



**Nisga'a Lisims Government**

**BCUC INDIGENOUS UTILITIES REGULATION INQUIRY**

**EXHIBIT C21-4**

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September 10, 2019

By Email: [Commission.Secretary@bcuc.com](mailto: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 – Responses to BCUC Information Request No. 1**

Please find attached the Nisga'a Nation's responses to Information Request No. 1 submitted by the BCUC in the above noted matter.

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

Yours truly,

**NISGA'A LISIMS GOVERNMENT**

A handwritten signature in blue ink, appearing to read 'Collier Azak'.

Collier Azak  
Chief Executive Officer

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

**British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry, Project  
No. 1598998**

**Nisga'a Nation Response to British Columbia Utilities Commission (BCUC) Information  
Request (IR) No. 1 on Written Evidence**

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*We intend the capitalized terms used in the Nisga'a Nation's responses to the BCUC's IR No. 1 to have the same meaning as in the Nisga'a Treaty or the Nisga'a Nation's written evidence, as applicable.*

**1.0 Reference: Exhibit C21-3, pp. 6, 7, 12 Enactment of Nisga'a Nation Laws**

On pages 6 to 7 of Exhibit C21-3, the Nisga'a Nation as represented by the Nisga'a Lisims Government (Nisga'a Nation) states:

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

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

On page 13, the Nisga'a Nation states:

The Nisga'a Nation may in the future wish to draw down legislation regulating, among other things, a Nisga'a Utility for the generation, storage, distribution and sale of energy.

**Request:**

1.1 Please confirm whether to date, the Nisga'a Nation has enacted any laws specifically related to the provision or regulation of utility services.

**Response:**

While the Nisga'a Treaty recognizes Nisga'a Lisims Government's power to enact laws regulating utilities on Nisga'a Lands, the Nisga'a Nation confirms that it has not, to date, chosen to exercise that power.

- 1.2 Please clarify whether the establishment of a Nisga'a Utility would require the Nisga'a Nation to enact law(s) regarding the regulation of the Utility.
- 1.2.1 If not, please explain in the view of the Nisga'a Nation, that in the absence of laws enacted by the Nisga'a Nation whether the *Utilities Commission Act* (UCA) could apply to the regulation of a Nisga'a Utility.

**Response:**

The Nisga'a Nation would not be required to enact laws for the establishment of a Nisga'a Utility on Nisga'a Lands.

The Nisga'a Nation would be required to enact laws for the regulation of the activities and the services provided by the Nisga'a Utility on Nisga'a Lands, including the establishment of a board or commission to hear complaints about a Nisga'a Utility.

If Nisga'a Lisims Government has not enacted legislation regulating a Nisga'a Utility, the UCA (including any relevant exclusions and exemptions under the UCA) would apply to the regulation of a Nisga'a Utility subject to the provisions of the Nisga'a Treaty and until such time that the Nisga'a Nation enacts legislation regulating the Nisga'a Utility.

On pages 7 to 8, the Nisga'a Nation states:

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

...

Nisga'a Lisims Government may make laws in respect of the regulation, control, or prohibition of any actions, activities, or undertakings on Nisga'a Lands, or on submerged lands within Nisga'a Lands, other than actions, activities, or undertakings on submerged lands that are authorized by the Crown, that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace, or safety;...<sup>26</sup> [*Emphasis added*]

In Footnote 26, it is stated that:

Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 59. In the event of a conflict between a Nisga'a law under paragraph 59 or 60 and a federal or provincial law of general application, the federal or provincial law prevails to the extent of the conflict; Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 62.

- 1.3 Please clarify the extent to which the enactment of laws related to the regulation of a Nisga'a Utility is enabled by Nisga'a Treaty, Chapter 11 – Nisga'a Government Chapter, para 59.

**Response:**

The Nisga'a Nation does not draw its lawmaking authority related to the regulation of a Nisga'a Utility from a single provision of the Nisga'a Treaty. Rather, the provisions of the Nisga'a Treaty must be read together. This is similar to how British Columbia's legislative jurisdiction in respect of public utilities in the province does not derive from a single subject matter delineated at section 92 of the *Constitution Act, 1867*.

Accordingly, while paragraph 59 of Chapter 11 – Nisga'a Government is one aspect of the Nisga'a Nation's lawmaking authority to regulate, among other things, a Nisga'a Utility on Nisga'a Lands, the provisions of the Nisga'a Treaty must be read together to understand the full breadth of the Nisga'a Nation's lawmaking authority.

As a self-governing Nation with principal lawmaking authority for Nisga'a Lands, the Nisga'a Nation has general authority to enact laws that regulate utilities on Nisga'a Lands, including the regulation of the services provided by a Nisga'a Utility.

The Nisga'a Nation refers the BCUC to section 3.2 of the Nisga'a Nation's written evidence, specifically paragraph 34, which sets out certain provisions of the Nisga'a Treaty that enables the Nisga'a Nation to enact laws related to the regulation of a Nisga'a Utility, including paragraph 59 of Chapter 11 – Nisga'a Government.

In any event, the Nisga'a Nation notes that paragraph 62 of Chapter 11 – Nisga'a Government is not a limitation on Nisga'a Lisims Government's law-making authority. Rather, it sets out that provincial laws would prevail only to the extent of a "conflict" between a Nisga'a law and a provincial law on the subject matters delineated at paragraph 59. Paragraph 52(a) of Chapter 2 – General Provisions sets a high threshold for a "conflict", stating that there is only a conflict between laws "if compliance with one law would be a breach of the other law".<sup>1</sup>

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<sup>1</sup> See paragraphs 52 and 53 of Chapter 2 – General Provisions of the Nisga'a Treaty for provisions addressing conflict and inconsistency of laws, and incidental impacts of Nisga'a laws on federal and provincial laws.

- 1.4 Please discuss if the Nisga'a Nation has a view on whether there may be any potential for conflict between the UCA and a law enacted by the Nisga'a Nation pursuant to Nisga'a Treaty, Chapter 11 Nisga'a Government Chapter, para 59.

**Response:**

The Nisga'a Nation refers the BCUC to its response in IR 1.3 above and to paragraphs 9, 14, 30, and 31 of the Nisga'a Nation's written evidence.

As noted at paragraph 34 of the Nisga'a Nation's written evidence, various provisions of the Nisga'a Treaty enable the Nisga'a Nation to enact laws related to the regulation of a Nisga'a Utility – some of these provisions provide that Nisga'a laws will prevail to the extent of any conflict or inconsistency with applicable provincial laws, while others provide that provincial laws will prevail to the extent of any conflict with applicable Nisga'a laws.

There may be potential for inconsistency or conflict between provisions of the UCA and those of a Nisga'a law regulating Nisga'a Utilities on Nisga'a Lands. Since Nisga'a Lisims Government has not, to date, enacted any such Nisga'a law, it would not be appropriate to attempt to speculate on the extent of any such inconsistency or conflict.

**2.0 Reference: Exhibit C21-3, pp. 3, 16, 17 Proposed Exclusion from Definition of Public Utility**

On page 3 of Exhibit C21-3, the Nisga'a Nation states:

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

On pages 16 to 17, the Nisga'a Nation proposes an exclusion to be added to the UCA definition of a "public utility." The Nisga'a Nation states on page 6:

The specific exclusion is necessary to respect the Nisga'a Nation's jurisdiction and allow the Nisga'a Nation to regulate the services provided by a Nisga'a Utility.

**Request:**

- 2.1 On the basis that the Nisga'a Nation has authority to enact laws that regulate utilities on Nisga'a Lands, which may prevail over the UCA, please explain why an exclusion from the UCA definition of a "public utility" is necessary.

**Response:**

The Nisga'a Nation refers the BCUC to its response in IR 1.4 above and to paragraphs 9, 10, 14, 17, 30, 31, 51, and 65-69 of the Nisga'a Nation's written evidence.

In paragraph 9 of the Nisga'a Nation's written evidence, the Nisga'a Nation states:

The Nisga'a Treaty has "been carefully crafted to respect constitutional principles and to fit into the wider constitutional fabric of Canada",<sup>2</sup> and sets out subject matters where Nisga'a laws will prevail over any inconsistent or conflicting provincial laws, and conversely, subject matters where provincial laws will prevail over Nisga'a laws to the extent of any conflict. Given the breadth of subject matters regulated under the UCA, there is a risk that its application on Nisga'a Lands will result in a patch work of prevailing provisions of Nisga'a laws and the UCA, and create regulatory uncertainty.

Therefore, although the Nisga'a Nation maintains that it has lawmaking authority to regulate, among other things, a Nisga'a Utility on Nisga'a Lands, an exclusion from the definition of "public utility" in the UCA would assist in providing regulatory certainty on Nisga'a Lands.

As an example, section 21(1) of the UCA assists in creating regulatory certainty by stating that Part 3 of the UCA "applies only to a public utility that is subject to the legislative authority of the Province."

Furthermore, excluding the utility services provided by the Nisga'a Nation from the definition of "public utility" in the UCA would respect the Nisga'a Nation's jurisdiction to organize its own affairs, including the flexibility in determining the structure and services to be provided by a Nisga'a Utility.

In addition, this exclusion would also be consistent with the BCUC's approach with respect to municipalities and regional districts. On this point, the Nisga'a Nation refers the BCUC to paragraphs 73-81 of the Nisga'a Nation's written evidence.

On a more fundamental level, the Nisga'a Treaty could, and should, be a solid basis for future ongoing reconciliation, but this goal cannot be achieved if the federal and provincial government, or independent agents of the provincial government like the BCUC, do not take steps to give effect to the government-to-government relationship the Nisga'a Nation has worked so hard to build with its Treaty partners.

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

Including the exclusion the Nisga'a Nation as suggested would protect the Nisga'a Nation's broad jurisdiction on Nisga'a Lands and honour a government-to-government relationship between British Columbia and the Nisga'a Nation.

**3.0 Reference: Exhibit C21-3, p. 12 Attributes of a Nisga'a Utility**

On page 12 of Exhibit C21-3, the Nisga'a Nation states:

A Nisga'a Utility could have the following attributes, while still retaining its fundamental character:

a) wholly or partly owned by the Nisga'a Nation or an entity owned by the Nisga'a Nation;

b) majority owned by the Nisga'a Nation or an entity owned by the Nisga'a Nation, with other Indigenous or non-Indigenous partners;

...

e) the Nisga'a Utility provides services within Nisga'a Lands (i.e. 'within its own boundaries');....

**Request:**

3.1 Please confirm, or explain otherwise, that a Nisga'a Utility would be majority owned by the Nisga'a Nation or an entity owned by the Nisga'a Nation.

**Response:**

The Nisga'a Nation confirms that a Nisga'a Utility would be majority owned by the Nisga'a Nation or an entity majority owned by the Nisga'a Nation (*i.e.* a limited partnership or corporation).

The fundamental element that would define the utility as a Nisga'a Utility would be that the Nisga'a Nation is providing the service, either directly or indirectly through contractors, within Nisga'a Lands.

The Nisga'a Nation further emphasizes that as a self-governing nation, the Nisga'a Nation should have the flexibility to determine how it will structure a Nisga'a Utility. The Nisga'a Nation may choose to offer services through a corporation or limited partnership, or enter into contracts for the provisions of services with other providers.

The Nisga'a Nation refers the BCUC to paragraphs 50 and 51 of the Nisga'a Nation's written evidence for further elaboration.

- 3.2 Please discuss if the Nisga'a Nation has a view as to how a Nisga'a Utility would be regulated if it were to provide service beyond Nisga'a Lands.

**Response:**

At this time, the Nisga'a Nation wishes to limit its responses to the services provided by a Nisga'a Utility on Nisga'a Lands.