. The plan was for the Beecher Bay First Nation to eventually own 100% of the Spirit Bay Utility.
[13] Section 2(1)

Utilities would then fall within the exemption provided to a municipality or regional district under section 1, definition of "*pubic utility*" of the UCA.

Spirit Bay Utilities was very confident that the Beecher FN had the power to provide Utility Services through Spirit Bay Utilities and to establish laws in this respect without the need for regulatory approval or continued oversight by the BCUC. However, it sought the exemption for legal certainty and to avoid a lengthy legal dispute over the regulatory jurisdiction of the BCUC on its reserve lands. The practical solution it sought did not materialize.

The BCUC concluded in part in relation to Beecher FN authority under Federal legislation:

> "*The Panel finds that the UCA applies to the Energy Services proposed by the 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 and 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 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 Nations 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…*[14]
>
> *With regard to Spirit Bay Utilities belief that the jurisdictional matter does not need to be considered by the Panel, we do not agree. An exemption is only required if the UCA applies and an exemption is granted pursuant to the UCA. Accordingly, we must determine that the jurisdiction to grant an exemption exists, before we can make any recommendation to grant an exemption. If the Commission has no jurisdiction under the UCA, no exemption would be warranted.*"

The BCUC concluded, in part, with respect to whether Spirit Bay Utilities as owned 51% by the Beecher FN should fall within the exemption from regulation enjoyed by municipal or regional district utilities:

> "*…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.*

[14] In this Submission see the Collective First Nation's comments in relation to *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer for a contrary view*

> *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.*"

The BCUC declined to exercise its general jurisdiction under Section 88(3) to grant relief from regulatory oversight, in part, because:

> "*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…*
>
> *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."*

Responses to OIC and Exhibit A Questions

For ease of reference the questions track the order in B.C. Order in Council No. 108 and Exhibit A-5[15] are in bold and italics.

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

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

[15] Letter dated May 10, 2019 – Outlining Additional Scope Questions

An Indigenous Utility is a public utility[16] that should be majority owned, or controlled[17] by an Indigenous nation(s), as this term is defined in B.C. Order in Council No. 108 namely[18]:

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

The key words are "*majority owned or controlled*" which varies from the use of the words "*owned or operated, in full or in part*," in B.C. Order in Council No. 108. Indigenous nations should have majority ownership or control of Indigenous utilities. The benefits from these utilities should accrue as much as possible to Indigenous nations and not others.

It is not necessary that Indigenous nations operate Indigenous Utilities. As evidenced by the development of run of river hydro projects in British Columbia, some Indigenous nations have the necessary expertise to successfully operate these projects as majority owners. It is a question of having the necessary expertise, deciding to develop it over time, contracting it out or any combination thereof. It should be up to the individual Indigenous nations how they wish to operate their public utilities. Enshrining an operational requirement in any way, for example by linking it to ownership, majority or otherwise, would create an unnecessary barrier to the development of Indigenous Utilities.

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

[16] As defined in section 1 of the UCA

[17] There are a variety of ways to define "control" and the following is but one example: "control", when used with respect to a Person, means the power to direct the management of such Person, directly or indirectly, whether through the ownership of voting securities, by contract of otherwise." "Person" means a natural person, Indigenous nation, partnership, limited partnership, limited liability partnership, corporation, limited liability corporation, unlimited liability company, joint stock company, trust, unincorporated association, joint venture or other entity or governmental entity. "Indigenous nation" means as defined in B.C. Order in Council No. 108.

[18] Section 1

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

The corporate structure of Indigenous Utility is irrelevant except that it be majority owned or controlled by Indigenous nations. This majority ownership could be achieved through the participation of one or more Indigenous nations in the same Indigenous Utility. Typically, the corporate structure of Indigenous nation's owned businesses consists of a limited partnership and a managing/general partner. However, there are various other corporate structures that could be utilized depending on the circumstances.

It is not necessary that the Indigenous Utility serve an Indigenous nation/band. In the case of Spirit Bay Utilities, the utility services would have been provided to the Spirit Bay Community, which although located altogether on reserve lands was not exclusively for Beecher FN members. Those that live on the reserve lands that are not part of the Spirit Bay Community were to remain customers of the existing public utility.

- ***Should there be a minimum threshold to the percentage of ownership of the utility by one or more Indigenous nations in order for it to qualify as an "Indigenous utility"?***

As noted above, it should be majority ownership.

- ***If there are partners in the utility what, if any, are the implications of the ownership split*?**

None other than there be majority ownership or control by Indigenous nations.

- ***Who operates the utility?***

As noted above, the utility could be operated by an Indigenous nation(s), this expertise could be developed, could be contracted out or any combination thereof. It is a decision for the majority owner(s) to make.

- ***How are decisions made regarding the running of the utility? Who participates in decision making?***

If the utility is a limited partnership, then by law the managing/general partner has to run the utility. The limited partners are not allowed to participate in the day to day operation of the utility. The corporate governance of the managing/general partner would be established through a shareholders agreement with the limited partners usually holding shares in the managing/general partner pro rata their percentage share of limited partnership units.

B. the type of services provided by Indigenous utilities,

- ***Does the utility produce and/or supply electricity/gas/heat? From what energy source?***

It depends on the circumstances. For example, the proposed Spirit Bay Utilities would have provided electricity, propane delivered by a system of interconnected pipes and heat and cooling through an ocean based district energy system. The heating and cooling loop would have been incorporated in into the Beecher FN marina facilities immediately adjacent to the Spirit Bay Community. The electricity would have been purchased from BC Hydro.

An Indigenous Utility might have its own source of electrical generation such as run of river hydro, wind, solar, geothermal or biomass including woodwaste that could be developed and distributed by the utility. It might also have access to its own hydro carbon resources such as natural gas or a heating or cooling source for a district energy system.

It would not be productive to limit the energy sources that an Indigenous Utility could produce and/or supply electricity/gas/heat from. It would depend on the resources that are available to each Nation.

- ***Does the utility resell or distribute energy provided by another utility?***

It might resell or distribute energy provided by another utility or self-produce and distribute this energy. However, it would not be productive to place any type of limitation on an Indigenous Utility. The circumstances will vary as between these utilities and there is need to retain flexibility so that Indigenous utilities can pursue whatever opportunity that in their discretion is available to them.

- ***Is the utility involved in the generation or distribution of energy, or both?***

As discussed in response to: *"Does the utility produce and/or supply electricity/gas/heat? From what energy source?"* it depends on the circumstances.

- ***What are the objectives of the utility?***

They are whatever the Indigenous nation(s) majority owner wants them to be. In the words of the Truth and Reconciliation Commission:

> *"In terms of the economy, that means participating in it on their own terms. They want to be part of the decision-making process. They want their communities to benefit if large-scale economic projects come into their territories. They want to establish and develop their own businesses in ways that are compatible with their identity, cultural values and world views as Indigenous peoples."*

- ***Does the utility provided services directly to customers? Do customers of the utility services pay for the service? If so, how and by whom are the rates determined? What are the objectives of the utility?***

Yes, it would provide services directly to customers which these customers would pay for. The rates would be determined by the Indigenous Utility.

- ***Does the service provided by the Indigenous utility compete with or displace other services that are currently provided by third parties?***

It is highly unlikely that the Indigenous Utility would compete with or displace other services that are currently provided by third parties and in particular public utilities. Because of the cost of building and maintaining utility infrastructure, it is generally not economic to duplicate

this infrastructure. It is expected that Indigenous Utilities would serve new developments and not existing ones.

- ***Is energy resold to another utility or third party? If so, under what arrangement?***

An Indigenous Utility could resell energy to another Indigenous Utility, public utility or third party if there is a buyer for it. The assumption is that the energy was originally purchased by the Indigenous Utility from a public utility or third party and not self- produced. The probability of being able to mark-up the price the Indigenous Utility paid and find a buyer that is willing to pay this increased price would be quite low. The Indigenous Utility would have to provide some added value and not simply mark the price up.

The arrangement would be contractual. If the contract is with a public utility it would be subject to whatever regulatory oversight that the public utility is subject to.

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

- ***Are the customers of the utility Indigenous nation/ band members only?***

No. See the above response to: "*What role does the structure of the utility play? ...*"

Many First Nations are building housing developments on reserve lands and sell or lease land to non-members on a market basis with a 99 year lease or other arrangements[19]. Providing Utility Services to non-members can be an important economic opportunity.

Businesses owned by members and non- members are also established on reserves through leases to land and business licenses, and also need utility services. This could include industrial park developments by the Osoyoos Nation, the Kamloops Nation and others.

- ***Does the utility serve both Indigenous nation/ band members and non-members?***

Presumably, yes. But it depends on the circumstances. An Indigenous Utility may not be created exclusively to serve only nation/band members. See the above response to: "*What role does the structure of the utility play?...*"

- ***Are the customers residential/ commercial/ industrial? If there is a mix, do all customers pay the same rates? If not, how and by whom will the appropriate rates to be charged to each group be determined?***

It depends on the circumstances. An Indigenous nation may be proceeding with, for an example, a real estate development that includes residential, commercial and industrial components. The opportunity may exist to provide Utility Services to all or some of these groups. Another may be proceeding with residential and commercial development.

[19] Examples include Ravenswood on Tseil-Waututh First Nation lands in North Vancouver, Musqueam Nation, Kamloops Indian Band and the Tsawout Nation. There also be some opportunities to provide Utility Services in remote communities to non-members.

If there is a mix, all customers would not necessarily pay the same rates. The cost of providing service for each customer group may be taken into account when the Indigenous Utility sets the rates. Generally, this is the non-Indigenous traditional way of setting rates however it isn't always followed. For example, BC Hydro's residential customers are not paying their proportionate share of costs through rates. An Indigenous Utility should have the flexibility to chart its own course with respect to rate setting. This would be considered a business decision with respect to economic viability and would be part of the business and feasibility planning for the utility.

D. the geographic areas served by Indigenous utilities

- ***Does the Indigenous utility provide service solely on reserve; Indigenous nation/band-owned lands; treaty lands; traditional territory?***

All the above and in particular on reserve lands as described in detail in response to: "*Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body*?"

- ***Does the Indigenous utility provide service on other lands?***

Subject to reviewing the submissions of other interveners and interested parties, no.

- ***Does the Indigenous utility operate where there is another utility service (e.g. BC Hydro, FortisBC)? If so, please describe the nature of other utility service, and whether the Indigenous utility is integrated with or dependent on the latter system.***

Because of the cost of utility infrastructure, it is highly unlikely an Indigenous Utility would own or control this infrastructure where there is another utility service with existing infrastructure. Generally, it doesn't make sense to have two sets of utility infrastructure that serves the same purpose.

However, there may be instances where an Indigenous Utility wishes to develop for example electrical generation or a fossil fuel source in one part of its traditional territory and transmit the output through existing public utility infrastructure energy to a distribution system that it owns or controls in another part of this territory.

There may be other instances where the existing public utility infrastructure is at capacity and it would be advantageous for the Indigenous Utility to develop parallel infrastructure.

As BC Hydro is not acquiring new supplies of electricity First Nations may wish to establish their own utilities to provide electricity to willing buyers within their traditional territories. First Nations should not be deprived of the opportunity to produce electricity and sell it to customers.

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

The Collective First Nation's preference is that they pass their own laws regarding Indigenous Utilities within their traditional territories. The courts have recognized that there are indigenous laws and space must be made within existing law[20]. The Universal Declaration of Indigenous Rights and the Truth and Reconciliation Commission also endorses First Nation laws. First Nations are capable of creating their own laws or utilizing laws that have long been in place. .

Indigenous Utilities should not be regulated under the UCA. At a minimum, Indigenous Utilities should have the same status under the UCA as municipalities and regional districts without being designated as such. Although there as some similarities to municipalities and regional districts that have been highlighted in this Submissions, the Collective First Nations right to pass laws in their traditional territories is different than the law making authority of municipal and regional governments. Advancing the proposition that they should be exempt from regulation under the UCA by using the example of municipalities and regional districts is not the equivalent of saying First Nations are municipalities or regional district or that the law making authority is the same.

Irrespective, the UCA should be amended or other legislation should be enacted so that Indigenous Utilities and/or their owners have the same exempt status as municipalities and regional district but it in a manner that clearly distinguishes between First Nations, municipalities and regional districts. This would put an end to any legal uncertainty about the regulation of Indigenous Utilities on reserve lands or elsewhere. See the Collective First Nation's response to: "*Should an Indigenous nation or band be considered similar to a municipality for the purposes of utility regulation*?"

Indigenous utilities should be regulated by their Indigenous owners subject to the common law.

Indigenous utilities need an opportunity to grow into substantial enterprises before any form of regulation under the UCA should even be thought about. To reiterate the findings of the Truth and Reconciliation Commission, which underpin many of the responses by the Collective First Nations in this Submission:

> *"Canada denied the right to participate fully in Canadian political, economic and social life to those Aboriginal people who refused to abandon their Aboriginal identity."*
>
> *"In terms of the economy, that means participating in it on their own terms. They want to be part of the decision-making process. They want their communities to benefit if large-scale economic projects come into their territories. They want to establish and develop their own businesses in ways that are compatible with their identity, cultural values and world views as Indigenous peoples."*

The UCA is designed for the regulation of existing large scale monopolies or near monopolies such as BC Hydro and Fortis and not "green shoot" Indigenous Utilities that have yet to establish themselves in an environment dominated by these institutions. Even as between large scale monopolies or near monopolies, regulation varies broadly. Not because of the BCUC

[20] For example see Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256

as regulator but primarily because of the ownership of BC Hydro by the Government of B.C. This utility is a partly regulated public utility with a generous mix of public policy added in. Not only do Indigenous Utilities have to survive the green shoot phase of development they have to establish themselves as: "*businesses in ways that are compatible with their identity, cultural values and world views*" with their Indigenous owners.

The assumption is that Indigenous Utilities will be modelled after for example BC Hydro or Fortis as different as these models are. Maybe they will be, or maybe they won't and an entirely different model will develop. But Indigenous Utilities must have the opportunity to determine what, if anything, works for their Indigenous owners - without being regulated under the UCA.

There is no guarantee that Indigenous Utilities will flourish absent regulation under the UCA. But this opportunity must be available to them.

- ***What are the reasons for Indigenous utilities to be regulated or unregulated?***

See the immediately above response.

- ***What are the benefits to regulation?***

Normally a guaranteed rate of return to the owners on rate base/invested capital or in the case of BC Hydro some variation thereof.

First Nations regulating themselves would mean they would be very conscious of the affordability of providing Utility Services for their members and those that live on their lands. First Nations are highly regulated in many areas and to add more onto them is contrary to self-government and self- determination as is being committed to by both the Federal and Provincial governments.

- ***What are the costs or barriers created by regulation?***

The cost of compliance that can only be reasonably managed if a utility is of a certain scale and that has sufficient regulatory experience. For example, see the list of items that follow the question below: "*What would be the reasons for continuing to regulate, or exempting from, sections of the UCA that address…*" for matters that are part of the regulatory oversight process. This is a comprehensive list that requires extensive expertise and resources to comply with. Resources that Indigenous utilities could use elsewhere.

Regulators are normally not knowledgeable about First Nations communities, needs, laws, and economic drivers and can make wrong decisions if they are not familiar with many different aspects of First Nations.

- ***If Indigenous utilities were unregulated, how would customers be protected to ensure they receive fair rates and safe, reliable service?***

The common law. From Chastain vs British Columbia Hydro and Power Authority[21]:

[21] Chastain vs British Columbia Hydro and Power Authority [1973] 2 W.W.R. 481

> ***"23*** *The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators.*
>
> *This has been true in England and in the common law jurisdictions throughout the world. In Munn v. Illinois, 94 U.S.113 in the Supreme Court of the United States, the historical roots of this principle were examined and they have been applied in the United States. In Canada the law has followed the same path. In St. Lawrence Rendering Company Ltd. v. The City of Cornwall [1951] O.R. 669 at p. 683, Spence, J. then of the Ontario High Court, said:*
>
> *That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: The Attorney-General of Canada v. The City of Toronto (1893), 23 S.C.R. 514; Scottish Ontario and Manitoba Land Co. v. City of Toronto (1899), 26 O.A.R. 345; The City of Hamilton v. The Hamilton Distiller Company; The Same v. The Hamilton Brewing Association (1907), 38 S.C.R. 239; 51 Corpus Juris, para 16."*

For about 20 years following its creation, BC Hydro was not regulated under the UCA. During this period it was under the common law: "compelled to treat all customers alike, to charge no one more than others and to supply the utility as a matter of duty and not as a result of a contract."

Practicality, an Indigenous Utility is going to be interested in providing a fair, reliable service to those that live on their lands and within their territories. They would need to be competitive to remain in business, make a margin of profit so that it can continue as a business and setting aside money for upgrades and other infrastructure. They would be self-regulated. Many First Nations communities pay large hydro bills during the winter and often have to make choices between paying their mortgage and keeping heat in their homes. They would not be providing Utility Services that would create greater hardship than what exists.

- ***Should an Indigenous nation or band be considered similar to a municipality for the purposes of utility regulation? Why or why not?***

Yes, at a minimum as set out in the Collective First Nation's response to: "*Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated***?"**

In the Spirit Bay Decision the BCUC said:

> "*…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.*"

It is not clear why an entitlement to vote results in municipal councils being: "… *accountable to ratepayers for the performance, including rates, of the municipal utility*." Commercial and industrial ratepayers of municipal utilities don't have a right to vote. Their entitlement to receive fair rates and safe, reliable service is protected by the common law and not a right to vote.

On the broader level, even though the Interpretation Act clearly does not include Indigenous nations or bands within the definitions of "*municipality*" or "*regional district*" the courts have considered legislation that isn't as clear and in the process have commented on the similarity of band councils to municipalities. These comments lend support to the proposition for a legislative amendment so that Indigenous nations or bands have at a minimum the same status as municipalities or regional districts for the purposes of regulation under the UCA.

For example with respect to the Income Tax Act, band councils have been granted the same exemptions as municipalities, and have been found to constitute a "municipality" within the language of the *Income Tax Act*.

Section 149(1) of the *Income Tax Act*, RSC 1985, c 1, grants an exemption from income tax to:

> *Municipal authorities*
>
> *(c) a municipality in Canada, or a municipal or public body performing a function of government in Canada;*

In ***Otineka Development Corp v Canada***, [1994] 2 CNLR 83 (TCC), the Pas Indian Band (Opaskwayak Cree Nation) sought an exemption from income tax for its wholly-owned corporation, Otineka Development Corp. The Band was a self-governing entity that had passed bylaws for most of the purposes allowed under the *Indian Act*, including the regulation of water supplies and sewers. It had also been granted a declaration that it was entitled to make bylaws

for the purpose of raising money from band members by means of taxation. The court noted that:

> *8…The Pas Indian Band, through its chief and council, is run on essentially the same lines as any other municipality and provides substantially the same services to its band members on the reserve as any municipality in Canada of comparable size.*

Looking to a provision that granted an exemption to corporations owned by municipalities, the court determined that the sole question was whether the Pas Indian Band was a "*municipality*" within that provision:

> *24 The term "municipality" is not defined in the Income Tax Act and unless there is a reason to do otherwise it must be given its ordinary meaning of a community having and exercising the powers of self-government and providing the type of services customarily provided by such a body. If its ordinary meaning is to apply, it is not necessary that it be incorporated.*

In finding that the Pas Indian Band was a municipality within the meaning of that provision of the *Income Tax Act,* the court reasoned that the federal government clearly would have the ability to create a municipality on reserve lands under the head of power of 91(24), and that although it had not done exactly that, it had conferred similar powers on the band through the *Indian Act*:

> *"30 …The result of that conferral of powers by the Government of Canada, and the exercise thereof by the band, has been to create a form of self-government that is an essential attribute of a municipality. It follows therefore that the entity exercising that form of self-government is a municipality within the ordinary understanding of that word. The question is not the nature of the authority that created the governmental body but rather the nature of the body that is created."*

The Saskatchewan Court of Appeal also described how band councils perform the functions of government. In part the Court said[22]:

> *"13 As municipal councils are "creatures" of the legislatures of the provinces, so Indian band councils are the "creatures" of the Parliament of Canada. Parliament, in exercising the exclusive jurisdiction conferred upon it by s. 91(24) of the B.N.A. Act to legislate in relation to "Indians, and Lands reserved for the Indians", enacted the Indian Act, R.S.C. 1970, c. I-6, which provides — among its extensive provisions for Indian status, civil rights, assistance, and so on, and the use and management of Indian reserves — for the election of a chief and 12 councilors by and from among the members of an Indian band resident on an Indian reserve. These elected officials constitute Indian band councils, who in general terms are intended by Parliament to provide some measure — even if*

[22] Whitebear Band v Carpenters Provincial Council (Saskatchewan) (1982) 135 DLR (3d) 128 (SKCA)

> *rather rudimentary — of local government in relation to life on Indian reserves and to act as something of an intermediary between the band and the Minister of Indian Affairs.*
>
> *14 More specifically, s. 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants are usually associated with a rural municipality and its council: a band council may enact by-laws for the regulation of traffic,* ***the construction and maintenance of public works*** *(emphasis added) zoning, the control of public games and amusements and of hawkers and peddlers, the regulation of the construction, repair and use of buildings, and so on. Hence a band council exercises — by way of delegation from Parliament — these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it…*
>
> *19 In summary, an Indian band council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power — delegated to it by Parliament — in relation to the Indian reserve whose inhabitants have elected it; as such, it is to act from time to time as the agent of the minister and the representative of the band with respect to the administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive, role in relation to the exercise by the minister of certain of his statutory authority relative to the reserve."*

- ***Should there be a different approach to the regulation of different Indigenous utilities? What characteristics of Indigenous utilities, or other factors, would justify different regulatory approaches?***

Indigenous utilities shouldn't be regulated by the BCUC i.e. they should at a minimum have the same status as municipalities and regional districts under the UCA.

Assuming that they are regulated under the UCA, the characteristics of Indigenous Utilities are yet to be determined. Currently they don't exist so it is not possible to describe what these characteristics are. It will also depend on what Utility Services they provide and the values of the Indigenous owners. One regulatory size doesn't fit all and the onus should be on the regulator to adapt accordingly rather that the onus being placed on Indigenous Utilities to adapt to the regulator's existing regulatory structure.

See also the comments of the Truth and Reconciliation Commission under the heading: "*Introduction*".

- ***What would be the alternative to regulation by BCUC?***

The common law or as described in the Collective First Nation's response to: "*Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body*?".

- ***What is the role and authority of Indigenous governance structures in overseeing Indigenous utilities? What experience and expertise are needed and/or available to oversee the activities of Indigenous utilities?***

With respect to the first question, see the Collective First Nation's response to: "*Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body?*"

With respect to the second question the experience and expertise required will be the function of the size of the Indigenous utility and the type of Utility Services it delivers. It is not expected they will be on the size and scale of BC Hydro or Fortis so the experience and expertise to oversee them will be reduced accordingly.

- ***What other safeguards are available to ensure that Indigenous utilities protect the customer and the public?***

The common law.

- ***Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body?***

Yes and this matter was canvassed extensively in the Spirit Bay Decision as summarized under the heading*: "Summary of Spirit Bay Decision*"**.** The essence of the Spirit Bay Utilities legal position was that because the Beecher FN had enacted the Beecher Land Code pursuant to the First Nations Land Management Act (Federal Legislation), the Beecher FN/ had the authority to regulate and provide electricity, propane delivered by a system of interconnected pipes and heat and cooling through an ocean based district energy system on reserve land, the UCA did not apply. The Federal legislation took precedence over the UCA.

Although the Beecher FN believed it had a very strong legal position as a matter of practically it sought an exemption under Section 88(3) of UCA from regulatory oversight by the BCUC. The development of the Spirit Bay Community was well underway and interconnection to the BC Hydro system was in jeopardy if the matter was not clarified.

In response the BCUC said in the Spirit Bay Decision*:*

> *"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 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 Nations 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…"*

This statement is true on its face, but neglects to account for overarching doctrines of interjurisdictional immunity and federal paramountcy. As noted by the B.C. Court of Appeal in

Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer[23]*:*

> ***38*** *In the Derrickson case, Chouinard J. found that even if s. 88 might have been available to make applicable the provincial legislation (the Family Relations Act, R.S.B.C. 1979, c. 121), the provincial statute could not apply to affect the disposition of reserve land since the terms of the Act were excluded by the doctrine of federal paramountcy.*

The court in *Sechelt* quoted to similar effect from the reasons of Vickers J. in the trial judgment in *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700:

> *[1035] Section 88 of the Indian Act makes some provincial laws applicable to Indians by referential incorporation in the Indian Act. That section provides that the provincial laws of general application "are applicable to and in respect of Indians..." There is no reference to the second element of s. 91(24), "Lands reserved for the Indians".*
>
> *[1036] This question was raised and discussed in Derrickson v. Derrickson, [1986] 1 S.C.R. 285, at pp. 297-299. Chouinard J. concluded it was unnecessary to decide the question as the case turned on the application of the federal paramountcy doctrine. In Cardinal v. Attorney General of Alberta, [1974] S.C.R. 695, Laskin J. (as he then was) noted at p. 727 that s. 88 "deals only with Indians, not with Reserves ..." Laskin J. was writing for the minority in that decision; the majority did not address the question of the meaning and effect of s. 88. In Paul, at para. 12, the Court concluded there was no need to consider s. 88.*
>
> *[1037] In Derrickson v. Derrickson (1984), 51 B.C.L.R. 42, at p. 46, the B.C. Court of Appeal unanimously concluded that s. 88 does not apply to Indian reserve lands which, like Aboriginal title lands, are "Lands reserved for the Indians". (The Court of Appeal decision was affirmed by the Supreme Court of Canada, but this point was not addressed as noted in the foregoing paragraph.) In Paul v. Forest Appeal Commission, (2001), 89 B.C.L.R. (3d) 210, 2001 BCCA 411, the majority of the Court of Appeal decided that s. 88 could not constitutionally invigorate provincial legislation in relation to its* application to "aboriginal title and the main body of aboriginal rights which are intimately related to the use of land": para. 76. The Court of Appeal's decision was reversed, but not on this point.
>
> *[1038] Lysyk J. undertook an extensive analysis of this question in Stoney Creek Indian Band v. British Columbia, [1999] 1 C.N.L.R. 192 (B.C.S.C.), reversed on other grounds, 1999 BCCA 527. He concluded that s. 88 did not constitutionally invigorate provincial laws in their application to Indian lands.*
>
> *[1039] The application of s. 88 to "Lands reserved for the Indians" has not been conclusively resolved by the Supreme Court of Canada. On a consideration of the case law outlined above, I conclude that provision is directed only to "Indians" and cannot be used to invigorate provincial legislation in its application to Aboriginal title lands. This view accords with the opinions expressed by Kent McNeil in "Aboriginal Title and Section 88 of the Indian Act" (2000) 34 U.B.C.L. Rev. 159, and Brian Slattery in "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at pp. 779-81.*

[23] 2013 BCCA 262, leave to appeal ref'd [2013] S.C.C.A. No. 353

Since the Spirit Bay Decision was rendered, the courts have further considered provincial jurisdiction more generally over reserve lands[24]. The question of a utilities commission's jurisdiction over reserve lands was recently addressed more directly as a matter of law, although not specifically applied, in *Reference re: Public Utilities Act (Nfld.),* [2017] N.J. No. 194, 2017 NLCA 34, in which the court was asked to rule on the following questions of law:

Whether the Board has jurisdiction pursuant to the *Act* to make the following orders relating to the provision of electrical services in Natuashish, NL:

(i) A declaration that NL Hydro's current classification of its Natuashish operations as one of its "non-regulated business units" is incompatible with provincial electrical policy under the *Act* and the *Electrical Power Control Act, 1994*; or,

(ii) An order requiring NL Hydro to provide regulated electrical services in Natuashish, NL; or

(iii) An order requiring NL Hydro to acquire title to the Natuashish electrical assets from the Mushuau Innu First Nation.

The court noted, of the relevant provision of the applicable Newfoundland Act (emphasis added):

> ***24*** *Section 70 would apply generally to any entity that satisfies the language of the definition and provides electrical service in the Province, subject to a possible constitutional impediment. For example, as applied to this case, provided there is no basis in federal jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the Constitution Act, 1867 to preclude the operation of section 70, and the provision of electricity by the Innu in Natuashish satisfies the definition of "public utility", the Board would have jurisdiction to review rates in Natuashish under that provision. The legislation does not limit the Board's jurisdiction over rate regulation to any particular provider of electricity. (Section 91(24) of the Constitution Act, 1867 is discussed below.)*

The court's later, somewhat parenthetical discussion of the role of s. 91(24) reads as follows:

> ***53*** *Since reference has been made to possible constitutional impediments to the Board's jurisdiction in Natuashish, a reserve under the Indian Act, I would make the following observations. The basic principles are concisely stated in Hogg, Constitutional Law of Canada, fifth edition, supplemented (Toronto, ON: Thomson Reuters Canada Limited, 2007). Beginning with the application of provincial law, at 28.2(a), Hogg summarizes:*
>
> *The general rule is that provincial laws apply to Indians and lands reserved for the Indians. ...*
>
> *These decisions establish that the provincial Legislatures have the power to make their laws applicable to Indians and on Indian reserves, so long as the law is in relation to a matter coming within a provincial head of power. ...*
>
> ***54*** *As applied to this case, with exceptions not relevant here, the Province has authority generally over the development and provision of electrical power in the Province (sections 92(13), 92(16) and 92A of the Constitution Act, 1867). That jurisdiction would extend to Natuashish unless an exception to the general rule applies.*

[24] McCaleb (c.o.b. Silver Sage Trailer Park) v Rose, 2017 BCCA 318.

> ***55*** *At 28.2(b) to (f), Hogg discusses exceptions to the general rule which may have the effect of ousting provincial jurisdiction. Of the five exceptions listed, only one may apply in the context of this case, that is, paramountcy. That exception is described at 28.2(d):*
>
> *The third exception to the general rule that provincial laws apply to Indians and lands reserved for the Indians is the doctrine of federal paramountcy. If a provincial law is inconsistent with a provision of the Indian Act (or any other federal law),* the provincial law is rendered inoperative by the doctrine of federal paramountcy.
>
> ***56*** *Accordingly, if any federal legislation, with particular attention to the provisions of the Indian Act, is inconsistent with the jurisdiction of the Board or the operation of the Public Utilities Act or the Electrical Power Control Act, the federal law would apply.*

Reference re: Public Utilities Act (Nfld.), [2017] N.J. No. 194, 2017 NLCA 34 thus expressly affirmed the relevance of the paramountcy doctrine to a public utility commission's jurisdiction over reserve lands, even if, in that case, it did not appear that any federal laws were at issue such as to render the doctrine applicable.

Irrespective of the submissions concerning land codes and Federal Government paramountcy, there should be no strict requirement that First Nations pass a land code before Indigenous Utilities are exempt from regulation under the UCA. The ability of First Nations to self-regulate these utilities is a matter that should be entrusted to them.

- ***What is the role of other legislation with respect to Indigenous utilities, such as the Clean Energy Act and the Greenhouse Gas Reduction Regulation?***

Unless under the overarching doctrines of interjurisdictional immunity and federal paramountcy Federal Government legislation applies, Provincial legislation of general application will apply to Indigenous Utilities or by unless otherwise determined by the courts for example with respect to First Nation's authority to pass laws with respect to their traditional territory.

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?

See the Collective First Nation's response to: "*Should there be a different approach to the regulation of different Indigenous utilities?...".* Indigenous businesses of all types have been marginalized for a very long time. It would be presumptive and potentially destructive to prescribe a regulatory remedy for an Indigenous Utility before the problems, if any, are known. They must be given the opportunity to find their own way.

- ***Should Indigenous utilities be exempt from some sections of the UCA but not all? What would be the reasons for continuing to regulate, or exempting from, sections of the UCA that address:***

    - ***safety, standards and reliability (25-26, 37-38);***

- o ***obligation to serve (28-30, 34-35, 39);***
- o ***duty to obey orders, provide information and keep records (42-44, 49);***
- o ***construction of new projects (45-46);***
- o ***setting of rates (59-61);***
- o ***energy supply contracts (71); and***
- o **complaints (83).**

Indigenous utilities should be exempted from the same provisions of the UCA as municipal or regional district utilities. Although not addressed in the question, the Collective First Nation's assume that section 125.2 of the UCA, "*Adoption of reliability standards, rules or codes*" applies or would apply to municipal or regional district utilities and Indigenous utilities.

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?

The common law.

- ***What is the role of Indigenous government structures in regulating Indigenous utilities?***

See previous comments.

- ***What relationship, if any, should Indigenous government structures have with the BCUC?***

None.

- ***Are there entities other than or in addition to the BCUC that could or should have a role in regulation?***

The courts in the case of common law. Or if the requested amendment to the UCA is not made, in the case of Indigenous Utilities on reserve lands even if not subject to a land code, band councils.

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?

At this time, yes.

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

No but post sale, the new owner should be subject to regulation in the same manner as any other public utility.

- ***What about the sale of an Indigenous utility from one Indigenous nation to another Indigenous nation – should an application to the BCUC (or another regulatory authority) be required to authorize the sale?***

No.

All of which is respectfully submitted.