



Nisga'a Lisims Government

T 250 633 3000 / F 250 633 2367
TF 1 866 633 0888
PO Box 231 / 2000 Lisims Dr
New Aiyansh BC / Canada V0J 1A0
NISGAANATION.CA

August 16, 2019

By Email: Commission.Secretary@bcuc.com

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

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

Dear Mr. Wruck:

Re: British Columbia Utilities Commission ("BCUC") – Indigenous Utilities Regulation Inquiry – Project No. 1598998 – Nisga'a Nation, as represented by Nisga'a Lisims Government – Written Evidence

The Nisga'a Nation, as represented by Nisga'a Lisims Government, respectfully submits the attached written evidence for the above noted matter.

If you have any questions regarding the foregoing, please contact the undersigned.

Yours truly,

NISGA'A LISIMS GOVERNMENT

Cheryl Moore
Acting Chief Executive Officer and Executive Director

cc: Eva Clayton, President, Nisga'a Lisims Government
Corinne McKay, Secretary Treasurer, Nisga'a Lisims Government
Brian Tait, Executive Chairperson, Nisga'a Lisims Government
Mansell Griffin, Director of Lands and Resources, Nisga'a Lisims Government
Micah Clark, Aldridge + Rosling LLP

**BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE UTILITIES COMMISSION ACT**

British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry

Project No. 159899

Nisga'a Nation

WRITTEN EVIDENCE

August 16, 2019

INDEX

1	INTRODUCTION	1
2	OVERVIEW	1
3	BACKGROUND ON THE NISGA'A NATION.....	4
3.1	Overview of Nisga'a Nation	4
3.2	Nisga'a Final Agreement.....	5
4	RESPONSES TO BCUC QUESTIONS.....	9
4.1	BCUC principles for public utility regulation	9
4.2	What are the defining characteristics of indigenous utilities?	9
4.3	The definition of Indigenous utility	10
4.4	The nature of the ownership and operation of Indigenous utilities	12
4.5	The types of services provided by Indigenous utilities	13
4.6	The persons to whom services are provided by Indigenous utilities	13
4.7	The geographic areas served by Indigenous utilities	15
4.8	Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?	15
5	CONCLUSION.....	20

1 1 INTRODUCTION

2 1. The Nisga'a Nation as represented by the Nisga'a Lisims Government submits this
3 written evidence to explain its perspective on the issues the British Columbia Utilities
4 Commission ("BCUC") is considering in this Inquiry.

5 2. The regulation of utilities within Nisga'a Lands is of great interest to the Nisga'a
6 Nation because of the Nisga'a Nation's broad jurisdiction, which includes principal law-
7 making authority for Nisga'a Lands, under the Nisga'a Final Agreement (the "**Nisga'a**
8 **Treaty**"). As explained in this submission, that jurisdiction and governance authority
9 distinguish a Nisga'a Nation utility from other Indigenous utilities. These distinctions
10 should be reflected in the definitions and regulatory approach that is applied to Nisga'a
11 Nation utilities.

12 3. This submission explains the Nisga'a Nation's perspective on the issues set out in
13 the Order in Council No. 108 (the "**OIC**"), Commission Order G-62-19 and the BCUC's
14 subsequent letter dated 10 May 2019 on Additional Scope Questions ("**Inquiry Issues**").

15 4. We have organized this submission as follows

16 a) An Overview of the Nisga'a Nation's main points.

17 b) A summary of the Nisga'a Nation and the Nisga'a Treaty.

18 c) Specific comments on each of the Inquiry Issues.

19 5. We intend the capitalized terms used in this submission to have the same meaning
20 as in the Nisga'a Treaty.

21 2 OVERVIEW

22 6. The Nisga'a Nation is a self-governing Nation with principal lawmaking authority
23 for Nisga'a Lands.¹

¹ This term is defined below; a map of Nisga'a Lands is attached hereto as Appendix "A".

1

2 7. While the Nisga'a Treaty recognizes Nisga'a Lisims Government's power to enact
3 laws regulating utilities on Nisga'a Lands, it has not exercised that power yet.

4 8. In the future, Nisga'a Lisims Government may choose to draw down legislation
5 regulating, among other things, utilities, owned or operated, in whole or in part, by the
6 Nisga'a Nation (a "**Nisga'a Utility**") for the generation, transmission, storage, distribution
7 and sale of energy within Nisga'a Lands.

8 9. The Nisga'a Treaty has "been carefully crafted to respect constitutional principles
9 and to fit into the wider constitutional fabric of Canada",² and sets out subject matters
10 where Nisga'a laws will prevail over any inconsistent or conflicting provincial laws, and
11 conversely, subject matters where provincial laws will prevail over Nisga'a laws to the
12 extent of any conflict. Given the breadth of subject matters regulated under the *Utilities*
13 *Commissions Act* (the "**UCA**"), there is a risk that its application on Nisga'a Lands will
14 result in a patch work of prevailing provisions of Nisga'a laws and the UCA, and create
15 regulatory uncertainty.

16 10. To respect the Nisga'a Nation's jurisdiction on Nisga'a Lands, the UCA definition
17 of "public utility" should be amended to expressly exclude utility services provided by the
18 Nisga'a Nation.³ This exclusion would be similar to the exclusion for municipalities and
19 regional districts, but it has a separate legal and constitutional basis. The exclusion would
20 respect the Nisga'a Nation's jurisdiction to organize its own affairs, including the
21 flexibility in determining the structure and services to be provided by a Nisga'a Utility.

22 11. The same public interest considerations that support the exemption of
23 municipalities and regional districts under the UCA also apply to the Nisga'a Nation. Just

² *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49 at para. 49.

³ The Nisga'a Nation recognizes that its submissions may generally apply to other modern treaty nations in the province. However, the Nisga'a Nation is not authorized to, nor does it purport to, make submissions on behalf of other modern treaty nations in the province. These submissions are, accordingly, limited to the Nisga'a Nation and provisions of the Nisga'a Treaty.

1 as municipalities have the ability to regulate their own utilities, so too does the Nisga'a
2 Nation have that ability.

3 12. However, the Nisga'a Nation is not a municipality or regional district within the
4 meaning of the *Interpretation Act*⁴ or the *Local Government Act*⁵, so the Nisga'a Nation is
5 not seeking to be considered a municipality for the purpose of the UCA. Unlike
6 municipalities, the Nisga'a Nation has inherent jurisdiction and constitutionally protected
7 rights, as set out in the Nisga'a Treaty. Municipalities and regional districts, in contrast,
8 are statute-based entities and subordinate to the provincial government.

9 13. Given this context, the OIC definitions of "Indigenous nation" and "Indigenous
10 utilities" are too broad. The definition of "Indigenous utilities" assumes that all utilities
11 owned or operated, in whole or in part, by an "Indigenous nation" are a "public utility"
12 within the meaning of the UCA and, therefore, subject to UCA regulation.

13 14. The Nisga'a Nation has authority under the Nisga'a Treaty to enact laws that
14 regulate utilities on Nisga'a Lands, and the provisions of these Nisga'a laws may prevail
15 over the UCA to the extent of any inconsistency or conflict. Therefore, the threshold
16 assumption that the BCUC has the authority to regulate a Nisga'a Utility on Nisga'a Lands
17 is flawed.

18 15. The BCUC must first consider the Nisga'a Nation's broad lawmaking authority
19 within Nisga'a Lands as set out in the Nisga'a Treaty.

20 16. The Nisga'a Nation's powers and law-making authorities under the Nisga'a Treaty
21 differ fundamentally from the other Indigenous groups included in the definition of
22 "Indigenous nation". Because of the difference, the Nisga'a Nation should be explicitly
23 excluded from the UCA definition of "public utility", and should not be subject to the same
24 general regulatory approach that may apply to other "Indigenous utilities" as defined in the
25 OIC. Including all Indigenous groups into one general definition will not take into account

⁴ R.S.B.C. 1996, c. 238.

⁵ R.S.B.C. 2015, c. 1.

1 fundamental differences between the groups and, in the case of the Nisga'a Nation, may
2 conflict with the provisions of the Nisga'a Treaty.

3 17. The specific exclusion is necessary to respect the Nisga'a Nation's jurisdiction and
4 allow the Nisga'a Nation to regulate the services provided by a Nisga'a Utility. The
5 Nisga'a Nation has comprehensive jurisdiction to enact and administer that regulation.
6 That governance structure also protects the public interest and offers Nisga'a Utility
7 customers recourse to protect their interests related to utility service.

8 18. For the purpose of the Inquiry, the Nisga'a Nation will comment only on whether
9 a Nisga'a Utility should be regulated by the BCUC, and let others comment on other
10 categories of Indigenous utilities.

11 **3 BACKGROUND ON THE NISGA'A NATION**

12 **3.1 Overview of Nisga'a Nation**

13 19. The Nisga'a Treaty defines the Nisga'a Nation as the collectivity of those
14 Aboriginal people who share the language, culture and laws of the Nisga'a Indians of the
15 Nass Area and their descendants.

16 20. As recognized in the *Preamble* to the Nisga'a Treaty, the "the Nisga'a Nation has
17 lived in the Nass Area since time immemorial".⁶ The Nass Area is defined in the Nisga'a
18 Treaty to mean: "a. the entire Nass watershed, b. all Canadian watersheds and water bodies
19 that drain into portions of Portland Inlet, Observatory Inlet, or Portland Canal, as defined
20 in subparagraph (c), and c. all marine waters in Pearse Canal, Portland Inlet, Observatory
21 Inlet, and Portland Canal northeast of a line commencing at the Canadian border, midway
22 between Pearse Island and Wales Island, and proceeding along Wales Passage
23 southeasterly to Portland Inlet, then northeasterly to the midpoint between Start Point and
24 Trefusis Point, then south to Gadu Point as set out approximately in Appendix I".⁷

⁶ Nisga'a Treaty, Preamble.

⁷ Nisga'a Treaty, Chapter 1 – Definitions.

1 21. The Nisga’a Nation sought a just and equitable settlement of the land question since
 2 the arrival of the British Crown, including through the preparation of the Nisga’a Petition
 3 to His Majesty’s Privy Council, dated 21 May 1913.⁸ As the plaintiffs in *Calder v. British*
 4 *Columbia (Attorney General)*⁹, the Nisga’a Nation helped usher “in the modern era of
 5 Aboriginal land law” and lead the Crown to “begin treaty negotiations with First Nations
 6 without treaties — mainly in British Columbia — resuming a policy that had been
 7 abandoned in the 1920s”.¹⁰ These negotiations eventually led to the Nisga’a Treaty, which
 8 is “intended to be the just and equitable settlement of the land question”.¹¹

9 3.2 Nisga’a Final Agreement

10 22. The Nisga’a Nation is a party to the Nisga’a Treaty, along with Her Majesty the
 11 Queen in right of Canada and Her Majesty the Queen in right of British Columbia. The
 12 Nisga’a Treaty is a treaty and land claims agreement within the meaning of sections 25 and
 13 35 of the *Constitution Act, 1982*.

14 23. The Nisga’a Treaty addresses all aspects of the continuing relationship between the
 15 Nisga’a Nation and the federal and provincial Crown, and sets out the Nisga’a Nation’s
 16 rights under section 35 of the *Constitution Act, 1982*.

17 24. The Nisga’a Treaty came into effect on 11 May, 2000 and was the first modern
 18 Treaty in British Columbia. It was also the first Treaty in Canada, and perhaps the world,
 19 to delineate and constitutionally protect an Indigenous nation’s right to self-government
 20 and authority to make laws over its land and for its people.

21 25. Pursuant to sections 3 and 5 of the *Nisga’a Final Agreement Act (BC)*¹² and
 22 sections 4 and 5 of the *Nisga’a Final Agreement Act (Canada)*¹³ the Nisga’a Treaty has the
 23 force of law, and is binding on and can be relied on by all persons.

⁸ Nisga’a Treaty, Preamble.

⁹ [1973] S.C.R. 313.

¹⁰ *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 at para. 10.

¹¹ Nisga’a Treaty, Preamble.

¹² S.B.C. 1999, c .2.

¹³ S.B.C. 2000, c. 7.

1 26. The Nisga'a Nation is a distinct legal entity with the capacity, rights, powers and
 2 privileges of a natural person, and the Nisga'a Nation acts through Nisga'a Lisims
 3 Government.¹⁴

4 27. The Lands Chapter of the Nisga'a Treaty recognizes that the Nisga'a Nation owns
 5 "Nisga'a Lands in fee simple, being the largest estate known in law...",¹⁵ and this
 6 ownership is mirrored in s. 6(2) of the *Nisga'a Final Agreement Act* (BC).

7 28. The Definitions Chapter defines "Nisga'a Lands" to mean "those lands identified
 8 in paragraphs 1 and 2 of the Lands Chapter and includes additions under paragraphs 9 or
 9 11 of the Lands Chapter".¹⁶ Paragraphs 1 and 2 of the Lands Chapter provides, *inter alia*,
 10 that Nisga'a Lands comprise approximately 1,992 square kilometres of land in the lower
 11 Nass Valley, the boundaries to which are set out in Appendix A to the Nisga'a Treaty.¹⁷

12 29. In addition to ownership, the Nisga'a Government Chapter recognizes that
 13 "Nisga'a Lisims Government and Nisga'a Village Governments, respectively, have the
 14 principal authority, as set out in, and in accordance with, [the Nisga'a Treaty] in respect of
 15 Nisga'a Government... Nisga'a Lands, and Nisga'a assets".¹⁸ The Nisga'a Treaty sets out
 16 the broad subject matters over which Nisga'a Lisims Government has lawmaking authority
 17 and recognizes that the jurisdiction and authority of Nisga'a Lisims Government will
 18 "evolve over time".¹⁹

19 30. The Nisga'a Treaty also states that federal and provincial laws generally apply to,
 20 among other things, the Nisga'a Nation, Nisga'a Institutions, Nisga'a Corporations,
 21 Nisga'a citizens and Nisga'a Lands, but that, "in the event of an inconsistency or conflict
 22 between [the Nisga'a Treaty] and the provisions of any federal or provincial law, [the
 23 Nisga'a Treaty] will prevail to the extent of the inconsistency or conflict".²⁰

¹⁴ Nisga'a Treaty, Chapter 11 - Nisga'a Government Chapter, para 5.

¹⁵ Nisga'a Treaty, Chapter 7 - Lands Chapter, para 3.

¹⁶ Nisga'a Treaty, Chapter 1 - Definitions.

¹⁷ Nisga'a Treaty, Chapter 7 - Lands Chapter, paras 1 and 2.

¹⁸ Nisga'a Treaty, Chapter 11 - Nisga'a Government Chapter, para 33.

¹⁹ Nisga'a Treaty, Chapter 11 - Nisga'a Government Chapter, para 4.

²⁰ Nisga'a Treaty, Chapter 2 - General Provisions Chapter, para 13(a).

1 31. The Nisga'a Treaty then sets out, in detail, the subject matters over which Nisga'a
 2 laws will prevail to the extent of any inconsistency or conflict with federal over provincial
 3 laws, and conversely, where federal or provincial laws will prevail to the extent of any
 4 conflict with Nisga'a laws.

5 32. The Nisga'a Government Chapter provides that Nisga'a Lisims Government will
 6 ensure appropriate procedures for the appeal or review of administrative decisions of
 7 Nisga'a Public Institutions.²¹ A review board established to hear complaints about a
 8 Nisga'a Utility would fall under the definition of a Nisga'a Public Institution.

9 33. The Nisga'a Government Chapter also sets out Nisga'a Government's relations
 10 with non-Nisga'a individuals ordinarily residing on Nisga'a Lands ("**non-Nisga'a**
 11 **residents**"). Such provisions will be detailed further in this submission.²²

12 34. As it relates to public works and utilities, the Nisga'a Government Chapter of the
 13 Nisga'a Treaty recognizes, *inter alia*, that:

14 a) Nisga'a Lisims Government may make laws in respect of the
 15 administration, management and operation of Nisga'a Government,
 16 including, *inter alia*, the establishment of Nisga'a Public Institutions;²³

17 b) Nisga'a Lisims Government may make laws in respect of, *inter alia*, the use
 18 and management of Nisga'a Lands owned by the Nisga'a Nation, a Nisga'a
 19 Village, or a Nisga'a Corporation;²⁴

20 c) Nisga'a Lisims Government may make laws in respect of, *inter alia*, the
 21 use, possession, and management of the assets on Nisga'a Lands of the
 22 Nisga'a Nation, Nisga'a Villages, and Nisga'a Corporations;²⁵

²¹ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 16. Further to this provision, Nisga'a Lisims Government has enacted the *Nisga'a Administrative Decisions Review Act*, NLGSR 2000/04.

²² Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, paras 19-23.

²³ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 34(a).

²⁴ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 44(a).

²⁵ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 53(a). In the event of an inconsistency or conflict between a Nisga'a law under paragraph 53 or 54 and a federal or provincial law, the Nisga'a law

1 Nisga'a Government to exercise its rights, or to carry out its responsibilities,
2 under this Agreement.³⁰

3 35. The above-listed provisions of the Nisga'a Treaty recognize the Nisga'a Nation's
4 authority to enact laws regulating public works and utilities on Nisga'a Lands.

5 **4 RESPONSES TO BCUC QUESTIONS**

6 **4.1 BCUC principles for public utility regulation**

7 36. In Exhibit A-5 to this proceeding, the BCUC outlined the principles that guide how
8 the BCUC approaches public utility regulation. The Nisga'a Nation has no concerns with
9 those principles, and leaves it to the BCUC to establish its governing principles. The
10 Nisga'a Nation would establish its own principles to guide its approach to regulation.

11 **4.2 What are the defining characteristics of indigenous utilities?**

12 37. In Exhibit A-5, the BCUC outlines several characteristics to consider to help define
13 Indigenous utilities:

- 14 a) the nature of the ownership and operation of Indigenous utilities,
- 15 b) the types of services provided by Indigenous utilities,
- 16 c) the persons to whom services are provided by Indigenous utilities, and
- 17 d) the geographic areas served by Indigenous utilities.

18 38. The Nisga'a Nation suggests that the BCUC add the following to the list, as a
19 threshold consideration: *The jurisdiction under which the Indigenous entity operates*. This
20 question would allow the BCUC to consider the Nisga'a Nation's jurisdiction on Nisga'a
21 Lands in determining whether the BCUC has, as a starting point, jurisdiction to regulate a
22 Nisga'a Utility.

³⁰ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 127.

1 **4.3 The definition of Indigenous utility**

2 39. Under the OIC, "**Indigenous utility**" means a public utility that is owned or
3 operated, in full or in part, by an Indigenous nation.

4 40. The OIC then defines "**Indigenous nation**" to mean any of the following:

- 5 a) a band within the meaning of the Indian Act (Canada)
- 6 b) the Westbank First Nation;
- 7 c) the Sechelt Indian Band and the Sechelt Indian Government District
8 established under the Sechelt Indian Band Self-Government Act (Canada);
- 9 d) a treaty First Nation;
- 10 e) the Nisga'a Nation and Nisga'a Villages;
- 11 f) another Indigenous community within British Columbia, if the legal entity
12 representing the community is a party to a treaty and land claims agreement
13 within the meaning of sections 25 and 35 of the *Constitution Act*, 1982 that
14 is the subject of Provincial settlement legislation

15 41. The OIC definitions of "Indigenous utilities" and "Indigenous nation" are too
16 general, since they do not recognize the important jurisdictional, constitutional and
17 governance distinctions between the Nisga'a Nation and other Indigenous groups
18 referenced in the definition of "Indigenous nation" in the OIC.

19 42. Further, the current OIC definition of "Indigenous utilities" and "Indigenous
20 nation" assume that the BCUC has jurisdiction to regulate such utilities on Nisga'a Lands.

21 43. The Nisga'a Nation is different – in a legally significant way that is relevant to the
22 BCUC's consideration in this Inquiry – from other Indigenous groups included in the
23 definition of "Indigenous nation". The Nisga'a Nation has authority under the Nisga'a
24 Treaty to enact laws regulating a Nisga'a Utility on Nisga'a Lands.

1 44. When the BCUC considers its authority to regulate a Nisga'a Utility, the BCUC
 2 must consider the Nisga'a Treaty. By including the Nisga'a Nation in the broad definition
 3 of "Indigenous nation", this important distinction is lost, and there is a risk that the BCUC
 4 will consider matters at such a level of generality that it will be unable to carry out the
 5 necessary Treaty analysis.

6 45. The Nisga'a Nation is not a band within the meaning of the *Indian Act*.³¹ The
 7 Nisga'a Treaty states that the *Indian Act* has no application to the Nisga'a Nation as of the
 8 effective date of the Nisga'a Treaty.³²

9 46. The Nisga'a Treaty further states that Nisga'a Lands are not "lands reserved for the
 10 Indians" within the meaning of the *Constitution Act, 1867*, and are not "Reserves" as
 11 defined in the *Indian Act*.³³

12 47. Unlike self-government acts, the Nisga'a Treaty is a treaty and land claims
 13 agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*. The
 14 Nisga'a Treaty is the full and final settlement of the section 35 rights, including aboriginal
 15 title, of the Nisga'a Nation.

16 48. In addition, the Nisga'a Treaty sets out defined areas of lands – including Nisga'a
 17 Lands – in which the Nisga'a Nation has specified treaty rights and legislative authority.
 18 This further distinguishes the Nisga'a Nation from other Indigenous groups referred to in
 19 the definition of "Indigenous nation" in the OIC.

20 49. The current OIC definition of "Indigenous utilities" does not properly distinguish
 21 the Nisga'a Nation and its constitutionally protected rights – including the rights of self-
 22 government – from the other Indigenous groups included in the definition and potentially
 23 make recommendations that are inapplicable to the Nisga'a Nation, or that are inconsistent
 24 with, or don't pay proper respect to, the provisions of the Nisga'a Treaty.

³¹ R.S.C. 1985, c. I-5.

³² Nisga'a Treaty, Chapter 2 – General Provisions, para 18.

³³ Nisga'a Treaty, Chapter 2 – General Provisions, para 10.

1 **4.4 The nature of the ownership and operation of Indigenous utilities**

2 50. The fundamental element that would define the utility as a Nisga'a Utility is the
3 Nisga'a Nation is providing the service, either directly or through contractors, within
4 Nisga'a Lands. Ultimately, the Nisga'a Nation is directing the service. A Nisga'a Utility
5 could have the following attributes, while still retaining its fundamental character:

- 6 a) wholly or partly owned by the Nisga'a Nation or an entity owned by the
7 Nisga'a Nation;
- 8 b) majority owned by the Nisga'a Nation or an entity owned by the Nisga'a
9 Nation, with other Indigenous or non-Indigenous partners;
- 10 c) wholly or partly operated, with certain services contracted to other utility
11 providers (i.e. generation of energy), by the Nisga'a Nation or a an entity
12 owned by the Nisga'a Nation;
- 13 d) decisions for the Nisga'a Utility are made by the majority owner, the
14 Nisga'a Nation or the entity owned by the Nisga'a Nation, for the purpose
15 of the utility;
- 16 e) the Nisga'a Utility provides services within Nisga'a Lands (i.e. "within its
17 own boundaries"); and
- 18 f) the Nisga'a Utility provides services to Nisga'a citizens, non-Nisga'a
19 residents and businesses operating on Nisga'a Lands.

20 51. As a self-governing Nation exercising its authority to regulate a Nisga'a Utility, the
21 Nisga'a Nation should have the flexibility to determine the corporate structure of a Nisga'a
22 Utility and the type of services it will provide. The Nisga'a Nation further submits that it
23 should not be confined in structuring a Nisga'a Utility in the same way as municipalities
24 must structure utilities to be exempt from regulation. A specific exclusion from regulation
25 under the UCA for the Nisga'a Nation should preserve such flexibility.

1 **4.5 The types of services provided by Indigenous utilities**

2 52. The Nisga'a Nation may in the future wish to draw down legislation regulating,
3 among other things, a Nisga'a Utility for the generation, storage, distribution and sale of
4 energy, including electrical power utility service related to: (i) run of river projects, (ii)
5 pumped storage projects, (iii) windfarms, and (iv) geothermal.

6 53. The types of services provided by a Nisga'a Utility would largely depend on the
7 structure of such Nisga'a Utility. For example, the Nisga'a Nation may decide to own and
8 operate a utility, but purchase the electricity, gas, or heat from another provider, including
9 BC Hydro or FortisBC.

10 54. The objectives of a Nisga'a Nation utility would be to serve Nisga'a citizens, non-
11 Nisga'a residents, Nisga'a businesses and/or non-Nisga'a businesses within Nisga'a Lands
12 with fair and efficient services.

13 55. The rates and terms of service would be determined by the Nisga'a Utility, in
14 accordance with principles establish under the Nisga'a Nation's regulatory regime.

15 **4.6 The persons to whom services are provided by Indigenous utilities**

16 56. A Nisga'a Utility would provide services directly to Nisga'a citizens, non-Nisga'a
17 residents, Nisga'a businesses and/or other businesses within Nisga'a Lands.

18 57. Nisga'a citizens have opportunities to elect representatives of the Nisga'a Lisims
19 Government and Nisga'a Village Governments,³⁴ and can express their interests and
20 concern to the respective government entities about any aspect of a Nisga'a Utility service.

³⁴ Paragraph 9 of Chapter 11 – Nisga'a Government Chapter provides that the Nisga'a Nation will have a Nisga'a Constitution, which, *inter alia*, will require the Nisga'a Government to be democratically accountable to Nisga'a citizens. Section 28 of the Nisga'a Constitution requires that elections of the Officers of Nisga'a Lisims Government, the Chief Councillor and the Village Councillors of each Nisga'a Village Government, and the representative from each Nisga'a Urban Local, will be held every four years. Section 12 of the Nisga'a Constitution provides that, subject to residency and other requirements set out in Nisga'a law, every Nisga'a citizens who is at least 18 years of age is eligible to vote in Nisga'a elections and to hold office in Nisga'a Government.

1 58. Further, the Nisga'a Lisims Government must ensure appropriate procedures for
 2 the appeal or review of administrative decisions of Nisga'a Public Institutions.³⁵ Any board
 3 or commission established to hear complaints from a Nisga'a Utility would be subject to
 4 such provisions. In accordance with the Nisga'a Government Chapter, this recourse is
 5 available to both Nisga'a citizens and non-Nisga'a residents on Nisga'a Lands.³⁶

6 59. The Nisga'a Government Chapter of the Nisga'a Treaty provides the following,
 7 *inter alia*, for rights of non-Nisga'a residents:

- 8 a) the Nisga'a Government will consult with non-Nisga'a residents about
 9 Nisga'a Government decisions that directly and significantly affect them;³⁷
- 10 b) the Nisga'a Government will provide that non-Nisga'a residents may
 11 participate in a Nisga'a Public Institution, if the activities of that Nisga'a
 12 Public Institution directly and significantly affect them;³⁸
- 13 c) the means of participation in a Nisga'a Public Institution will be:
- 14 i. a reasonable opportunity to make representations to the Nisga'a
 15 Public Institution in respect of activities that significantly and
 16 directly affect them;
- 17 ii. if the members of a Nisga'a Public Institution are elected:
- 18 a. the ability to vote for or become members of the Nisga'a
 19 Public Institution, or
- 20 b. a guaranteed number of members, with the right to vote, on
 21 the Nisga'a Public Institution; or

³⁵ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 16.

³⁶ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 22.

³⁷ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 19.

³⁸ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 20.

1 c. other comparable measures.³⁹

2 60. These governance "checks and balances" ensure that non-Nisga'a residents have
3 appropriate recourse if they wish to express their interests and concerns about any aspect
4 of a Nisga'a Utility service.

5 **4.7 The geographic areas served by Indigenous utilities**

6 61. A Nisga'a Utility would provide services on Nisga'a Lands. The approach would
7 be analogous to a municipality and regional district that provide its services "within its own
8 boundaries".

9 **4.8 Should Indigenous utilities be regulated under the UCA or under another** 10 **mechanism, or be unregulated?**

11 62. In the *Spirit Bay Utilities Decision*, the BCUC relied on section 88 of the *Indian*
12 *Act* to support its finding that the UCA should apply on Reserve lands.

13 63. This analysis does not apply to the Nisga'a Nation.⁴⁰ The *Indian Act* does not apply
14 to the Nisga'a Nation, and Nisga'a Lands are not Reserve lands nor are there any Reserve
15 lands for the Nisga'a Nation or Nisga'a Villages.⁴¹

16 64. Similarly, the Nisga'a Nation has no comment on the validity of the constitutional
17 analysis included in the FortisBC submission for this Inquiry.⁴² That analysis deals with
18 the application of the UCA on Reserve lands and therefore, does not apply to the Nisga'a
19 Nation and Nisga'a Lands.

20 65. British Columbia, Canada and the Nisga'a Nation intended the Nisga'a Treaty to
21 provide certainty about Nisga'a ownership and use of lands and resources, and the

³⁹ Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 21.

⁴⁰ The Nisga'a Nation specifically refers to the BCUC's analysis on whether provincial law applied to Reserve lands in the Order No. G-175-16 in the matter of the *Utilities Commission Act, R.S.B.C.* 1996, c. 473 and Spirit Bay Utilities Application for Section 88(3) Exemption or Section 72 Declaration dated December 1, 2016 (the "Spirit Bay Utilities Decision").

⁴¹ Nisga'a Treaty, Chapter 2 – General Provisions Chapter, para 16.

⁴² FortisBC Submission in the Inquiry Respecting the Regulation of Indigenous Utilities at pages 8-9.

1 relationship of federal, provincial and Nisga'a laws, within the Nass Area.⁴³ The UCA
2 must respect this intent.

3 66. The Nisga'a Treaty recognizes Nisga'a Lisims Government's power to enact laws
4 regulating public utilities on Nisga'a Lands, and it may choose to draw down legislation
5 regulating, among other things, a Nisga'a Utility.

6 67. To recognize the Nisga'a Nation jurisdiction, utility services provided by the
7 Nisga'a Nation should be excluded from regulation under the UCA.

8 68. The Nisga'a Nation is not seeking to be considered a municipality for the purpose
9 of the UCA. Rather than attempting to "fit" the Nisga'a Nation under the definition of
10 "municipality" within the meaning of the *Interpretation Act*, the UCA should explicitly
11 exclude the utility service provided by the Nisga'a Nation. Such an exemption will honour
12 a government-to-government relationship between British Columbia and the Nisga'a
13 Nation, and reflect the Nisga'a Nation's authority to regulate public utilities, specifically a
14 Nisga'a Utility, on Nisga'a Lands as set out in the Treaty.

15 69. The Nisga'a Nation proposes that that the following exclusion be added to the UCA
16 definition of "public utility":

17 "public utility" means a person, or the person's lessee, trustee, receiver or liquidator,
18 who owns or operates in British Columbia, equipment or facilities for

19 (a) the production, generation, storage, transmission, sale, delivery or
20 provision of electricity, natural gas, steam or any other agent for the
21 production of light, heat, cold or power to or for the public or a corporation
22 for compensation, or

23 (b) the conveyance or transmission of information, messages or
24 communications by guided or unguided electromagnetic waves, including

⁴³ Nisga'a Treaty, Preamble.

1 systems of cable, microwave, optical fibre or radiocommunications if that
2 service is offered to the public for compensation,

3 but does not include

4 (c) a municipality, a regional district, **the Nisga'a Nation or a Nisga'a**
5 **Village** in respect of services provided by the municipality, the regional
6 district, **the Nisga'a Nation or a Nisga'a Village** within its own boundaries.

7 [emphasis added]

8 70. Although the Nisga'a Nation authority under the Nisga'a Treaty to enact laws
9 differs from a municipality, similar public interest considerations that support the exclusion
10 of public utility service provided by municipalities apply to the Nisga'a Nation.
11 Specifically, both forms of government have a comprehensive governance regime that
12 allows them to regulate the service in the public interest.

13 71. The BCUC has determined that regulation is required when natural monopoly
14 characteristics are present and there is a need to regulate to protect the public interest.⁴⁴
15 The BCUC has further found that the objective of the BCUC is the "protection of the public
16 interest by regulating public utilities to ensure that they provide safe and reliable service at
17 a reasonable prices."⁴⁵ The BCUC regulates public utilities to "ensure that the prices they
18 charge to customers, who are often captive, are reasonable for the level of service
19 provided".⁴⁶

20 72. In the *Spirit Bay Utilities Decision*, the BCUC found that "if monopoly
21 characteristics are not present, or are somehow mitigated, for example by an alternative
22 regulatory body, and exemption from regulation under the UCA may be warranted."⁴⁷

⁴⁴ *BCUC Report in the Matter of the FortisBC Energy Inc. Inquiry Into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives* dated December 27, 2012 at p. 8.

⁴⁵ Order No. G-104-18 in the matter of the *Utilities Commission Act, R.S.B.C.*, 1996, Chapter 473 and SSL-Sustainable Services Ltd. Status as a Public Utility under the *Utilities Commission Act* dated June 5, 2018 at p. 9.

⁴⁶ *Ibid.*

⁴⁷ *Spirit Bay Utilities Decision*, pp. 8-10.

1 73. The UCA excludes “a municipality or regional district in respect of services
 2 provided by the municipality or regional district within its own boundaries”.⁴⁸ The
 3 rationale for excluding municipalities from regulation is that municipalities, who are
 4 governed by the *Local Government Act* are accountable to their citizens. The reference to
 5 within their own boundaries in the exclusion under the definition of “public utility” under
 6 the UCA further ensures that all ratepayers have this right to vote.

7 74. British Columbia’s “local government system is based on concepts of autonomy,
 8 empowerment, and accountability, and collaboration among local governments and with
 9 other forms and levels of government”.⁴⁹ Local governments “make decisions based on a
 10 legislative framework, provide services and are accountable to their electors in a diverse
 11 range of communities”.⁵⁰ The *Local Government Act* and the *Community Charter* set out
 12 the principal authority of local governments and guide decision-making. The *Community*
 13 *Charter* “provides the statutory framework for all municipalities in B.C. except the City of
 14 Vancouver”.⁵¹

15 75. Section 1 of the *Local Government Act* states:

16 The purposes of this Act are

17 (a) to provide a legal framework and foundation for the establishment and
 18 continuation of local governments to represent the interests and respond to
 19 the needs of their communities,

20 (b) to provide local governments with the powers, duties and functions
 21 necessary for fulfilling their purposes, and

⁴⁸ *UCA*, section 1.

⁴⁹ British Columbia, “Local Government Facts & Framework” at <https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework>.

⁵⁰ *Ibid.*

⁵¹ British Columbia, “Local Government Legislative Framework” at <https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/legislative-framework>.

1 (c) to provide local governments with the flexibility to respond to the
2 different needs and changing circumstances of their communities.

3 76. The foregoing analysis applies similarly to the Nisga'a Nation as represented by
4 Nisga'a Lisims Government, when exercising its governance and lawmaking authority
5 within Nisga'a Lands.

6 77. Nisga'a Lisims Government and Nisga'a Village Governments are accountable to
7 their citizens. Nisga'a citizens have the right to vote to elect representatives of Nisga'a
8 Lisims Government and Nisga'a Village Governments, and therefore, can exercise such
9 right to vote out of power representatives responsible for a Nisga'a Utility if Nisga'a
10 citizens are unhappy with the rates or services.

11 78. For non-Nisga'a residents, the Nisga'a Government Chapter, as described above,
12 would provide adequate recourses and participation in the ratemaking process of a Nisga'a
13 Utility for non-Nisga'a residents.

14 79. Further, the Nisga'a Government Chapter of the Nisga'a Treaty provides for
15 specific recourses for Nisga'a citizens and non-Nisga'a residents in respect of Nisga'a
16 Public Institutions. Any commission or board established to hear ratepayer complaints
17 about a Nisga'a Utility would be subject to these provisions.

18 80. Moreover, a Nisga'a Utility would operate within Nisga'a Lands, which, for the
19 purpose of the UCA, is analogous to "boundaries" referenced in the definition of "public
20 utility".

21 81. Therefore, a Nisga'a Utility would meet the policy rationale for being excluding
22 from the definition of "public utility" under the UCA. Given the fundamental difference
23 between the Nisga'a Nation (as a modern treaty nation) and a municipality (as a statutory-
24 based government), the UCA should have a separate exclusion for the Nisga'a Nation.

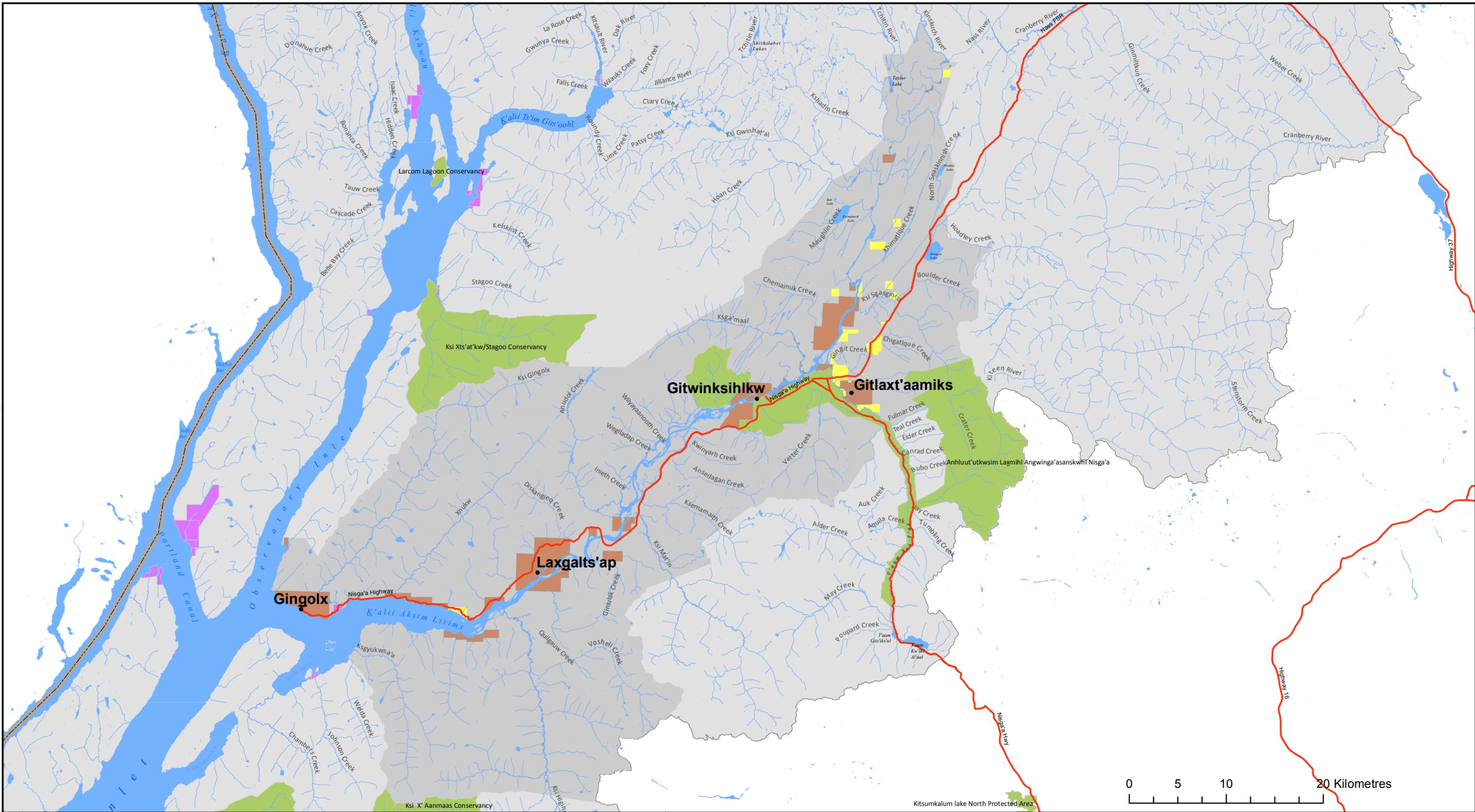
25 82. As part of the exercise of its governance right, the Nisga'a Nation could adopt by
26 reference legislative regimes like the UCA as part of the Nisga'a Nation regulatory regime,

1 and contract with a regulatory body such as the BCUC to regulate a Nisga'a Utility. This
2 approach could create a seamless approach to utility regulation on Nisga'a Lands.

3 **5 CONCLUSION**

4 83. The Nisga'a Nation appreciates the opportunity to engage in this Inquiry. The
5 regulation of Indigenous utilities has important policy and jurisdictional issues that must
6 be considered carefully. For this reason, the regulatory approach for Nisga'a Utilities
7 should not be fit within other categories – such as the municipal utility exclusion. A
8 separate approach is necessary that recognizes the fundamental legal differences in the
9 form and nature of the Nisga'a Nation jurisdiction.

10 84. All of which is respectfully submitted on behalf of the Nisga'a Nation as
11 represented by the Nisga'a Lisims Government.



Nisga'a Lands Overview

- Nisga'a Lands
- Excluded Lands
- Category A and B Fee Simple Sites
- Village Lands
- Parks & Protected Areas
- Nisga'a Highway
- Nass Wildlife Area
- Water
- International Boundary

Nisga'a Lisims Government
 Directorate of Lands and Resources
 NAD 83 UTM Zone 9N

