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Utilities Commission

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Sent via email/eFile

BCUC INDIGENOUS UTILITIES REGULATION INQUIRY
EXHIBIT A-27

Ms. Jaime Sanchez
First Nations Leadership Council
Suite 1020 - 1200 West 73rd Avenue
Vancouver, BC V6P 6G5
jaime.sanchez@bcafn.ca

Re: British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry – Project No. 1598998 - BCUC Information Request No. 1

Dear Ms. Sanchez:

Further to British Columbia Utilities Commission Order G-110-19, enclosed please find BCUC Information Request No. 1 to the First Nations Leadership Council. 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



British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry

INFORMATION REQUEST NO. 1 TO FIRST NATIONS LEADERSHIP COUNCIL

1.0 Reference: Exhibit C16-2, Section 1, pp. 5, 6
Characteristics of an Indigenous utility

On page 5 of Exhibit C16-2, the First Nations Leadership Council (FNLC) states:

Indigenous utilities must, at minimum, be exempted from being regulated as public utilities within the meaning of the *Utilities Commission Act* (UCA), and regulations must be introduced that support the economic viability of First Nations-led renewable energy projects.

On page 6 of Exhibit C16-2, FNLC states:

We submit that if the utility is majority-owned (50.1% or more) or majority-controlled (subject to BC Corporations Act and Securities Regulation) by the Indigenous Nation (or group of Nations), it is an Indigenous utility.

...However, in many cases First Nations rely on third-party investment to finance projects and might have a minority share in their utilities, at least at the outset of projects, with a plan to transition over time. These minority owners should not be excluded from identifying as an Indigenous utility, as long as the rights and jurisdiction of the Proper Title Holders are respected.

- 1.1 In FNLC's view, please explain for clarity whether utilities with minority ownership by Indigenous Nation(s)¹ should be exempted from being regulated as public utilities within the meaning of the UCA.

2.0 Reference: Exhibit C16-2, Section 2, p. 6
Jurisdiction

FNLC states: "The FNLC maintains that Indigenous utilities have authority and jurisdiction over all aspects of energy generation, transmission, and distribution in their territories."

- 2.1 Please discuss how FNLC sees this jurisdiction applying in situations where Indigenous utilities are serving customers beyond their territories.

3.0 Reference: Exhibit C16-2, Section 3, p. 9
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

On page 9 of Exhibit C16-2, FNLC states:

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

BC, in partnership with First Nations organizations, is currently drafting legislation to align provincial laws with UNDRIP. When this bill becomes law, it will further elevate UNDRIP's legal status in the province and require changes to legislation across all sectors, including the energy sector.

- 3.1 Please discuss whether FNLC considers that any potential legislative changes regarding the regulation of Indigenous utilities should be deferred until UNDRIP is formally embedded within BC legislation.

**4.0 Reference: Exhibit C16-2, Section 4, p. 11
Criteria for regulation**

On page 11 of Exhibit C16-2, FNLC states:

BCUC [British Columbia Utilities Commission] exists as a quasi-judicial body to make decisions that balance the needs of all Canadians, including First Nations peoples and future generations. Its role is to ensure fairness and a healthy economic environment for all. Decisions must ensure substantive equality to be truly fair and in accordance with the Constitution. The BCUC, if it is to regulate Indigenous utilities for any future length of time, should be mandated to apply a broad range of criteria to make fair decisions that will contribute to substantive equality and economic reconciliation, in accordance with Title and Rights and with UNDRIP.²

- 4.1 In a scenario where the BCUC were to continue to regulate Indigenous utilities for some length of time, please discuss if FNLC has a view on how such criteria should be developed and what that criteria should entail.

4.1.1 Does FNLC have a view on whether such criteria would apply equally to all Indigenous utilities?

**5.0 Reference: Exhibit C16-2, Section 4, p. 12
Regulatory frameworks in other jurisdictions**

FNLC summarizes the regulatory model for cooperatives in Alaska:

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

- 5.1 Please discuss if FNLC has a view on the pros and cons of a model whereby Indigenous utilities could choose to “opt-out” of being subject to regulation by the BCUC under the UCA, rather than creating a category of exemption/exception from the UCA for Indigenous utilities.

² Emphasis added.

**6.0 Reference: Exhibit C16-2, Section 4, p. 14
Traditional territories**

On page 14 of Exhibit C16-2, FNLC states:

Accordingly, exempting Indigenous utilities from regulation on the same basis as municipalities would require careful discussion and support to ensure that Nations' Title and Rights are upheld, Indigenous governance and legal processes are respected, and at the same time ensure that viable dispute resolution and appeal procedures are available to ensure Indigenous ratepayers' interests are protected.

A question that arises in this analysis is what constitute the boundaries within which an Indigenous utility provides service. The FNLC maintains that to be consistent with Title and Rights, as well as for economic viability, the boundaries must reflect a territorial approach rather than be limited to reserve. This territorial approach means Indigenous utilities must be empowered to determine their customer base, which reasonably would extend to non-Indigenous people and non-band members residing within the service area of an Indigenous utility.

- 6.1 Does FNLC have any views on how to deal with potential overlaps in territory between Indigenous Nations, which may affect the extent of an Indigenous utility's service area?
- 6.2 Please discuss whether FNLC considers whether there are short-term transitional mechanisms, such as an exemption for Indigenous utilities that provide service on Reserve/Treaty lands, to allow for further discussion on the appropriate long-term nature of an exemption for operation on traditional territory.

**7.0 Reference: Exhibit C16-2, Section 4, p. 15
Complaints**

On page 15 of Exhibit C16-2, FNLC states:

The BCUC could retain a complaints-based or appeal body role wherein Indigenous utilities would be regulated under the UCA should their Nation's dispute resolution procedures be exhausted. Alternatively, a separate First Nations regulatory body could be developed to act in this appeal role on an opt-in basis.

- 7.1 Please discuss if FNLC has a view on the pros and cons of the BCUC retaining a complaints-based or appeal body role, in either a transitional or long-term capacity.

**8.0 Reference: Exhibit C16-2, Section 4, p. 15; Exhibit C2-2, p. 9
Indigenous Utilities Commission**

On page 15 of Exhibit C16-2, FNLC states:

The FNLC recommends the research and development of legislation creating an independent Indigenous Utilities Commission (IUC), led and directed by First Nations organizations, to provide expert guidance to Indigenous utilities in BC as well as acting as a quasi-judicial body with similar functions to the BCUC – with key differences. Along with a mandate to protect ratepayers and establish a fair price for utilities, the IUC would have a diversified mandate to consider the unique circumstances of Indigenous utilities and to support First Nations decision making and dispute resolution structures according to their own legal orders. The Commitment Document sets out the goal of establishing an Indigenous commission to provide a dispute resolution, governance building, and law-making role that First Nations may opt-in to use, 'in accordance with

First Nations respective laws, customs, and traditions'. A specialized IUC could build on this model, with the energy expertise to provide case-by-case guidance and parameters on utility service rates in consultation with Indigenous utilities and communities. Alternatively, it could act as an appeal body in case of disputes. More consultation is needed to understand to what extent these regulatory structures should be available on an opt-in basis, and to what extent they should be binding on Indigenous utilities. The approach must be distinctions-based to provide flexibility for the different circumstances of different First Nations owned and/or operated utilities in their unique territories.³

- 8.1 Recognizing more consultation is needed on the IUC model, where possible, please elaborate if FNLC has a view on:
- a) How the IUC would mitigate any potential negative consequences of monopolistic behaviour;
 - b) How the IUC would manage disputes with non-Indigenous community member customers;
 - c) If and how the IUC could be financed;
 - d) Under what circumstances (if any) would FNLC foresee that the IUC may be phased out over time or replaced with another regulatory body (if the latter, which one); and
 - e) What governance structure would the IUC model follow?
- 8.2 Does FNLC have a view on whether an Indigenous Utilities Commission should be established in advance of there being a critical mass of Indigenous utilities?
- 8.3 Recognizing that the research and development of an Indigenous Utilities Commission may take time, does FNLC have a view on whether it is desirable for there to be an established Indigenous Utilities Commission before any exemption from regulation under the UCA for Indigenous utilities takes place?
- 8.3.1 If FNLC considers this is desirable, please clarify what transitional solution (if any) FNLC would propose for the regulation of Indigenous utilities pending the establishment of an IUC.

On page 9 of Exhibit C2-2, the British Columbia Hydro and Power Authority (BC Hydro) states:

As a regulated Public Utility, BC Hydro has a general obligation to serve customers who wish to take service and who meet the conditions of BC Hydro electric tariffs. Where a potential BC Hydro customer is itself a Public Utility, having that Public Utility regulated under a different regulatory framework (i.e., – regulated under a different set of rules than the UCA and/or administered by a different regulator than the Commission) has the potential to create uncertainty and duplication, impact BC Hydro's ongoing operations and increase costs for existing and future ratepayers.

- 8.4 Please discuss if FNLC has a view on how potential disputes or inconsistencies between entities regulated by the BCUC and entities regulated under an IUC would be managed or mitigated.
- 8.4.1 Please discuss which entity should have the authority to adjudicate such disputes and resolve the inconsistencies and why?

³ Emphasis added.