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September 10, 2019

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, B.C.
V6Z 2N3

Attention: Mr. Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Mr. Wruck:

Re: British Columbia Utilities Commission (BCUC) Indigenous Utilities Regulation Inquiry (Inquiry) – Project No. 1598998

Written Evidence of the FortisBC Group of Companies¹ (collectively FortisBC or the Companies)

FortisBC Responses to BCUC Information Request (IR) No. 1

In accordance with BCUC Order G-214-19 updating the Regulatory Timetable for the above noted Inquiry, FortisBC respectfully submits the attached responses to BCUC IR No. 1.

If further information is required, please contact the undersigned.

Sincerely,

on behalf of FORTISBC

Original signed:

Doug Slater

Attachments

cc (email only): Registered Parties

¹ Including FortisBC Energy Inc. (FEI), FortisBC Inc. (FBC), FortisBC Alternative Energy Services Inc. (FAES), and Mt. Hayes Limited Partnership (MHLP).

1 **1.0 Reference: Exhibit C4-2, Section 2.3, p. 4**

2 **Existing co-ownership and operation of an “Indigenous utility” -**
3 **MHLP**

4 In Exhibit C4-2, the FortisBC Group of Companies (FortisBC) summarizes the Mt. Hayes
5 Limited Partnership (MHLP) liquefied natural gas (LNG) facility. FortisBC states:

6 The example of MHLP, which for all intents and purposes functions like a
7 component of BC’s largest natural gas utility (FEI), underscores how important it
8 is for the BCUC to remain cognizant of the purpose of utility regulation when
9 determining the form of regulation for an ‘indigenous utility’ – just as it would for a
10 non-‘indigenous utility.’

11 1.1 Please discuss, in FortisBC’s view, whether different considerations for the form
12 of regulation would be required if an entity such as MHLP were:

- 13 a) Majority owned by Indigenous Nation(s)¹; and/or
14 b) Not functioning like a component of FortisBC Energy Inc. (FEI).

15
16 **Response:**

17 In terms of (a), the primary rationale for regulation is to protect the public from the exercise of
18 monopoly power by the utility. The ownership structure of MHLP – whether majority ownership²
19 or minority ownership³ by Indigenous Nation(s)⁴ – does not affect how it provides service to
20 customers or the requirements for regulation.

21 In terms of (b), MHLP is regulated by virtue of its beneficial ownership of the LNG storage
22 facility. It would still be regulated as a storage facility regardless of whether FEI or some other
23 entity held the lease and operated it.

24

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 Majority ownership would fall under Grouping 3 in FortisBC’s proposed approach.

³ Minority ownership would fall under Grouping 4 in FortisBC’s proposed approach.

⁴ In these responses, FortisBC has used the term Indigenous Nation as synonymous with the defined term “indigenous nation” in the Terms of Reference.

1 **2.0 Reference: Exhibit C4-2, Section 3, 4, pp. 7–8**

2 **Definition of “Indigenous utility” and appropriate regulatory models**

3 On pages 7 to 8 of Exhibit C4-2, FortisBC states:

4 Rather than developing a regulatory scheme tied to the definition of ‘indigenous
5 utility’ in the Terms of Reference, the BCUC [British Columbia Utilities
6 Commission] should focus on the presence or absence of the underlying policy
7 rationale for public utility regulation.

8 ...In general, an ‘indigenous utility’ should be regulated similarly to an equivalent
9 non-‘indigenous utility’, with the nature of regulation (i.e., full or some form of
10 light-handed regulation) dependent on what is required to achieve the purpose of
11 regulation.

12 2.1 Based on the preamble, does FortisBC consider that the recommendations of
13 this Inquiry, with respect to the nature of regulation, should apply equally to all
14 utilities, regardless of Indigenous or non-Indigenous ownership? Please explain
15 FortisBC’s position.

16
17 **Response:**

18 No. FortisBC is suggesting in this Inquiry that any new legislated exclusions from the definition
19 of “public utility” applicable to an “indigenous utility”⁵, or exemptions granted under section 88 to
20 “indigenous utilities”, be defined in a way that aligns with the exclusions and exemptions
21 applicable generally. FortisBC is not, in this Inquiry, proposing changes to the current
22 exclusions in the “public utility” definition or existing exemptions as they apply to non-
23 “indigenous utilities” generally. FortisBC believes the Inquiry should remain focused on the
24 matters identified by the Terms of Reference.

25 FortisBC is identifying that the rationale for municipal / regional district exclusion from the “public
26 utility” definition can be applied to “indigenous utilities”, as can the rationale underlying the
27 existing section 88 exemption for strata corporations. In both cases, the underlying rationale is
28 that the customers of the utility are protected by virtue of the control that they exercise over the
29 entity that owns the utility (a principle which we will refer to as “unified governance” for short-
30 hand). In these cases, the premise is that customers have access to the governance of rates
31 and service primarily through their voting rights. To the extent that the conditions of unified
32 governance can exist within an Indigenous Nation, then it is consistent with the theory of public
33 utility regulation and the current legislation and practice in British Columbia to forebear from
34 BCUC regulation. Treatment of an “indigenous utility” is then equivalent to other comparable
35 non-“indigenous utilities”. However, to the extent that the control is absent (e.g., if any party
36 other than that particular Indigenous Nation or municipality has a controlling interest, or the

⁵ In these responses, FortisBC has used the term “indigenous utility” in quotation marks to signify the defined term in the Terms of Reference.



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1 service extends to those without control over governance), then the conditions warranting
2 exemption from BCUC regulation do not exist.

3 FortisBC recognizes that the municipality/regional district exception in the existing definition of
4 “public utility” is not a perfect fit based on the underlying public policy rationale, since (a) there
5 will be residents of a municipality or regional district who cannot vote, and (b) businesses in the
6 municipality are customers and yet cannot vote. However, addressing if and how the municipal
7 exclusion needs to change is better suited to the ongoing BCUC Municipal Energy Utilities
8 Inquiry⁶ than this proceeding. In this Inquiry, given the Terms of Reference, the BCUC should
9 simply acknowledge that the same policy rationale for regulation applies to both “indigenous
10 utilities” and non-“indigenous utilities”.

11 Please also refer to FortisBC’s response to BCUC IR 1.1.1.

12

⁶ As established by BCUC Order G-177-19.

1 **3.0 Reference: Exhibit C4-2, Section 4.1, pp. 8–9; Exhibit C14-2, p. 7**

2 **Constitutional considerations**

3 Prepared by its legal counsel, FortisBC provides an analysis in Exhibit C4-2 of
4 constitutional considerations with respect to the applicability of the *Utilities Commission*
5 Act (UCA) on Reserve lands.

6 On page 9, FortisBC states:

7 ...provincial laws that regulate the use of Reserve lands (i.e., laws concerning,
8 for example, the manner of landholding or disposition of land-based interests) are
9 likely inapplicable. Section 88 of the *Indian Act* does not explicitly refer to 'lands
10 reserved for the Indians' and has to date been interpreted not to apply to laws
11 regulating land. Provincial laws with this character therefore remain inapplicable
12 on Reserve lands.

13 ...[T]he regulation of *activities* on Reserve lands (as opposed to the *use* of land)
14 through a provincial law of general application such as the UCA likely only
15 incidentally interferes with section 91(24) [of the *Constitution Act, 1867*].
16 Therefore, the UCA and the jurisdiction of the BCUC extends [sic] to the
17 regulation of compensable utility services provided on Reserve lands.

18 3.1 Please discuss whether the analysis prepared by FortisBC's legal counsel
19 reviewed the jurisdiction of the BCUC on Treaty lands or Indigenous Nations with
20 self-government agreements.

21
22 **Response:**

23 This response was prepared by FortisBC's legal counsel.

24 Historic treaties, which cover a small portion of British Columbia (i.e., Treaty 8 and the Douglas
25 treaties), do not alter the underlying jurisdictional analysis provided with respect to Reserve
26 lands as set out in FortisBC's evidence.

27 In FortisBC's view, the applicability of the UCA and jurisdiction of the BCUC in the context of
28 land covered by modern treaties (or self-government agreements) is best assessed on a case-
29 by-case basis. However, in general and assuming that a given treaty does not address this
30 issue or expressly exclude the application of provincial laws of general application (including the
31 UCA), it is likely that the BCUC would have jurisdiction in such instances.

32 FortisBC's approach is sensitive to the diversity of Indigenous groups in British Columbia, as
33 reflected by the broad definition of Indigenous Nation (as defined in the terms of reference for
34 this Inquiry). Therefore, the applicability of the UCA in such instances likely depends on specific
35 provisions and interpretation of a given treaty.

36

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1
2 3.1.1 As applicable, please provide FortisBC’s view on the applicability of the
3 UCA and the jurisdiction of the BCUC in such instances.
4

5 **Response:**

6 Please refer to FortisBC’s response to BCUC IR 1.3.1.
7

8
9
10 3.2 Please explain further why FortisBC considers utility services to be an *activity* on
11 lands rather than a *use* of lands.
12

13 **Response:**

14 This response was prepared by FortisBC’s legal counsel.

15 The UCA comprises a single, comprehensive set of regulatory considerations applicable to
16 public utilities, including the provision of utility services. While the courts have not specifically
17 considered the applicability of the UCA on Reserve lands, in FortisBC’s view the “pith and
18 substance” of the statute regulates the *activities* of public utilities (i.e., ensuring that customer
19 receive safe and reliable utility services at a reasonable cost). While providing utility services
20 may incidentally relate to or involve considerations with respect to land, the UCA does not
21 purport to regulate the use of land, including lands on a reserve.

22 Put another way, the utility services regulated by the UCA do not directly relate to the *use* of or
23 interests in land. The regulation of such services by the BCUC on Reserve lands would
24 therefore be within its jurisdiction (i.e., *intra vires*). Any effects to Reserve lands resulting from
25 the application of the UCA, if any, would be incidental to the primary purpose of the UCA.

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27
28
29 On page 7 of Exhibit C14-2, the Adams Lake Indian Band (Adams Lake) states:

30 The *Indian Act* provides authority for First Nations to make decisions respecting
31 their land:

32 **81(1)** The council of a band may make by-laws not inconsistent with this
33 Act or with any regulation made by the Governor in Council or the
34 Minister, for any or all of the following purposes, namely...

35 (f) the construction and maintenance of watercourses, roads, bridges,
36 ditches, fences and other local works....

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1 To interpret the wording of the statute in its grammatical and ordinary sense,
2 'local works' must include Indigenous utilities.

3 3.3 Please discuss if the analysis undertaken by FortisBC's legal counsel included
4 section 81(1) of the *Indian Act*, with respect to its potential applicability in the
5 context of utilities.
6

7 **Response:**

8 This response was prepared by FortisBC's legal counsel.

9 FortisBC's position that the UCA and the jurisdiction of the BCUC extends to Reserve lands is
10 consistent with section 81(1) of the *Indian Act*.

11 Under section 81(1), band councils may make by-laws that are "not inconsistent" with other
12 provisions of the *Indian Act* (including section 88). Under section 81(1)(f), this includes the
13 making of by-laws with respect to the "construction and maintenance...of local works". While the
14 construction and maintenance of local works may be a relevant consideration to an Indigenous
15 utility, this does not conflict with the application of the UCA on Reserve lands, which relates to
16 the regulation of compensable utility services. Moreover, any bylaws made under section 81(1)
17 must be consistent with other provisions of the *Indian Act*, including section 88 making
18 provincial laws of general application applicable in respect of "Indians in the province". As the
19 BCUC recognized in the Spirit Bay Utilities decision, "there is nothing inconsistent between the
20 UCA and the *Indian Act*".

21
22

23
24 3.3.1 If FortisBC has a view, please comment on the submission of Adams
25 Lake with respect to the applicability of the term "local works" to utilities.
26

27 **Response:**

28 Please refer to the response to BCUC IR 1.3.3.

29

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- 1 • An Indigenous Nation may hold the majority of the voting shares in the public utility, and
2 hold a minority in the aggregate outstanding shares in the public utility. In the view of
3 FortisBC, the Indigenous Nation has a controlling interest in the public utility.
- 4 • Alternatively, an Indigenous Nation may own the majority of the aggregate outstanding
5 shares in a public utility, and hold a minority of the voting shares in the public utility. In
6 the view of FortisBC, the Indigenous Nation does not have a controlling interest in the
7 public utility (in the absence of some other form of control, such as described in the next
8 bullet).
- 9 • There may be a shareholders agreement, or in the case of a partnership, a partnership
10 agreement, in place which prescribes the extent to which the Indigenous Nation has the
11 ability to control the public utility.

12
13 In other words, when determining whether the rationale for regulatory oversight exists or
14 whether the section 88(3) exemption should apply, it is important to look at the extent to which
15 the Indigenous Nation has the ability to control the public utility, rather than just examining the
16 extent of the Indigenous Nation’s ownership interest in the public utility.

17 In the view of FortisBC, in order for an “indigenous utility” to secure an exemption, the
18 controlling interest should of a nature that provides the customers of the utility with meaningful
19 input in the governance of the utility. If it is not possible to demonstrate this unified governance,
20 then it is appropriate as a default, for the BCUC to regulate it as a public utility. Note that the
21 form of the regulation (i.e., whether some light-handed approach is taken) could still vary
22 depending on the circumstances, as is the case with other public utilities.

23
24

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- 26 4.2.1 Please discuss if FortisBC has a position on whether a “controlling
27 interest” could be held by: a single Indigenous Nation; a corporation
28 wholly owned by an Indigenous Nation; multiple Indigenous Nations; or
29 a combination thereof.

30

31 **Response:**

32 Please refer to FortisBC’s response to BCUC IR 1.4.2.

33 In the view of FortisBC, a “controlling interest” could be held by a variety of types of structures,
34 including a single Indigenous Nation, a corporation wholly owned by an Indigenous Nation,
35 multiple Indigenous Nations, or a combination thereof. The key consideration is whether the
36 customers served by the “indigenous utility” have a similar degree of control over the entity
37 providing service to them as would be the case for a strata unit holder or a municipal voter. The
38 consumer protection rationale applies in a similar manner.

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4.3 Please explain whether FortisBC’s position is that each Indigenous utility would have to apply to the BCUC for a section 88(3) exemption, or that there should be a class exemption based on the description of this grouping, or otherwise.

Response:

9 FortisBC does not have a position with respect to the specific process through which an
10 “indigenous utility” should be granted a section 88(3) exemption (i.e., by one-off application or
11 class exemption). If the BCUC is of the view that certain “indigenous utilities” warrant
12 exemption from the UCA, the process for granting such an exemption should promote certainty
13 and be developed in a manner consistent with general principles of utility regulation. In
14 particular, a reasonable balance should be struck between regulatory efficiency objectives and
15 the BCUC’s need to be adequately informed about the activities contemplated by the
16 “indigenous utility”. Striking the appropriate balance will ensure safe and reliable service can be
17 provided to consumers cost-effectively.

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4.3.1 Please explain, in FortisBC’s view, whether such an exemption would cease to apply if an Indigenous utility were to serve customers that were not members of the Indigenous Nation(s).

Response:

26 In FortisBC’s view, the policy underlying utility regulation would suggest that an exemption from
27 the UCA should not apply to the extent that a utility’s customers would not be effectively and
28 efficiently protected if the exemption were to remain in place. In the case of an “indigenous
29 utility”, this policy would suggest that BCUC regulation should exist in some form whenever an
30 “indigenous utility” expands its services to non-members of the Indigenous Nation (whether
31 within its boundaries or not).

32 An exemption under section 88(3) of the UCA is a means of promoting regulatory efficiency
33 where a utility’s customers are effectively protected from monopoly power through alternative
34 means. This includes forms of regulation in which customers have a say in the governance of
35 the utility (e.g., Grouping 2). Members of an Indigenous Nation are a unique group of customers
36 in that they are able to hold their Nation’s leadership to account, often through clearly-defined
37 processes such as elections. Non-members of an Indigenous Nation do not have the same
38 ability to voice their concerns within an Indigenous Nation and are, therefore, a more vulnerable
39 customer group, whether receiving service within or beyond the boundaries of the Nation.

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1 An “indigenous utility” serving only members is analogous to a Strata Corporation that owns a
2 Thermal Energy System (TES) and exclusively serves its Strata Unit Owners, which is exempt
3 from regulation under the UCA because its Strata Unit Owners have recourse through the *Strata*
4 *Property Act*. If the Strata Corporation sought to provide services to customers beyond its Strata
5 Unit Owners, these customers (like non-members of an Indigenous Nation) would be inherently
6 more vulnerable to potential abuse and would not have access to the same recourse. In this
7 context, the Strata Corporation exemption from regulation under the UCA ceases to apply in
8 order to ensure the public is properly protected.

9 In the context of municipal utilities, the ability of municipal residents to exercise some control
10 over utility governance has been considered sufficient recourse to obviate the need for
11 regulation under the UCA. The municipal exclusion from the definition of “public utility” only
12 applies to service within municipal boundaries, recognizing that persons outside the municipal
13 boundaries have no say in municipal governance.

14 FortisBC recognizes that the municipal exclusion is itself imperfect from the perspective of
15 consumer protection because there may still be people or companies served by a municipality’s
16 utility that do not have the right to vote. The equivalent treatment, applied to “indigenous
17 utilities” would be to allow an “indigenous utility” to retain an exemption if it is serving non-
18 members within the boundaries of a Reserve or Treaty Lands, but for the BCUC to regulate any
19 service beyond those boundaries. FortisBC is proposing in the case of “indigenous utilities” to
20 prioritize the consumer protection rationale over repeating the known gap in the municipal
21 exclusion for the sake of ensuring the same treatment as municipalities. FortisBC also notes
22 that the BCUC Municipal Energy Utilities Inquiry is examining the appropriate approach to
23 regulating municipalities.

24 The form of BCUC regulation adopted in the case of Grouping 3 “indigenous utilities” need not
25 be burdensome. As discussed in FortisBC’s response to BCUC IR 1.4.5, the form of regulation
26 under the UCA can be tailored to specific circumstances. For instance, it could be as simple as
27 complaints-based oversight of arms-length commercial service contracts between the utility and
28 sophisticated commercial customers.

29
30

31

32 4.3.1.1 Please discuss if FortisBC has a view on what provisions may
33 be required to transition an Indigenous utility from exempt to
34 non-exempt status.

35

36 **Response:**

37 FortisBC has not currently identified any provisions necessary to transition an “indigenous utility”
38 from exempt to non-exempt status.

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1 The five groupings outlined on pages 10 to 11 of FortisBC’s evidence align with the rationale for
2 utility regulation by prioritizing the protection of the public from monopoly power, while clearly
3 defining when an Indigenous utility could be exempt from regulation under the UCA (in the form
4 of “bright-line” groupings). If an exempted “indigenous utility” intended to serve customers
5 beyond the scope of their exemption, then that utility would need to make the appropriate
6 application to the BCUC for the approval of rates.

7 For example, if an exempted “indigenous utility” controlled by an Indigenous Nation and only
8 serving its membership wanted to expand its service area beyond the Nation’s boundaries (i.e.,
9 transition from Grouping 2 to Grouping 3), then the utility would apply to be regulated by the
10 BCUC as a public utility under one of the two approaches set out in FortisBC’s response to
11 BCUC IR 1.4.3.

12 Similarly, if an exempted “indigenous utility” underwent a change in ownership (i.e., no longer
13 controlled by an Indigenous Nation / now falling within Grouping 4), all of the utility’s services
14 would transition to regulation under the UCA akin to non-“indigenous utilities”.

15 There would be a positive obligation on an “indigenous utility”, as with any other utility, to report
16 to the BCUC changes in circumstances that are relevant to its exempt status.

17

18

19

20 On page 12, FortisBC states:

21 The definition of ‘public utility’ in the UCA excludes ‘a municipality or regional
22 district in respect of services provided by the municipality or regional district
23 within its own boundaries...’. The logic behind this exclusion is that these bodies
24 have in place governance structures that allow all ratepayers to hold the
25 municipality accountable. Residents of a municipality can exercise the right to
26 vote if they object to how service is provided. The qualifier ‘within its own
27 boundaries’ ensures that all recipients of the service can avail themselves of that
28 right to vote.

29 On page 16, FortisBC states:

30 Group 3 ‘indigenous utilities’ are public utilities with a controlling interest owned
31 by an ‘indigenous nation’, serving one or more customers who do not have a say
32 in the governance of the ‘indigenous nation’. This is the situation that the BCUC
33 considered in the Spirit Bay proceeding, discussed above. These ‘indigenous
34 utilities’ should be regulated because the rationale for an exclusion akin to
35 municipalities is absent. Some customers (i.e., non indigenous customers or
36 corporations) would have no meaningful recourse in the event of inadequate
37 service or excessive rates.

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1 On page 15 of Exhibit C13-2, the Nuu-chah-nulth Tribal Council, Cowichan Tribes,
2 Gitanyow First Nation, Homalco First Nation and B.C. First Nations Clean Energy
3 Working Group (Collective First Nations) state:

4 It is not clear why an entitlement to vote results in municipal councils being: ‘...
5 accountable to ratepayers for the performance, including rates, of the municipal
6 utility.’ Commercial and industrial ratepayers of municipal utilities don’t have a
7 right to vote. Their entitlement to receive fair rates and safe, reliable service is
8 protected by the common law and not a right to vote.

9 4.4 Please discuss whether FortisBC has a view on the Collective First Nations’
10 position that some ratepayers of municipal utilities do not have a right to vote.

11
12 **Response:**

13 FortisBC’s evidence with respect to municipal utilities was intended to suggest that “indigenous
14 utilities” are likely to have characteristics which make them “akin” to municipal utilities that might
15 justify an exemption in certain circumstances, rather than an endorsement of the existing
16 municipal exclusion in the UCA.

17 The following discussion was prepared by legal counsel:

18 The observation of the Collective First Nations’ that some ratepayers of municipal
19 utilities do not have a right to vote is factually accurate, making the municipal
20 exclusion overly broad from a consumer protection standpoint. Nonetheless, the
21 rationale for the municipal exemption is that ratepayers have an avenue for
22 redress through the vote, rather than the (debatable) continued application of the
23 common law of public utility regulation and recourse to the courts as suggested
24 by the quoted passage in the preamble. In the absence of the UCA, the common
25 law would have applied to any public utility, municipal or otherwise and yet a
26 deliberate policy decision was made under the UCA to have a provincial
27 regulator regulate non-municipal utilities (and municipal franchises, concessions
28 etc.) and exempt municipal utilities.

29 The five groupings outlined on pages 10 to 11 of FortisBC’s evidence align with the
30 rationale for utility regulation and would ensure that all ratepayers are adequately
31 protected.

32 FortisBC believes that, from a consumer protection standpoint, it is better to alter the municipal
33 exception to address any perceived shortcoming in the protection offered to municipal utility
34 customers rather than using an imperfection in the current municipal exclusion to justify
35 compromising consumer protection in the case of future “indigenous utilities” as well. While the
36 similarities between some Indigenous utilities and municipal utilities can be addressed in this
37 Inquiry, the proper form of regulation of municipalities is a matter to be addressed in the BCUC
38 Municipal Energy Utilities Inquiry.

39

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1

2

3 4.5 Does FortisBC consider that an Indigenous utility may be able to develop other
4 recourse mechanisms for: non-Indigenous customers; Indigenous customers
5 without voting rights; or corporations?
6

6

7 **Response:**

8 FortisBC is of the view that BCUC oversight is appropriate in such circumstances, with the
9 existence of such other recourse mechanisms potentially informing how the BCUC exercises its
10 oversight as opposed to whether the BCUC should have oversight at all.

11 Whether an Indigenous utility is a “public utility” under the UCA is a binary determination, but the
12 way in which the utility is ultimately regulated is not. The BCUC is afforded considerable
13 flexibility with respect to the scope and form of regulation applied to public utilities, including
14 “indigenous utilities”. In certain circumstances, there may be merit to “light-handed” regulation in
15 which only certain aspects of an “indigenous utility’s” operations are actively regulated, or where
16 complaints-based regulation is sufficient. As a hypothetical illustration, the BCUC could
17 regulate contracts with non-Indigenous customers, Indigenous customers without voting rights,
18 or corporations, by providing these ratepayers with a complaints mechanism. The Indigenous
19 utility could be self-regulating in all other respects.

20 Certain alternative recourse mechanisms may also put the above-noted customer groups at risk
21 by not adequately protecting customers. As highlighted in the Spirit Bay Utilities Decision,
22 described on pages 13 to 16 of FortisBC’s evidence, alternative recourse mechanisms can
23 result in the owner of the utility also being its regulator. This would be the case where an
24 Indigenous Nation is both the majority owner of an “indigenous utility” and responsible for
25 accepting complaints from non-members of the Nation. In this circumstance only the members
26 of an Indigenous Nation would have a sufficient say in the governance of the nation to protect
27 their interests as ratepayers.

28

29

30

31 4.5.1 Does FortisBC consider that if other recourse mechanisms could be
32 demonstrated, that this would be a consideration in whether a section
33 88(3) exemption was warranted?
34

34

35 **Response:**

36 As described in FortisBC’s response to BCUC IR 1.4.5, the existence of an alternative recourse
37 mechanism other than voting rights could be a consideration in determining the nature of BCUC
38 regulation. This might entail consideration of a section 88(3) exemption from some parts of the



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- 1 UCA, or might simply be reflected in how the BCUC decides to regulate (e.g., “light-handed”
- 2 regulation).
- 3

1 **5.0 Reference: Exhibit C4-2, Section 4.3, 4.5, p. 11, 17–18**

2 **Indigenous Utility Regulation and small utilities**

3 On page 11 of Exhibit C4-2, FortisBC states with respect to “grouping 3” (a public utility
4 with controlling interest owned by an Indigenous Nation; serving one or more customers
5 who don’t have a say in the governance of the Indigenous Nation): “The nature of
6 regulation (i.e. whether light-handed or not) should depend on the extent of consumer
7 vulnerability and proportionality of regulatory burden.”

8 On pages 17 to 18, FortisBC describes the spectrum of regulation of public utilities,
9 referencing the Alternative Energy Solutions (AES) Inquiry Report.

10 5.1 In FortisBC’s view, please clarify whether small Indigenous utilities should be
11 subject to the same considerations as small non-Indigenous utilities, in
12 determining the nature of regulation.

13
14 **Response:**

15 In FortisBC’s view, the considerations for small “indigenous utilities” should be subject to the
16 same considerations as similarly situated non-“indigenous utilities” in determining the
17 appropriate nature of regulation. The underlying rationale for regulation will be similar from a
18 consumer protection perspective, and the considerations of efficiency and proportionality that
19 inform light-handed regulation will also be similar.

20
21

22
23 5.1.1 If FortisBC considers there are different considerations for Indigenous
24 utilities, please explain.

25
26 **Response:**

27 Please refer to FortisBC’s response to BCUC IR 1.5.1.

28
29

30
31 5.2 Please discuss if FortisBC considers that BCUC guidelines for scaled regulation
32 for Indigenous utilities would be appropriate or beneficial.

33

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1 **Response:**

2 FortisBC's evidence in this Inquiry suggests a scaled approach to the regulation of "indigenous
3 utilities"⁷ on the premise that the form of regulation should always be proportionate and efficient.
4 FortisBC considers that development of BCUC guidelines for scaled regulation of all smaller
5 public utilities, including "indigenous utilities", would be appropriate and beneficial.

6 FortisBC has participated in the development of BCUC guidelines for scaled regulation of
7 thermal energy service (TES). FortisBC considers that exercise to have been positive and
8 effective in developing a workable framework for the regulation of a new market. FortisBC
9 notes that the TES Guidelines were implemented with the intention of updating them as
10 experience and markets evolved.

11 "These Guidelines may be revised or updated from time to time in order to
12 incorporate lessons learnt and adjust to evolving market circumstances and
13 changes to the *Utilities Commission Act (UCA)*."⁸

14 FortisBC notes that it may be appropriate to develop an overall set of BCUC Guidelines for
15 scaled regulation of public utilities at this point in time, although it should occur outside of this
16 Inquiry to ensure that the appropriate stakeholders (Indigenous and non-Indigenous) are
17 involved. For the purposes of this Inquiry it is sufficient to recognize that similar policy
18 considerations are at play (proportional and efficient framework to protect consumers)
19 regardless of whether a small utility is an "indigenous utility" or not.

20
21

22

23 5.3 In FortisBC's view, please discuss if there would be any concerns with small
24 utilities (Indigenous or otherwise) being subject to a different degree of regulation
25 than the "full" regulation applied to FEI and FortisBC Inc.
26

27 **Response:**

28 FortisBC interprets the question to ask whether FortisBC would have any concerns if small
29 utilities (Indigenous or otherwise) were subject to regulatory treatment that, for instance,
30 exempts small utilities from certain sections of the UCA (such as pre-approval of rates and/or
31 capital expenditures) and/or has rates determined by agreement or using streamlined
32 processes. FEI supports scaled regulation, particularly in cases where the need for regulatory
33 efficiency is magnified such as in newly formed or small utilities or even in new business lines of
34 existing utilities. Proportional and efficient regulation that still protects consumers benefits both
35 utilities and utility customers.

36 FortisBC agrees with the Commission statements in the AES Inquiry:

⁷ Exhibit C4-2. Evidence of FortisBC Group of Companies. Section 4.3, pp. 10-11.

⁸ Thermal Energy Services Regulatory Framework Guidelines, Appendix A to Order G-27-15, page 5.

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1 *Key Principles:*

2 (i) *Where regulation is required use the least amount of regulation needed*
3 *to protect the ratepayer.*

4 (ii) *The benefits of regulation should outweigh the costs.*

5 *Guidelines:*

6 • *The form of regulation should:*

7 ○ *Provide adequate customer protection in a cost effective manner;*

8 ○ *Consider administrative efficiency;*

9 ○ *Consider the level of expenditure, the number of customers, the*
10 *sophistication of the parties involved and the track record of the*
11 *utility in undertaking similar projects; and*

12 ○ *Require the provision of sufficient information to allow the*
13 *Commission to assess the new business activity, and any rates to*
14 *be set, against BC's Energy Objectives and the requirements of*
15 *the Utilities Commission Act and the Clean Energy Act.⁹*

16
17 FortisBC is also prepared to participate in meaningful efforts to collaborate with parties and the
18 BCUC to develop such a framework, which might use the Thermal Energy Service Guidelines
19 as a foundation. As stated in FortisBC's response to BCUC IR 1.5.2, the potential for a scaled
20 utility framework applicable to small utilities generally is most appropriately considered outside
21 the context of this Inquiry.

22

⁹ Inquiry into the Offering of Product and Services in Alternate Energy Solutions and Other New Initiatives Report. Project No. 3698635, p. 18.

1 **6.0 Reference: Exhibit C4-2, Section 4.7, pp. 18–19**

2 **Additional considerations relevant to the regulatory framework**

3 FortisBC states in Exhibit C4-2:

4 Some presenters in the BCUC’s town hall meetings have expressed support for
5 the creation of a new regulator for ‘indigenous utilities’. FortisBC believes that
6 energy consumers in British Columbia, whether Indigenous or non-Indigenous,
7 are best served by the BCUC continuing to regulate all public utilities in British
8 Columbia. This would be irrespective of whether or not those utilities are
9 ‘indigenous utilities’. The BCUC has considerable expertise with public utilities.
10 There are advantages to having consistent application of decisions, based on
11 established regulatory principles and policy.

12 6.1 If a regulator for Indigenous utilities were to be created, please provide
13 hypothetical examples of how inconsistent application of decisions could
14 disadvantage public utilities regulated under the UCA and/or Indigenous utilities
15 subject to an Indigenous utility regulator.

16
17 **Response:**

18 FortisBC notes that the UCA does not bind the BCUC to precedent. Rather, each decision
19 reflects the circumstances and evidence relating to that particular application and the current
20 law that prevails. This framework can appropriately accommodate inclusion of the interests of
21 the relevant Indigenous community(ies) to the particular application.

22 Consistent decisions based on established regulatory principles and policy can benefit both
23 utilities and consumers. For instance:

24 • There may be instances where two utilities want to serve a particular area or customer.
25 If this occurred today, those applications would be heard together by the BCUC. Having
26 two regulators presiding over two distinct CPCN applications could give rise to the
27 situation where a CPCN is granted to two different entities to serve the same area. It
28 may not be in the public interest to have duplicate utility infrastructure on / under streets,
29 and a feature of a natural monopoly is that one utility can deliver the product to
30 consumers at a lower cost than multiple utilities. At a minimum, it would make it very
31 difficult for one regulator to review a CPCN while another related proceeding was
32 ongoing before another regulator.

33 • A similar disconnect could occur in the case of existing utility service areas. The same
34 regulator that granted a CPCN to one entity to operate in an area should be responsible
35 for determining whether a CPCN should subsequently be granted to another entity in the
36 same area. Determinations about the extensions of an “indigenous utility” into the
37 service area of another non-“indigenous utility” affect the ratepayers of the latter
38 because of the potential loss of volumes driving up delivery rates, the risk of



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1 underutilized or stranded assets, and the potential for a higher cost of capital due to
2 increasing business risk.

- 3 • Having different scaled frameworks in place for smaller non-“indigenous utilities” from
4 “indigenous utilities” would create an un-level playing field where they are competing for
5 business (e.g., for thermal energy utilities). Regulation gives rise to costs, and creates
6 uncertainty for developers. It could influence the developer’s decision.

7
8 FortisBC notes that it is suggesting that “indigenous utilities” that can demonstrate unified
9 governance between the provider and customer (akin to a municipal voter or strata unit owner)
10 would warrant an exemption in any event. There would be no need for active regulation in such
11 cases, whether by the BCUC or otherwise.

12