MillerTiterle +Company

MEMORANDUM

TO: NISGA'A VILLAGE OF GITWINKSIHLKW
SUBJECT: BRITISH COLUMBIA UTILITIES COMMISSION – INDIGENOUS UTILITIES REGULATION INQUIRY
DATE: JUNE 17, 2019

INTRODUCTION

The British Columbia Utilities Commission ("**BCUC**") will be undertaking community input sessions throughout BC as part of its inquiry into the regulation of Indigenous-owned utilities (the "**Inquiry**"). The Inquiry will be seeking input as to the characteristics of an Indigenous Utility and whether Indigenous Utilities should be regulated. The BCUC will also be considering written submissions which are due by July 15, 2019. The BCUC expects to issue an interim report by December 31, 2019 and a Final Report by January 31, 2020.

We will summarize the issues for consideration under both the topics above and provide initial analysis for the upcoming community input session in Victoria.

1. CHARACTERISTICS OF AN INDIGENOUS UTITLITY

The BCUC is seeking input on the ownership and operation of Indigenous Utilities, to which we respond:

(a) Providing the utility is majority owned by a Nisga'a Village of Gitwinksihlkw ("**NVG**") (51% or greater), the corporate structure NVG chooses is within their discretion and should not be the concern of any regulator. Other Indigenous Nations will vary significantly in terms of capacity constraints and will seek different corporate models according to their distinct needs. Indigenous Utilities should be defined according to the same standards applied to Indigenous businesses.

(b) Equity investment preferences will vary greatly among Indigenous Nations, including among the Nisga'a Village Governments and Nisga'a Lisims Government, and will also evolve as Nations assume greater jurisdiction and leverage their economic power. The ownership of system components among Nations will equally vary, with some Nations seeking to own all components of the physical system to assure complete management while others may only seek to acquire the generation assets. These are all exercises of self-determination, however, and each community must be given the regulatory flexibility to choose their preferred degree of ownership according to their community objectives.

(c) If BC and the Commission decide to enforce constraints in relation to equity and asset ownership, this must be understood as an infringement upon Nisga'a self-determination and self-government and a possible breach of our Nisga'a Final Agreement.

(d) Regarding decision-making, true partnership with NVG and our Nisga'a Nation requires a substantial role in decision-making versus token involvement on certain projects. This translates to equal representation on the board of the corporate entity and a decision-making role in the management and operation of the Indigenous Utility. A combination of empowered co-management in partnership arrangements and a significant degree of de facto power would be the corporate requirement for all Nisga'a energy ventures. Indigenous participation is not sufficient if it is not connected to in real terms to decision-making.

(e) Indigenous Utilities should have the authority and jurisdiction to determine their customer base which reasonably would extend to non-band members residing within the service area of the 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 Indigenous Nations. 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.

2. REGULATION OF INDIGENOUS UTILITIES

(i) Do Indigenous Utilities Meet the Definition of a "Public Utility"?

Currently, Indigenous Utilities are defined as public utilities that are owned or operated, in full or part, by an Indigenous Nation (Order in Council No. 108). However, entities such as municipalities which provide services only to employees or tenants are exempted from the definition of a "public utility"".

Under the *Utilities Commission Act* ("**UCA**"), "public utility" means:

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

Part 3 of the UCA extends extensive requirements onto public utilities, including the filing of rate applications. The costs and administrative burden these regulatory requirements impose on smaller-scale energy service providers, have led many Indigenous communities and energy system developers to request exemptions from the public utility provisions of the UCA.

NVG takes the position that Indigenous Utilities should be exempted from the definition of a "public utility" due to the inherent right of Indigenous Nations to self-government, which the Nisga'a Nation and NVG are actively exercising. Enabling decision-making authority is a direct consequence of respecting the rights of Indigenous self-determination. If sufficient reasoning can be applied to the autonomy and independent governance structures within municipalities, the rights of self-governing Nations like the Nisga'a Nation must be upheld. We strongly disagree however with drawing any comparisons between municipalities and Indigenous

Nations for the legal fact that we are not local governments with delegated authority but Nations with inherent and constitutionally protected rights.

We particularly bring to the Commission's attention, the following provisions of Ch. 11 of the Nisga'a Final Agreement:

> The Nisga'a Nation has the right to self-government, and the authority to makes laws, as set out in this Agreement.
>
> …
>
> The exercise of Nisga'a Government jurisdiction and authority set out in this Agreement will evolve over time.
>
> ….
>
> The Nisga'a Constitution will require a system of financial administration comparable to standards generally accepted for governments in Canada, through which Nisga'a Lisims Government will be financially accountable to Nisga'a citizens, and Nisga'a Village Governments will be financially accountable to Nisga'a citizens of those Nisga'a Villages.
>
> Nisga'a Government will provide appropriate procedures for the appeal or review of administrative decisions of Nisga'a Public Institutions.
>
> The Supreme Court of British Columbia has jurisdiction in respect of applications for judicial review of administrative decisions of Nisga'a Institutions exercising a statutory power of decision under Nisga'a law, but no application for judicial review of those decisions may brought until all procedures for appeal or review provided by Nisga'a Government and applicable to that decision have been exhausted.

The provisions above highlight both the existing legal authority of the Nisga'a Government and the intent of the Province and the Nisga'a to enable the Nisga'a to develop their own boards, commissions or tribunals established under Nisga'a law in exercising their jurisdiction over all matters affecting Nisga'a Lands and our citizens.

In addition, attaining approval under the UCA is both a lengthy and time intensive process. The rate applications that public utilities must submit are primarily reviewed on their economic merits with little accounting for the urgent need of renewable energy sources for Indigenous Nations to shift from the adverse impacts of diesel-based reliance. The social and environmental factors that Nations are weighing in choosing renewable energy sources but must also be factored into the regulation of these entities.

To conclude, the NVG advocates that the regulation of Indigenous Utilities must be approached from an innovative perspective that is grounded upon Indigenous rights and self-government.

(ii) If Indigenous Utilities Are Exempted, How will Ratepayers Interests Be Protected?

While NVG agrees with the importance of ensuring protection for ratepayers, we disagree with this being the sole guiding factor in the regulation of Indigenous Utilities. Instead, we submit that the context in which Indigenous Utilities will be operating demands a focus upon the participation of communities and individuals in the governance of these systems. While our

current system of utility provision may be well-regulated, it is absent of any real community involvement and remains a largely unilateral decision-making process. This approach is not only at odds with the governance processes of the Nisga'a Nation but also is fatal to producing new mechanisms of energy production, distribution and consumption.

Notwithstanding the need to shift the regulatory analysis, NVG contends that many Indigenous governance systems are already equipped with recourse measures that citizens can employ against Indigenous Utilities. In addition, Indigenous legal orders and their governance systems contain arbitration processes to resolve disputes that could arise among ratepayers and Indigenous Utilities on issues of rates or service.

Self-governing Nations such as the Nisga'a have thorough dispute resolution processes ranging from collaborative negotiations to adjudication and arbitration.

The Nisga'a Final Agreement outlines recourse measures Nisga'a citizens may take against the Nisga'a Government and its' entities and in-depth dispute resolution processes are outlined in Chapter 19 to resolve conflicts where they arise. We submit that the structure and participatory mechanisms found throughout the Nisga'a Final Agreement enable the Nisga'a Village Governments to enact laws to specifically protect the interests of citizens and that the existing governance structures of the Nisga'a allow for greater community participation than available under the UCA structure.

The revitalization of Indigenous environmental governance is another element that Indigenous Nations, such as the Nisga'a, bring to the regulation of Indigenous Utilities. The Nisga'a have implemented locally derived management institutions. This has strengthened decision-making within the Nation and has provided mechanisms for developing our relationships with others. In addition, Indigenous Knowledge of our Nation is utilized to inform our decision-making as it pertains to resource management.

Finally, we would bring to the Commission's attention that many of the facilities which have been exempted from Part 3 of the UCA may continue to be regulated under the UCA on a complaint basis. This mechanism under the UCA could serve as a last resort forum for Indigenous ratepayers.

In closing, we would like to emphasize the importance of prioritizing the viability of Indigenous-led, renewable, and community-scale energy projects. This will only be achieved through innovative approaches to regulation of these entities that support Nation objectives and diversity.