September 10, 2019

Mr. Patrick Wruck
Commission Secretary
British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC
V6Z 2N3
Delivered via email: commission.secretary@bcuc.com

Re: British Columbia Utilities Commission –
Indigenous Utilities Regulation Inquiry
Written Evidence of Coastal First Nations-Great Bear Initiative

Dear Mr. Wruck:

Please find attached our response to the British Columbia Utilities Commission Information Request No. 1 in the referenced matter.

Sincerely,

Paul Kariya
Senior Policy Advisor

COASTAL FIRST NATIONS-GREAT BEAR INITIATIVE SOCIETY

Response to Information Request No. 1 from the British Columbia Utilities Commission

British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry Proceeding No. 1598998

September 10, 2019

1.1 Does CFN have a view on whether the "majority of the customer base" should be measured by the number of customers, or the total revenue received from the customers.

The basis for the CFN position is the democratic accountability of the utility to its membership. For this reason, we believe that the number of customers is the most appropriate test.

1.1.1 Under CFN's proposal, would an Indigenous utility that initially provided service primarily to members of that Nation/Band but at some later date provided service primarily to non-members of that Nation/Band then be subject to regulation under the UCA at that time?

Yes. The requirements for exemption should be on-going.

1.2 Please confirm if both the members and non-members of a Nation/Band would be able to complain to the BCUC under CFN's proposal.

CFN's proposal is intended to provide protection from discrimination to non-members. As the "baseline" for this test of discrimination would be the rate charged to members, the complaint provision need only apply to non-members. Our proposal is that the Nation/Band can otherwise properly set rates on the basis of political accountability.

1.3 Please clarify if the proposed exemption would only be applied to not-for-profit utilities.

The exemption would be appropriate for utilities owned by the Nation/Band, where political accountability is a check on monopoly behaviour. CFN does not believe that this accountability requires the utility to be "not-for-profit", because the political accountability is adequate protection from the utility earning monopoly rents, including through price discrimination. CFN does not believe that exemptions should be tethered to whether or not the Indigenous Nation/Band chooses to earn a reasonable profit on its activities, or operate on a pure cost-recovery basis.

CFN notes that the exemption from the definition of a "public utility" for municipalities and regional districts does not include a test of whether that utility is intended to earn a profit for the municipality or regional district, and CFN submits that, similarly, this test need not apply in the Indigenous utility context.

2.1 Please clarify under CFN's proposal whether "consumer-owned" could also mean owned in whole or in part by non-Indigenous customers.

The protection from monopoly behaviour in a consumer-owned utility comes from the customers having an incentive to manage the utility in their own best interest. This is the standard basis for the non-regulation of co-operative utilities, for example, in many jurisdictions. In this context, CFN does not see a reason to be concerned about monopoly behaviour when the membership includes a mix of Indigenous and non-Indigenous customers.

2.2 Please clarify under CFN's proposal whether an Indigenous Nation itself could be the owner, or whether each individual customer of the utility would need to have a separate ownership share.

Protection from monopoly behaviour in the consumer-owned utility arises because each customer has an ownership interest. Where an Indigenous Nation is the owner, and the customers are not, the case for exemption would arise from political accountability. This is the case where an Indigenous Band/Nation can be exempted from regulation on a basis analogous to a municipality or regional district, as described elsewhere in CFN's evidence.

3.1 Please clarify whether "material benefits" and "Indigenous value" tests are the same, and if not, describe how they differ.

As those two terms are used on page 12 of the CFN evidence, they may be used interchangeably.

3.2 If CFN has a view, please expand on how these tests may be developed for the purposes of determining whether an entity is an Indigenous utility.

As described in CFN's evidence, this test would be, substantially, for the protection of Indigenous Nations/Bands. If the Commission determines that such a test is, in concept, appropriate, CFN suggests that it should seek input from Indigenous Nations/Bands about its specifics.

3.2.1 Would there be a single test that would be applied to all prospective Indigenous utilities? If so, what would be the specific elements of the test?

CFN believes that the test should be transparent and standard.

Since the underlying logic of the Indigenous utility exemption proposed by CFN is based on the utility having political accountability to its customers, this must be the foundation for the test. That is, if the "mind and management" of the utility does not rest with the Indigenous Nation/Band, then the rationale for exempting the utility from regulation is lost. This is true regardless of the nominal ownership interest that the Nation/Band holds.

3.3 In the above example, please clarify whether an Indigenous Nation would still have majority control of the <u>decision-making</u> in a firm.

CFN struggles slightly with the meaning of the term "majority control" in the question. However, as noted in the emphasised words of the question, the key issue is that the Indigenous Nation/Band has sufficient decision making control (the ability to set rates, for example) that there can be no question that the exemption granted to an Indigenous Nation/Band can be safely grounded on political accountability.

3.4 For the purposes of considering exemptions from regulation under the UCA, does CFN have a view on whether the land that a utility operates should be:

a) Classified in any definition of "exempt Indigenous utility";
b) Considered on a case-by-case basis in a utility's application for an exemption; or
c) Based on some other mechanism?

CFN sees no practical alternative to a case-by-case consideration. However, a guiding principle can usefully be included in a definition of "exempt Indigenous utility". CFN suggests that such a principle could be rooted in circumstances where it is electrically rational and/or most cost-effective for the customer in question to be served by the Indigenous utility. This rationale should include enhancing the economic viability of the Indigenous utility in question. CFN believes that it would be an undesirable outcome for Indigenous utilities to resist service to nearby customers, where that was in the interest of both the utility and its potential customers, because doing so was a requirement of protecting its exempt status.

4.1 Please confirm, or explain otherwise, that "constituent customers" refers to customers who are members of the Indigenous Nation.

Confirmed.

4.2 Please discuss the accountability that would apply when a government-owned Indigenous utility serves non-constituent customers.

In light of the concern underlying this question, CFN has suggested that this accountability can be ensured by a provision that allows these customers an avenue of complaint to the Commission, in cases where these customers feel that they are being discriminated against, relative to constituent customers. Without such a provision, there would clearly be a concerning accountability gap.

4.2.1 Please explain how CFN sees the role of the BCUC in protecting non-constituent customers from monopoly discrimination should be carried out?

As noted in the above response, CFN has suggested that non-constituent customers should be allowed to complain to the Commission in cases where it believes that the Indigenous utility is charging them rates that are discriminatory, in the sense that that term is used in, for example, sections 39 and 59 of the *Utilities Commission Act*. Where the Commission finds such discrimination, the Indigenous utility's exempt status can be made contingent on the discrimination being remedied.

5.1 Please discuss if CFN has a view on how such outcomes should be addressed. For example, would this require an amendment to the UCA, or would such issues need to be considered on an application-by-application basis or some other mechanism?

The concern raised by CFN in the referenced portion of its evidence is an artefact of cost-of-service ratemaking, as traditionally applied in utility regulation. CFN believes that it is within the Commission's power, in setting rates in each specific case, to make the suggested adjustments to its "normal" ratemaking practice. CFN does not believe that the UCA constrains the Commission from setting rates in a manner that takes account of CFN's concerns and, as such, CFN does not anticipate that its recommendation would require a change to the UCA. In particular, CFN notes that section 59(4) specifies that whether or not rates are just and reasonable is a "question of fact" of which the Commission is the "sole judge".