British Columbia Utilities Commission
Indigenous Utilities Regulation Inquiry
Tuesday, September 10, 2019
FLINTOFF REPLY to BCUC Exhibit A-21 IR NO. 1

1.0 Reference: Exhibit C5-2, Section 3, pp. 10–13
Characteristics of Indigenous utilities

On page 10 of Exhibit C5-2, Mr. Donald Flintoff (Flintoff) states:

> …[B]oundaries for a municipality or regional district are usually easy to define. However, the indigenous nations' boundaries need to be determined. Indigenous lands may be reserves, villages, district lands, traditional lands, crown lands just to name a few. So, to be an indigenous utility and exempt from regulation, the boundaries need to be discussed further.

On page 11, Flintoff states: "If the indigenous nations own or operate a utility within their own boundaries (District Lands, Reserves, Villages, etc) then they should be exempt from regulation under the UCA."

On page 13, Flintoff states that "[b]y 'boundaries', I interpret this to mean - indigenous district lands (not traditional lands). As the district lands are scattered this is not the same as lands under the control of a BC municipality or regional district."

1.1 Please explain further why Flintoff considers that "indigenous nations own or operate a utility within their own boundaries" should be exempt from regulation under the *Utilities Commission Act* (UCA).

1.1 **Response:**

Indigenous nations that own or operate a utility within their own boundaries should be exempt from regulation under the Utilities Commission Act (UCA) for the same reasons as municipalities and regional districts are considered to be exempt. If we accept that municipalities and regional districts can administer their own affairs through their elected Councils then why would we not accept that the elected administrative indigenous Councils are not also capable of managing the indigenous utilities affairs for their members?

1.2 Please clearly identify what Flintoff identifies as "district lands."

1.2 Response:

By "district lands", I mean any lands that come under the direct control of the elected administrative indigenous Councils. "district lands" may be referred to as reserves, etc under other Acts of Government. By using the descriptor "district" it is easier to align an indigenous nation's multiple reserves into a district. Also, the word "district" is used by some indigenous nations such as the Shíshálh.

SIGD is in essence, the local government, created by Bill C 93 Sechelt Indian Band Self Government Act and established as a local government in BC by Bill 4 Sechelt Indian

Government District Enabling Act in 1987.[1] This most likely influence my use of district lands instead of reserves.

1.2.1 Please confirm, or explain otherwise, that Flintoff considers that a utility must operate within "district lands" to be exempt from regulation under the UCA.

1.2.1 Response:

If we consider "district lands" or "village" to be synonymous with the municipalities or regional districts and the indigenous nation is 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; then as the definition of a public utility does not include a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries.

1.2.1.1 Please explain why Flintoff considers that "district lands" should be a defining factor in whether an Indigenous utility should be regulated under the UCA.

1.2.1.1 Response:

"district lands" should be a defining factor in whether an Indigenous utility should be regulated under the UCA for the same reasons it applies to municipalities and regional districts. These indigenous district lands have elected administrative indigenous Councils and for that reason are very comparable to municipal Councils and regional district Boards.

If the indigenous district Councils accept "village" status under the Local Government Act and the word "village" is added to the UCA alongside "municipality" and "regional district" then the indigenous nations having interest in proceeding with utility projects have equal status with other municipalities and regional districts in BC. Otherwise, the balance between indigenous and non-indigenous utilities will not be maintained throughout BC. It is necessary to apply a common set of rules and regulations to all utilities within BC.

On page 12, Flintoff states:

> By 'own' (have or hold as property, possess), I interpret this to mean - an indigenous nation must own (possess) a utility directly and not hold it through a corporation, partnership, joint-venture within or outside of their boundaries.

1.3 Please confirm, or explain otherwise, that Flintoff considers that for an Indigenous utility to be exempt from regulation under the UCA, the utility must be 100 percent owned by a single Indigenous Nation.[2]

1.3 Response:

I believe this question is directing me to the following in the OIC: "indigenous utility" means a public utility that is owned or operated, in full or in part, by an indigenous nation?

[1] https://shishalh.com/our-nation-government/sechelt-indian-government-district/

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

I believe that the definition of a public utility only includes a utility that is owned or operated, in full, by a person and not owned or operated in part.

A part ownership is usually another form of business structure created to reduce risk and/or obtain financing but that business corporation has the capacity and the rights, powers and privileges of an individual (a person) of full capacity.

LOCAL GOVERNMENT GRANTS ACT only includes municipalities and regional districts and not other government enterprises unless by prescription. Hence, the government clearly meant municipality and regional districts in the UCA and not other government enterprises.

I do not believe it is in the public interest to accept a definition that a public utility that is owned or operated in part by an indigenous nation would be exempt as it will cause disruption in the non-indigenous area: we will not have a level playing field for all utilities in BC.

1.4 Please explain further why Flintoff considers utilities held by Indigenous Nations through corporations, partnerships or joint ventures should not be exempt from regulation under the UCA.

1.4 Response:

See Response 1.3. The UCA should be applied uniformly across all utilities in BC to assist in the continuing development of the energy supply without creating different rules for different types of utilities.

FortisBC in its Exhibit C4-2, sections 4.4.3 , and 4.4.4, address the matter of controlling interest , non-controlling interst and the gaming the UCA. Further, in the Spirit Bay decision (G-175-16), one of Commission's Determination is as follows:

Commission determination

Spirit Bay Utilities' alternative request that it be declared a municipality or regional district for purposes of the UCA is denied.

Section 2(1) of the Interpretation Act states that "[the Interpretation Act] applies to every enactment, whether enacted before or after the commencement of [the Interpretation Act], unless a contrary intention appears in [the Interpretation Act] or in the enactment."

Municipality and regional district are defined in the Interpretation Act as follows:
'municipality' means, as applicable,

(a) the corporation into which the residents of an area are incorporated as a municipality under the Local Government Act, the Vancouver Charter or any other Act, or
(b) the geographic area of the municipal corporation…
'regional district' means a regional district as defined in the Local Government Act.

Thus the exclusion to the definition of public utility in the UCA that applies to "a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries" only applies to municipalities and regional districts that meet those definitions in the Interpretation Act. Beecher FN does not meet either of these definitions and thus the Panel cannot find it to be a municipality or regional district for the purposes of the UCA.

The evidence shows that Spirit Bay Utilities is a corporation and is therefore not a municipality and is also not excluded from the definition of public utility in the UCA. The Panel also notes that Spirit Bay Developments is a limited partnership and is therefore not a municipality.

Further, the LOCAL GOVERNMENT GRANTS ACT only includes municipalities and regional districts and not other government enterprises unless by prescription. Hence, the government clearly meant municipality and regional districts in the UCA and not other government enterprises. This should remove attempts to interpret the UCA otherwise. To create new flexibility in the UCA will call into question past BCUC decisions in this area.

The Panel also notes that generally speaking, ratepayers of a municipal utility are entitled to vote in a municipal election. Thereby, municipal councils are accountable to ratepayers for the performance, including rates, of the municipal utility. However, for ratepayers of Spirit Bay Utilities who are not members of Beecher FN, participation in the ratemaking process of Spirit Bay Utilities appears to be limited to making comments and asking questions of Beecher FN Council.

In G-175-16, the Commission has already determined that a limited partnership is not a municipality and further provides a definition of a municipality. The matter of ownership is further address by the Commission in its Decision G-104-18. The Commission's Decision on the Public Utility Argument was: " The Panel finds that SSL is not entitled to the benefit of the Municipal exclusion and is therefore a public utility as defined in the UCA. SSL is subject to regulation by the BCUC and not the City." And further explains:

To find, as the City and SSL submit, that SSL should be entitled to the benefit of the Municipal exclusion because SSL has entered into a partnering agreement with the City and the City is thereby providing the service through SSL as a vehicle, requires a finding that the City is providing the service. However, the Panel has already found as a fact that SSL owns and operates the equipment and facilities to provide the public utility service. The City has entered into an agreement with SSL to provide the service but that does not grant SSL the same legal status as a municipality. SSL is a separate corporate entity. To find otherwise would require the Panel to ignore the initial words of the exclusion restricting the exclusion to municipalities and regional districts. Therefore the Panel cannot make the finding that SSL can benefit from the Municipal exclusion. "

It is clear from these proceedings and others that part ownership is not permitted by the definitions in the UCA and that the "playing field" in BC would be disrupted by allowing indigenous utilities to engage in part ownership or other similar corporate structures. Otherwise, by recommending this part ownership concept, the floodgates from other utilities having sought exemptions on a similar matter is open alleging discrimination in application of the UCA.

2.0 Reference: Exhibit C5-2, Section 5, p. 20
Non-voting parties

On page 20 of Exhibit C5-2, Flintoff states:

> Some municipalities are already imposing conditions on corporate entities (non-voting) in the Province. The issue of non-voting, non-band members on indigenous district lands must be addressed equitably in a similar fashion to how non-voting citizens or corporations are dealt with in municipalities and regional districts.

2.1 Please expand upon what "conditions" Flintoff is referring to.

2.1 Response:

Unusual Conditions:
For example, the City of Richmond requires Cadillac Fairview Richmond Centre South development to connect to District Energy Utility - Bylaw 9892 to design, construct, and transfer a low carbon energy plant to the City's DEU service provider is consistent with that achieved through recent City Centre rezoning applications.[3][CNCL-72] Further the City of Richmond Bylaw 9895[4], part 5, makes it mandatory for new buildings to connect to and utilities the DEU.

The DEU is operating with monopolistic characteristics granted by the City and the City restricts competition by other utilities. The corporate entities (non-voting) and the new inhabitants of these complexes can no longer choose their service provider and as Council approves the rates, there is little recourse provided.

Eligible Voter:
Also, an eligible voter must be a Canadian citizen.
Further, a person cannot vote on behalf of a corporation, or as a non-resident property elector, based on a property owned wholly or in part by a corporation.

2.2 Does Flintoff have a view on how the issue of non-voting, non-band members being served by an Indigenous utility beyond district lands could be addressed in a similar fashion to non-voting entities in municipalities.

2.2 Response:
If the indigenous utility serves customers beyond district lands then, by definition, it no longer operates within its boundaries and therefore would be a public utility outside of its boundaries and subject to the UCA. As FortisBC has already submitted, this is similar to the City of Nelson.

For example, as a municipality, the City of Nelson is excluded from the definition of a public utility with respect to energy sales within its own boundaries. However, the Commission does regulate the City of Nelson's sales with respect to customers in the surrounding area.[Ex. C4-2, sec. 4.4.3]

3.0 Reference: Exhibit C5-2, Section 5, p. 20
Disadvantages to existing utilities

On page 20 of Exhibit C5-2, Flintoff states:

> Indigenous utilities should have the same status and advantages as municipalities and regional districts under the UCA. However, the indigenous utilities should not have superior or inferior status as this would be discriminatory and disadvantageous to the other existing utilities and any future utility developments. If all parties are treated equally under the UCA, then we have a level playing field for all utilities including indigenous utilities.

3.1 Please provide hypothetical examples of any disadvantages to existing utilities resulting from different treatment of Indigenous utilities under the UCA.

[3] https://www.richmond.ca/__shared/assets/10_App_CFRichmondCentre_CNCL_09241851606.pdf
[4] https://www.richmond.ca/__shared/assets/Bylaw_9895_070819_54046.pdf

3.1 Response:

FortisBC's Exhibit C4-2 provides examples of disadvantages which I will repeat.

The hypothetical examples of any disadvantages to existing utilities from different treatment of exempt Indigenous utilities under the UCA are:

- *Risk of monopoly abuse.*
- *Arbitration of complaints,*
- *Gaming of government grants,*
- *Gaming by non-indigenous investors,*
- *Gaming of EPAs and SOPs,*
- *Risks of Commission being faced with appeals of past decisions for non-indigenous utilities based on discrimination,*
- *Reduced oversight may lead to abuse on sale of utility, and*
- *Fair setting of rates to protect both the utility and its customers.*

4.0 Reference: Exhibit C5-2, Section 5.2.1, p. 25
Reselling energy provided by another utility

On page 25 of Exhibit C5-2, Flintoff states: "An indigenous utility should be able to resell or distribute energy provided by another utility within its own boundaries and to its district lands without being a public utility. An example of this is YVR."

4.1 Please provide further explanation to support this statement, including why YVR may be analogous to an Indigenous utility.

4.1 Response:

I did not intend for the Commission to interpret this as YVR being analogous to an indigenous utility.

Rather, YVR is an example of a utility (non-regulated) that resells and distributes energy provided by BC Hydro within YVR's own boundaries. Also, the City of New Westminster (regulated) resells energy from BC Hydro.

4.1.1 Would this include reselling or distributing energy to non-Indigenous peoples, non-voting Indigenous peoples and corporations? Please explain.

4.1.1 Response:

An indigenous utility should be able to resell or distribute energy provided by another utility within its own boundaries and to its district lands without being a public utility provided that it owns the facilities; otherwise, it is a public utility.

Two situations arise in this instance.

First, if the indigenous utility is regulated and wishes to resell or distribute energy to non-Indigenous peoples, non-voting Indigenous peoples and corporations within its boundaries then it should be able to do so as the UCA applies and protects all parties.

Second, if the indigenous utility is non-regulated and the UCA "public utility" definition does not apply, then the indigenous utility most likely will have an EPA with the energy supplier and this energy may be acquired at a rate to be determined by the Commission. However, the indigenous utility may set the rates to be charged to its customers within its own boundaries similar to the City of Nelson.