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Utilities Commission

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August 2, 2019

Sent via email/eFile

BCUC INDIGENOUS UTILITIES REGULATION INQUIRY
EXHIBIT A-25

Mr. David Austin
Stirling LLP
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Vancouver, BC V7Y 1E4
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Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998 - BCUC Information Request No. 1

Dear Mr. Austin:

Further to British Columbia Utilities Commission Order G-110-19, enclosed please find BCUC Information Request No. 1 to the Collective First Nations. In accordance with the Regulatory Timetable, please file your responses no later than Tuesday, September 10, 2019.

Sincerely,

Original Signed By:

Patrick Wruck
Commission Secretary

/nd

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British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry

INFORMATION REQUEST NO. 1 TO COLLECTIVE FIRST NATIONS

1.0 Reference: Exhibit C13-2, p. 3
Barriers to entry

In Exhibit C13-2, the 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) state:

> First Nations in general and the Collective First Nations in particular have never had an equal opportunity in British Columbia to participate in the : '(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 respect to the generation, transmission and distribution of electrical energy by BC Hydro [British Columbia Hydro and Power Authority] in the majority of the Province, the matter of BCUC [British Columbia Utilities Commission] 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.

1.1 Please discuss the extent to which the Collective First Nations consider that the barriers to entry for Indigenous utilities are different from those experienced by prospective non-Indigenous, non-incumbent utilities.

2.0 Reference: Exhibit C13-2, pp. 7, 11, 12; Exhibit C20-2, p. 12; Exhibit C16-2, p. 6
Defining characteristics of Indigenous utilities

On page 7 of Exhibit C13-2, the Collective First Nations state: "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."

The Coastal First Nations and the First Nations Leadership Council submit in their written evidence that a majority-ownership test should not be the only measure for identifying an Indigenous utility, as some First Nations may face constraints securing a majority equity position upfront.

2.1 Please discuss whether the Collective First Nations would consider Indigenous Nations[1] with a minority share in the utility, but with demonstrable benefits accruing to the Nation, to be an Indigenous utility.

On page 11 of Exhibit C13-2, in response to the question "Does the Indigenous utility provide service on other lands?" the Collective First Nations state: "Subject to reviewing the submissions of other interveners and interested parties, no."

2.2 Please confirm, or explain otherwise, if the position of the Collective First Nations is that an Indigenous-owned utility operating outside of its: Reserve; Indigenous Nation/Band-owned lands; Treaty lands; and traditional territory, would be subject to regulation by the BCUC.

On page 12 of Exhibit C13-2, in response to the question "Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?" the Collective First Nations state in part:

> 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.

2.3 Please discuss if the Collective First Nations have a view on how laws regarding Indigenous utilities would be applied where there are potential overlaps in traditional territories between Indigenous Nations.

3.0 Reference: Exhibit C13-2, pp. 9–10, 11
Utility infrastructure

On pages 9 to 10 of Exhibit C13-2, the Collective First Nations state:

> 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.

On page 11 of Exhibit C13-2, the Collective First Nations state: "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."[2]

3.1 In the Collective First Nations' view, please clarify whether such "parallel infrastructure" developed by an Indigenous utility might compete with or displace existing utility services.

4.0 Reference: Exhibit C13-2, p. 12
Common law

The Collective First Nations state in Exhibit C13-2:

> Indigenous Utilities should not be regulated under the UCA [*Utilities Commission Act*]. 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

[1] As defined in section 1 of Order in Council No. 108, http://www.bclaws.ca/civix/document/id/oic/oic_cur/0108_2019.
[2] Emphasis added.

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.

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

4.1 Please explain how common law would apply to protect ratepayers who may be non-Indigenous but either living on traditional territory lands or being served by an Indigenous utility beyond that Nation's traditional territory.

4.2 Please discuss whether the Collective First Nations have a view on whether the common law would be applicable to the regulation of an Indigenous utility serving customers on Treaty territory or self-governing traditional territory, where an Indigenous Nation has negotiated a Treaty or self-government agreement.

5.0 Reference: Exhibit C4-2, pp. 8–9; Exhibit C13-2, pp. 18–21
Applicability of the UCA

In Exhibit C13-2, the Collective First Nations provide a response to the question "Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body?"

Prepared by its legal counsel, the FortisBC Group of Companies (FortisBC) provides an analysis on pages 8 to 9 in Exhibit C4-2 of constitutional considerations with respect to the applicability of the UCA and the jurisdiction of the BCUC on Reserve lands. FortisBC submits that the UCA is a law of general application and applies to Reserve lands.

5.1 Please provide the view of the Collective First Nations on the legal analysis provided by FortisBC, regarding the applicability of the UCA on Reserve lands.