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Via Email: commission.secretary@bcuc.com

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File No. 1077-020

British Columbia Utilities
Commission (BCUC)
6 Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Commission Secretary:

**Re: Adams Lake Indian Band (“Adams Lake”) written evidence
submissions to BCUC Indigenous utilities Regulation Inquiry (the “Inquiry”)**

1. We are legal counsel to Adams Lake and write on its behalf to provide written evidence to the panel for the Inquiry.
2. Adams Lake’s interest in this Inquiry is based on its on-going assertion and promotion of its Indigenous laws and jurisdiction, and pursuit of meaningful self-government and self-determination for all Indigenous communities in British Columbia. Adams Lake believes establishing, operating, and regulating Indigenous services and utilities are crucial components of self-government and self-determination as they promote long-term economic development and capacity building.
3. Adams Lake’s specific long-term goals in respect of energy management within its territory revolve around its emphasis on renewable forms of energy. Adams Lake would better realize its goals if it directly administered utilities providing services to its community and, potentially, beyond. By ensuring room for Indigenous governance of Indigenous utilities, the BCUC would remove a structural barrier to

Indigenous economic development and capacity building and facilitate meaningful reconciliation in British Columbia.

About Adams Lake

4. Adams Lake belongs to the Secwepemc Nation, which consists of seven divisions. Adams Lake is a member of the Pespessellkwe Division, which also includes Neskonlith Indian Band and Little Shuswap Indian Band. Adams Lake is also a member of the Shuswap Nation Tribal Council (SNTC), which consists of nine Secwepemc Bands.
5. The Secwepemc Nation is an aboriginal group who occupy traditional Secwepemc territory, known as Secwepemcul'ecw. Secwepemcul'ecw is a substantial area of approximately 180,000 km² that spans the south central interior plateau of British Columbia. The Pespessellkwe Division is responsible for the protection and management of its part of Secwepemcul'ecw in accordance with Secwepemc laws, customs and traditions.
6. Much of the Secwepemcul'ecw territory is presently used or held as fee simple land for uses such as cities and towns, farms, ranches, parks, mining activities, hydro developments, timber enterprises, oil and gas exploration and other uses related to transportation, among others. Despite the steady increase in those non-Indigenous uses of the Secwepemc traditional lands, they have had minimal benefit from its development. For example, thousands of km of hydro lines criss-cross Secwepemc territory distributing power from hydro dams at Mica, Revelstoke, Arrow, Pingston and others, but the Secwepemc were not consulted about nor accommodated for these developments.
7. Today, Adams Lake holds seven non-contiguous reserves totalling approximately 2,911 hectares. The reserves are primarily located around lakes and rivers in the interior of British Columbia including Adams Lake, the Adams River, the South Thompson River and Little Shuswap Lake.
8. Adams Lake's community has witnessed significant change since the reserve system began in 1865. The Shuswap region has witnessed an influx of settlers and more recently tourists that vacation in and on the region's lakes. The extensive development of Adams Lake's lands and generations of unilaterally imposed federal and provincial policies (such as the *Indian Act*, fisheries and wildlife regulations, and land use planning and development decisions) have impacted its traditional economies, its ability to exercise its Aboriginal rights, its culture and way of life.

9. It is important to Adams Lake that it builds a sustainable economy for now and into the future. The Nation is seeking to meaningfully realize the benefits of its rich traditional territory in a way that is consistent with its principles and legal orders and rooted in stewardship and conservation.

Strategic Plan for Adams Lake Self-Governance

10. Adams Lake completed Swixweytec – Our Ancestral Voice, a Comprehensive Community Strategic Plan (“CCSP”) in 2015. In the CCSP, it identified that it will “bring together traditional governance and contemporary practices” to move forward with self-governance goals in a meaningful way. Following on the CCSP, Adams Lake developed a Strategic Plan for Self-Governance (“SPSG”).
11. The express objective of the SPSG was to assist Adams Lake in developing capacity to use traditional law and governance systems and to enhance self-sufficiency. In respect of law and governance, Adams Lake has implemented an Election Code and developed various administrative policies. Since 1995, Adams Lake has also assessed and applied property tax to various property classes within its reserve lands, including interests held by non-Indigenous lease-holders (of which there are over 100).
12. In the future, Adams Lake also intends to adopt a Land Code guiding land use and management, which ought to include the right to provide utility services.

Adams Lake’s Energy Initiatives

13. Adams Lake and the Secwepemc Nation, of which it is a member, have actively engaged BC Hydro in respect of its claims for Aboriginal Title and Rights within the tradition territory of the Secwepemc Nation. In 2016, Adams Lake and other members of the Secwepemc Nation signed a protocol agreement with BC Hydro which is to guide reconciliation efforts between the parties.
14. The purpose of the protocol agreement was to develop a reconciliation framework that may lead to new social, economic and environmental arrangements and agreements between the parties. The development of Indigenous utilities in cooperation with BC Hydro is a prospect in line with the goals of the protocol agreement and that addresses both the assertion of Aboriginal Title and Rights and the need for historical and contemporary reconciliation between the parties.
15. More recently, Adams Lake has explored a number of “green” energy projects with a view to independently service both Adams Lake members and leaseholders that

reside within Adams Lake territories. Adopting renewable energy sources, with power from BC Hydro as a backup, would provide Adams Lake with both a potential source of revenue generation and control over a core service demanded by its members and leaseholders.

16. Adams Lake is committed to developing business partnerships with its leaseholders. As set out in the Adams Lake Indian Band — Five Year Economic Plan, Adams Lake encourages initiatives that may be developed by leaseholders, and sees value in leasing, lease renewals, and new or renewed leases that extend into the long term. This sort of overarching policy objective reflects Adams Lake's core values on partnership with non-members and would inform dealings concerning rate structures and utility charges between the Nation and its leaseholders.
17. As stated in the Five Year Economic Plan, the value brought by lease holders should be considered within any negotiation processes in connection with leases and lease renewals. Adams Lake's policies are aimed at furthering good relations between membership and non-members, and an Indigenous utility would be governed by these overarching policy directives.
18. Indigenous utilities would further the ability of Indigenous communities to work in partnership with non-Indigenous communities. Often Indigenous and non-Indigenous communities have shared concerns, including the desire for reliable energy security. An Indigenous utility would provide a mechanism for Indigenous governments to entice new business developments, as energy independence may encourage potential leaseholders to explore the opportunities for partnering and doing business with and within Indigenous communities.
19. Adams Lake is vigorously engaging with "green" technology. Among other things, Adams Lake has explored the pumpback potential of its lake. Pumpback technology allows the operator to create on-demand hydraulic energy supply when power demand is high by strategically displacing water reserves. Essentially, Indigenous utilities would promote flexibility for adding new generation technologies.
20. Adams Lake also engaged with a developer to erect a wind research tower to investigate the potential for generating electricity and exploring whether water turbines strategically placed within irrigation systems could capture energy during the growing season.
21. These projects would all fulfill Adams Lake's mission to generate local, renewable energy for its community members and leaseholders.

Indigenous governance and Indigenous utilities

22. Adams Lake would establish a system energy regulation that reflects its Indigenous laws, and is rooted in the history, present, and future of its community, which can be seen in the focus on “green” technologies. Adams Lake believes that it would be inconsistent with British Columbia’s commitment to reconciliation and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) to regulate Indigenous utilities as public utilities under the *Utilities Commission Act* (“UCA”) as this would undermine rights to self-determination and self-government. Indigenous utilities would not likely operate on the same scale as the major public utilities for which the UCA is designed and also likely have different objectives than major public utilities. For example, revenue from Indigenous utilities would likely be directed at funding community economic development needs and addressing energy security issues.
23. Adam’s Lake’s vision in establishing and operating its own utilities is progressive and revitalizing for the community and would contribute to a sustainable economy. The additional revenue generated by Indigenous owned and operated utilities would be significant, and would benefit both Adams Lake members and leaseholders. For example, additional own-source revenue would potentially allow the Nation to off-set others costs, freeing up resources to explore developments beneficial to the community.
24. Owning and operating an Indigenous utility would also create economic opportunities and jobs across various sectors. Many jobs would be created by the construction and operation of an energy utility. In addition, other types of jobs would be created from the day-to-day administrative work involved in running a utility. These jobs would revitalize the community and lead to re-investment in other community enterprises, and well as new developments. In short, an Indigenous utility would have benefits that would be felt throughout all cross sections of the community. New infrastructure could be added as the system demands grow, allowing for ongoing economic development within the community.
25. As mentioned above, Adams Lake has been exploring developing a pump-back green energy system on a lake above one of its reserves. The pumpback system would enable Adams Lake to use lake energy when hydro rates are at a premium and then buy hydro during the middle of the night when rates are lower to pump water back into the lake to use during the next day. This would further enable Adams Lake to maximize its investment in energy utilities.

26. Adams Lake's objective with the pumpback system would be to provide power from that system for up to 8 months of the year when water level and flow conditions are appropriate to offset the community's power needs. It estimates it could provide power for approximately 250 homes and likely have excess energy to contribute back into the hydro grid.

Characteristics of an Indigenous Utility

27. The Commission should avoid a narrow vision of an Indigenous utility because, just as Indigenous communities throughout British Columbia are diverse, so too are their energy needs and capacity. Moreover, Indigenous communities' views of governance and regulation and management of lands and resources will vary. In order to recognize the *sui generis* nature of Indigenous governance, we encourage the Commission to take a broad and purposive view of an Indigenous utility.
28. Adams Lake, for example, is interested in exploring and supporting green energy initiatives, and developing local practices that are environmentally sound. In this way, Adams Lake would support global and local climate action efforts. Other concerns that may be addressed by Indigenous utilities include the ability to provide secure and reliable energy to a remote location. There is also significant potential for economic development objectives off-reserve land. It is important to leave room for Indigenous utilities to flexibly adapt to the different needs of each community.
29. We would also caution against requiring that Indigenous utilities be exclusively Indigenous owned, as this would create an unfair barrier to Indigenous economic development. Utility projects often require more capital than that to which many First Nations will have immediate access and this barrier would unduly hamper cooperation and partnership between Indigenous and non-Indigenous people.

Regulation of Indigenous Utilities

30. Indigenous communities' self government includes the right to make laws and oversee all matters that fall within their jurisdiction. In Adams Lake's view, Indigenous utilities fall within the jurisdiction of Indigenous governments and should, therefore, be exempt from the UCA. For self government to have substantive meaning, utilities located on reserves should fall within the purview of Indigenous governments to regulate.
31. To the extent that an Indigenous utility provides services within its community, logically it should not be considered a public utility, in the same way a municipal or regional district utility is not considered a public utility under the UCA. Where an

Indigenous utility will provide utility services beyond its lands, it should maintain its jurisdiction over its services to promote fairness and consistency among ratepayers in a region. In addition, an Indigenous utility may prove better situated to provide utility services to certain communities due to factors such as local geography. This in turn, may result in fewer costs associated with the development of new infrastructure, as ratepayers may be able to avail themselves of a proximate Indigenous utility system.

32. The *Indian Act* provides authority for First Nations to make decisions respecting their land:

81(1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely

...

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works....

To interpret the wording of the statute in its grammatical and ordinary sense, “local works” must include Indigenous utilities.

33. Under the *Indian Act*, Adams Lake is empowered to enact bylaws governing local works that would ensure procedural fairness, transparency, and protect ratepayers; Adams Lake may also develop and enact comprehensive policies. By legislation, Council has been granted the authority to develop its own enactments, and this authority should be honoured.
34. The Supreme Court of Canada said in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 SCR 623, 2013 SCC 14 that the honour of the Crown is a core precept that finds its application in concrete practices. The Court specifically stated the principle that this means that the Crown must act in a way that accomplishes the purpose of statutory grants to Indigenous peoples (at para. 73 (4)). It would be contrary to this principle not to interpret the *Indian Act* to provide First Nations with jurisdiction over Indigenous utilities.
35. At a minimum, a First Nations’ authority to regulate a utility is analogous to a municipality. Although not a municipality, an example of the analogy is seen in the *Community Charter*, which defines a public authority to include a First Nation. Indigenous governments and services, however, are *sui generis*, which means that they are inherently unique. Where a municipality has only delegated authority, Indigenous governments have authority from a variety of sources, including inherent

rights protected by s.35 of the *Constitution Act, 1982*, which we submit empowers them with even greater rights and abilities to establish and operate utility services. In addition to the statutory grants of authority in the *Indian Act* and other legislation, First Nations' inherent rights to self-government and self-determination should not be interpreted narrowly or unduly restricted.

36. The emergence of an Indigenous utilities sector will support creative approaches that support flexibility in sustainability based in Indigenous laws and a community's local resources. Each Indigenous community is unique, with its own resources, history and potentially distinct approach to energy. Indigenous utilities would support communities developing local systems tied to the particular context of the location. For example, initiatives such as exploring technologies that use recycled energy to heat buildings can significantly reduce greenhouse gas pollution associated with heating buildings, may be explored and established as part of Indigenous energy utilities. Other technologies, like using steam heat, or geothermal technologies, may be explored as part of an Indigenous utility, and would further Indigenous goals, such as the preservation of resources for future generations.
37. The development of Indigenous utilities would allow Council to do what is best for its community and ratepayers, and to explore and adopt novel and emergent technologies in an effective manner. This furthers the ultimate goal of self-government, self-determination and reconciliation.

Conclusion

38. Is it important that the regulation of Indigenous utilities is driven by First Nations, and that any decisions regarding the emergence of this sector are made in consultation with Indigenous communities. For reconciliation to have any meaning, the regulation of Indigenous utilities cannot just be another example of importing external laws, policies, and regulations onto Indigenous governments without consideration of their perspectives or their laws and legal principles. It may be beneficial to develop resources to work in partnership with Indigenous utilities, providing resources, for example model rates bylaws, policies and resolutions. These forms of assistance, however, must remain firmly rooted in the objectives of self determination and self government.
39. We submit that the goal of reconciliation must inform all aspects of consideration on Indigenous utilities. The BC Government has announced that it will implement UNDRIP through legislation in the province. Reconciliation must be more than symbolic. It is essential that Indigenous perspectives are considered substantively and demonstrably in order to move forward with true reconciliation. This Inquiry

marks an important beginning to the process of reconciliation but there is much that still needs to be accomplished. Adams Lake encourages the panel to recommend an outcome that substantively recognizes and implements the importance of the Indigenous rights to self government and self determination.

Yours truly,

JFK Law Corporation

A handwritten signature in black ink, appearing to read "R.C. Phillips", written in a cursive style.

Per:

Robin C. Phillips

RCP/clt