Doug Slater
Director, Regulatory Affairs

Gas Regulatory Affairs Correspondence
Email: gas.regulatory.affairs@fortisbc.com

Electric Regulatory Affairs Correspondence
Email: electricity.regulatory.affairs@fortisbc.com

FortisBC
16705 Fraser Highway
Surrey, B.C. V4N 0E8
Tel: (778) 578-3874
Cell: (778) 214-3842
Fax: (604) 576-7074
Email: doug.slater@fortisbc.com
www.fortisbc.com

September 10, 2019

Mr. Donald Flintoff
Richmond, BC
don_flintoff@hotmail.com

Attention: Mr. Donald Flintoff

Dear Mr. Flintoff:

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

Written Evidence of the FortisBC Group of Companies[1] (collectively FortisBC or the Companies)

FortisBC Responses to Mr. Don Flintoff (Flintoff) Information Request (IR) No. 1

In accordance with BCUC Order G-214-19 updating the Regulatory Timetable, FortisBC respectfully submits the attached response to Flintoff 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): Commission Secretary
Registered Parties

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

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A. DEFINITIONS

1.0 Reference: THE DEFINITION OF "INDIGENOUS UTILITIES"

Exhibit #C5-2, Section # 3, pp. # 5-7 Public Utility and Village

The Terms of Reference define "indigenous utility' as follows: "a public utility that is owned or operated in full or in part, by an indigenous nation". This definition is so broad that it would encompass:

- everything from a micro-utility owned, in whole or in part, by a First Nation for on-reserve service, to a utility like MHLP, all the way to a major investor-owned utility that happens to have sold a single non-voting share to an "indigenous nation";
- a company that provides, for compensation, any of the types of service referenced in the definition of "public utility", including natural gas, electricity, or thermal energy;
- a company that serves Indigenous peoples or non-Indigenous peoples; and
- a company that operates entirely on a Reserve, as well as a utility that covers the entire province.

…

The breadth of entities (which only vary by geographic scope and ownership) captured within the term "indigenous utility" demonstrates that the phrase is too broad to be useful in a practical sense when it comes to determining the appropriate approach to regulation.

LOCAL GOVERNMENT ACT, Part 2 — Incorporation of Municipalities and Regional Districts,

Division 4 — Specific Powers in Relation to Municipal Letters Patent, Section 26 — Letters patent for reserve village: additional powers

> **26** (1)Letters patent incorporating a village under section 9 (1) [incorporation of reserve residents as village] may
>
> (a) include exceptions from statutory provisions,
>
> (b) specify the effective period or time for an exception, and
>
> (c) provide for restriction, modification or cancellation by the Lieutenant Governor in Council of an exception or its effective period.

(2)The letters patent or agreement referred to in section 9 (1) may exempt the municipality or owners or residents from a provision of this or another Act and may include a provision considered desirable whether or not it is consistent with any Act.

1.1 Would the word “village” from the LGA inserted into the definition of public utility in the UCA along with municipality and regional district be sufficient to create a level playing field that protects not only the customers but all utilities in the province? See excerpt below:

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

…

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district ***or village*** within its own boundaries,

…

Response:

FortisBC does not consider that inserting the word “village” from the LGA into the definition of public utility in the UCA would create a level playing field as contemplated.

1.1.1 If not, why not? Please elaborate.

Response:

Amending the UCA as proposed would amount to a novel but restrictive regulatory model that would create regulatory complexity and uncertainty for Indigenous utilities, existing utilities and customers. In this context, a more nuanced regulatory model is required to create a level playing field that protects both customers and utilities. In FortisBC’s view, inserting the word “village” into the UCA would not create a level playing field because:

- Inserting the word “village” into the definition of public utility in the UCA would create a patchwork of villages, non-villages and Indigenous Nations that are not eligible to become villages under the LGA. Section 9(1) of the LGA provides for the incorporation of “the residents of an area of land inside a reserve” as a village. The provision’s scope is limited to bands within the meaning of the *Indian Act* and would not include other groups captured by the term “Indigenous Nation”.

- The incorporation process set out in section 9(2) of the LGA requires that each band complete the incorporation process. This would need to be undertaken before a band could be considered a village under the UCA and, therefore, excluded from the definition of public utility. The incorporation process requires: (i) the agreement of the Governor in Council and the band council; and (ii) an affirmative vote from the band's membership. While the process would be the same for all bands, reliance on the LGA would introduce unnecessary barriers for Indigenous utilities seeking an exemption from the UCA.

- Any change to the LGA could have unanticipated impacts on the regulatory framework developed by the BCUC with respect to Indigenous utilities. For example, if section 9 were removed from the LGA an Indigenous group that had not previously incorporated as a village would be prevented from doing so. This would allow certain bands to provide service without being subject to the UCA, while others would be prevented from doing so unless a new framework were developed.

- Rather than prioritizing access to safe and reliable service at a reasonable price for all, reliance on the term "village" could ultimately leave certain classes of customers without sufficient recourse (i.e., non-members of the Indigenous Nation). This is not conducive to the creation of a level playing field.

B. THE APPROPRIATE REGULATORY MODEL(S):

2.0 Reference: Approach to Indigenous Utility Regulation Can Be Usefully Considered in Relation to Five Groupings

Exhibit B-1, Section 1.4, pp. 8–9

Regulatory Groupings

Grouping	Description	FortisBC Position	Rationale
1	An "indigenous nation"[15] provides unmetered service to members only, without compensation.	Not subject to the UCA.	This service is not "public utility" service if there is no compensation payable.
2	Public utility with controlling interest owned by an "indigenous nation", serving only Indigenous peoples who have a say in the governance of the "indigenous nation".	Section 88(3) exemption from Part 3 of the UCA.	Similar to municipalities, where consumer protection is provided by the ability to vote for municipal government.
3	Public utility with controlling interest owned by an "indigenous nation"; serving one or more customers who don't have a say in the governance of the "indigenous nation"16	Regulated by BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates. The nature of regulation (i.e. whether light-handed or not) should depend on the extent of consumer vulnerability and proportionality of regulatory burden.shousdf should depend on the extent of consumer vulnerability and proportionality of regulatory burden.
4	Public utility with non-controlling interest owned by an "indigenous nation"; serving one or more customers who don't have a say in the governance of the "indigenous nation".18	Regulated by BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates. Necessary to avoid gaming. An investor owned public utility should not be able to avoid regulation by the BCUC, simply by granting a non-controlling interest to an "indigenous nation".

5	Public utility owned either by "indigenous nation", other non-Indigenous investors, or both; "indigenous nation" is contracted operator;	The owner is a public utility, regulated by the BCUC. A contractor may or may not be a public utility regulated by the BCUC. Nature of regulation depends on other factors typically considered by the BCUC.	A contractor may or may not be a public utility regulated by the BCUC, depending on the extent of delegation of the owner's rights and obligations. The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates.

2.1 Rational for Grouping 1 states: "This service is not "public utility" service if there is no compensation payable."

2.1.1 The concept of "free" is difficult to demonstrate. Compensation can take many forms not just currency. On November 26, 2018, the BCUC issued the Phase 1 Report. … The broad definition of "compensation" in the UCA encompasses many forms of direct and indirect compensation rendering most EV charging stations to be public utilities.

2.1.1.1 Please elaborate on what without compensation entails.

Response:

Section 1 of the UCA defines "compensation" as follows:

> a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it

The definition of "compensation" in the UCA is broad. It encompasses both direct and indirect compensation and does not restrict compensation to specific types of remuneration (i.e., a direct exchange of cash for service). This generally limits the scope of "without compensation" to circumstances where a *quid pro quo* exchange, either directly or indirectly, is absent between the customer and the utility. Put another way, something more than goodwill is required for such an exchange to be considered a form of compensation.

In theory, any indirect collection of, e.g., money via unattributed taxes or fees charged to residents of a reserve as part of global funding of operations generally might potentially be considered "compensation" for an unmetered service. However, FortisBC acknowledges that, in the context of an Indigenous utility, this type of link might be too indirect and may warrant a

narrower view to avoid capturing what are really intended to be more along the lines of social services within the definition of a "public utility" service. If the BCUC were to determine that the definition of "compensation" was broad enough to capture that circumstance, then it would likely warrant a section 88 exemption.

2.2 Rational for Grouping 2 states: "Similar to municipalities, where consumer protection is provided by the ability to vote for municipal government."

2.2.1 In the description "Public utility with controlling interest owned by an "indigenous nation", serving only Indigenous peoples who have a say in the governance of the "indigenous nation"; however, when the indigenous "public" utility serves non- indigenous customers who may not have a vote, does a difference arise?

Response:

FortisBC notes that the scenario described in the question above ("*indigenous 'public' utility serves non-indigenous customers who may not have a vote*") is the scenario described in Grouping 3 and Grouping 4 of FortisBC's evidence[1]. FortisBC noted that regulation is appropriate for Groupings 3 and 4 whereas an exemption under Section 88(3) may be appropriate for Grouping 2.

2.2.2 Should the exemption be applied for individually or granted to all indigenous nations as each indigenous nation may have different treaty agreements for utilities with the governments?

Response:

Please refer to FortisBC's response to BCUC IR 1.4.3.

2.3 Rational for Grouping 3 states: "The rationale for an exclusion akin to municipalities is absent. Some customers would have no meaningful recourse in the event of inadequate service or excessive rates."

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

2.3.1 As it is still Public utility with controlling interest owned by an "indigenous nation"; serving one or more customers who don't have a say in the governance of the "indigenous nation", would not the public utility come under the UCA? Please explain.

Response:

FortisBC notes that Grouping 3 is suggested to be regulated by the BCUC as the rationale for exclusion akin to municipalities is absent.

2.3.2 If the indigenous utility was owned or operated (not just an interest), could it be conferred with the status of a "village" akin to a municipality or regional district and permit the exempt utility to regulate rate and complaints similar to other municipalities or regional districts who have non-voting businesses or customers who live outside of their boundaries. Please elaborate if you feel otherwise.

Response:

Please refer to FortisBC's response to Flintoff IR 1.1.1.1 which outlines why the addition of the word "village" to the definition of public utility in the UCA would increase regulatory complexity and result in an undesirable patchwork approach to regulation.

2.4 Should the definition "public utility" apply for an indigenous nation who directly owns or operates a utility for the public or a corporation for compensation within its own boundaries?

Response:

As FortisBC highlighted in its responses to BCUC IRs 1.1.1. and 1.2.1, the rationale for third party regulation is to protect the ratepayers from the exercise of monopoly power by a utility. That economic rationale is related to access to recourse for the ratepayers and the risks and rewards for the utility owners rather than land ownership or title, although FortisBC notes that it is unclear which boundaries the question is referring to.

C. GROUP 3 INDIGENOUS UTILITIES – "INDIGENOUS NATION" HAS CONTROLLING INTEREST

3.0 Reference: "Indigenous Nation" Has Controlling Interest

Exhibit C4-2, Section 4.4.3, p. 16

Traditional Lands

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.

3.1 Does FBC believe that the Commission could regulate indigenous district lands and traditional lands using the same concept as the City of Nelson?

Response:

FortisBC assumes that when Mr. Flintoff refers to "indigenous district lands", he is referring to Reserve lands or other lands covered by a modern treaty (or self-government agreement) with accepted boundaries. We will refer to those lands as "Reserve/Treaty lands" in this response.

FortisBC has proposed a regulatory model that incorporates a grouping (i.e., Grouping 2) under which services provided to members of an Indigenous Nation within their Reserve/Treaty lands would be excluded from the definition of a "public utility" under the UCA. As discussed in the response to BCUC IR 1.4.3.1, FortisBC is proposing that service to non-members (Groupings 3 and 4) would result in the "indigenous utility" being subject to BCUC regulation with respect to service to non-members, irrespective of whether those non-members are located on or off Reserve/Treaty lands. This is similar, but not identical to how municipalities like the City of Nelson are regulated. Municipalities are regulated by the BCUC where they provide service beyond their boundaries; however, they are otherwise excluded from the definition of "public utility" despite serving some non-voters in the municipality (e.g. corporations). FortisBC believes that the approach to regulation outlined in that response for "indigenous utilities" is both effective and efficient, and would ensure customers without control over the utility have meaningful recourse in the event of inadequate service or excessive rates.

Like the boundaries of a municipality, the boundaries of Reserve/Treaty lands are generally well-defined. On the other hand, Indigenous "traditional lands" remain less-clearly defined (i.e., uncertain) and are more-readily subject to overlapping claims, which would add unintended complexity.

D. LOOPHOLES THAT WOULD ALLOW UTILITIES TO AVOID SCRUTINY

4.1 Reference: "Indigenous Nation" Has Controlling Interest

Exhibit C4-2, Section 4.4.3, p. 16

Traditional Lands

FortisBC's view is that "indigenous utilities" should generally be regulated in a similar manner to non- "indigenous utilities". In that case, a change in ownership should not result in the need to change the form of regulation.

4.2 Does FBC believe that it is necessary for indigenous utilities to be regulated in the same manner as non-indigenous utilities?

Response:

FortisBC believes that the rationale for the regulation of a utility is based on consumer protection and is valid irrespective of utility ownership whether Indigenous or non-Indigenous. Similar considerations would also apply to both "indigenous utilities" and non-"indigenous utilities" when determining the nature of the regulatory oversight (i.e., whether light-handed regulation is appropriate).

4.3 Please explain the benefits of having the same regulations apply to indigenous utilities as non- indigenous utilities.

Response:

The main benefit of having the same regulations apply is addressed in Section 4.6 of FortisBC's evidence[2]. FortisBC believes that the existing regulatory framework in BC is well established and robust. This provides both utilities and consumers with the benefit of a consistent and predictable regulatory framework.

[2] Exhibit C4-2. Evidence of FortisBC Group of Companies. Section 4.6, p. 18.