



**Nisga'a Lisims Government**

**BCUC INDIGENOUS UTILITIES REGULATION INQUIRY  
EXHIBIT C21-5**

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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 Flintoff Information Request No. 1**

Please find attached the Nisga'a Nation's responses to Information Request No. 1 submitted by Donald Flintoff 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 Don Flintoff (Flintoff) Information Request (IR) No. 1  
on Written Evidence**

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*The Nisga'a Nation intends the capitalized terms used in the Nisga'a Nation's responses to Mr. Flintoff'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.*

**A. EXCLUSION FROM UCA**

**1.0 Reference: Nisga'a Nation Jurisdiction  
Exhibit C21-3, Section 67, p. 16  
Excluded from regulation under the UCA**

67. To recognize the Nisga'a Nation jurisdiction, utility services provided by the Nisga'a Nation should be excluded from regulation under the UCA.

68. The Nisga'a Nation is not seeking to be considered a municipality for the purpose of the UCA. Rather than attempting to "fit" the Nisga'a Nation under the definition of "municipality" within the meaning of the *Interpretation Act*, the UCA should explicitly excluded the utility service provided by the Nisga'a Nation. Such an exemption will honour a government-to-government relationship between British Columbia and the Nisga'a Nation, and reflect the Nisga'a Nation's authority to regulate public utilities, specifically a Nisga'a Utility, on Nisga'a Lands as set out in the Treaty.

**Request:**

1.1 If the Nisga'a Nation is excluded from the UCA, who will regulate the sale or purchase of energy at the boundaries of Nisga'a Lands?

**Response:**

The Nisga'a Nation would regulate the sale or purchase of energy within Nisga'a Lands. The Province would be responsible for regulating the sale and purchase of utilities outside of Nisga'a Lands.

- 1.1.1 Is the Nisga'a nation proposing that the NEB become its regulator? Please explain.

**Response:**

The Nisga'a Nation is not proposing that the NEB become its regulator.

The Nisga'a Nation has comprehensive jurisdiction to enact and administer laws regulating, among other things, the services provided by a Nisga'a Utility on Nisga'a Lands. Although the Nisga'a Nation has not established a Nisga'a Utility and therefore, has not enacted legislation to regulate a Nisga'a Utility, the Nisga'a Nation may choose to do so in the future.

The Nisga'a Nation refers Mr. Flintoff to paragraphs 7-10, 17, 22-34, 65-70 of the Nisga'a Nation's written evidence.

- 1.1.2 How does the Nisga'a Nation propose to enter into Energy Purchase Agreements EPA with say BC Hydro?

**Response:**

The Nisga'a Nation is a distinct legal entity with the capacity, rights, powers and privileges of a natural person, and the Nisga'a Nation acts through Nisga'a Lisims Government.<sup>1</sup> It can therefore enter into agreements for the purchase or sale of energy with other entities, such as BC Hydro.

- 1.1.3 Assuming the Nisga'a Nation's customer base is small, how does the Nisga'a Nation propose to develop its resources and sell to a broader market that is highly regulated by BCUC and NEB?

**Response:**

The Nisga'a Nation would decide how to best develop its customer base and market based on the circumstances at the time. The objective of a Nisga'a Utility would be to serve Nisga'a citizens, non-Nisga'a residents, Nisga'a businesses and/or non-Nisga'a businesses within Nisga'a Lands with fair and efficient services.

- 1.2 Does the BC government have any authority to regulate energy services within the boundaries of Nisga'a Lands?

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<sup>1</sup> Nisga'a Treaty, Chapter 11 - Nisga'a Government Chapter, para 5.

**Response:**

The Nisga'a Nation's written evidence addresses both the Nisga'a Nation's authority to regulate utilities within the boundaries of Nisga'a Lands and the application of provincial law (see part 3.2 of the Nisga'a Nation's written evidence). While federal and provincial laws generally apply to the Nisga'a Nation, the Nisga'a Treaty will prevail "in the event of an inconsistency or conflict between [the Nisga'a Treaty] and the provisions of any federal or provincial law..." (Nisga'a Nation written evidence at para 30).

See paragraphs 9, 14, 30-31 and 34 of the Nisga'a Nation's written evidence.

It is not clear what is meant by "energy services". We have not addressed the regulation of energy services, to the extent that it may differ from utility services.

- 1.3 Does BC Hydro or any other utility (public or otherwise) own assets or infrastructure within the boundaries of Nisga'a lands?

**Response:**

BC Hydro and other utility companies own assets and infrastructure on Nisga'a Lands that are subject to specific provisions of the Nisga'a Treaty and applicable Nisga'a laws.

- 1.3.1 Does the Nisga'a Nation currently regulate who does utilities?

**Response:**

This question is not clear. The Nisga'a Nation is not currently regulating any Nisga'a Utilities.

The Nisga'a Nation has not enacted laws specifically regulating utilities within Nisga'a Lands. However, utilities providers are subject to the provisions of the Nisga'a Treaty, and in particular the Roads and Rights of Way Chapter, applicable Nisga'a laws, and the terms of any licences of occupation granted by the Nisga'a Nation.

- 1.3.2 Would the Nisga'a Nation consider acquiring these other utility assets rather than having them become stranded assets?

**Response:**

This question is outside the scope of the Inquiry.

- 1.3.3 Does CHAPTER 7, ROADS AND RIGHTS OF WAY, Ownership of Works and Plant apply to the above assets? Please explain.

**Response:**

The Roads and Rights of Way Chapter of the Nisga'a Treaty applies, subject to its specific provisions, to public utility assets and infrastructure located on Nisga'a Lands.

- 1.4 Who currently regulates safety and rates for BC Hydro and BC Tel (?) on Nisga'a Lands?

**Response:**

Public utilities on Nisga'a Lands are generally regulated through a combination of provincial law, federal law, applicable provisions of the Nisga'a Treaty, and in particular the Roads and Rights of Way Chapter, applicable Nisga'a laws, and the terms of any licences of occupation granted by the Nisga'a Nation.

- 1.5 Does Technical Safety BC provide inspection and permit services on Nisga'a Lands?

**Response:**

This question is outside the scope of the Inquiry. This question is best addressed to Technical Safety BC.

- 1.6 Considering the jurisdictional matters, does the BC Lieutenant Governor in Council have the jurisdictional ability to include the Nisga'a Nation in this inquiry regarding the Regulation of Nisga'a Utilities? Please explain.

**Response:**

The intention of this question is not clear. Nonetheless, this question is best addressed to the BC Lieutenant Governor in Council.

The Nisga'a Nation is voluntarily participating in this Inquiry, and appreciates this opportunity to provide information to the BCUC and other interveners about the Nisga'a Treaty and the Nisga'a Nation's jurisdiction on Nisga'a Lands.

- 1.7 Was the Nisga'a Nation made aware of this inquiry by the appropriate means? Please explain.

**Response:**

The Nisga'a Nation refers Mr. Flintoff to the Nisga'a Nation's response in IR 1.6 above and otherwise submits that this question is outside the scope of the Inquiry.

**B. NISGA'A NATION'S PROPOSAL TO ALTER UCA**

**2.0 Reference: Nisga'a Nation Proposal  
Exhibit C21-3, Section 69, pp 16-17  
Wording**

69. The Nisga'a Nation proposes that the following exclusion be added to the UCA definition of "public utility":

"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

(a) 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, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality, a regional district, the **Nisga'a Nation or a Nisga'a Village** in respect of services provided by the municipality, the regional district, **the Nisga'a Nation or a Nisga'a Village** within its own boundaries. [emphasis added]

**Request:**

2.1 Given the definition, does the Nisga'a Nation agree that the Nisga'a Nation's proposed changes only excludes the Nisga'a Nation from regulation as long as the Nisga'a Nation owns the Nisga'a Utility outright and not through another corporate structure (wholly owned, majority owned, partly owned, or with other Indigenous or non-Indigenous partners)? Please explain.

**Response:**

The Nisga'a Nation disagrees with the above statement, and refers Mr. Flintoff to paragraphs 8, 10, 50 and 51 of the Nisga'a Nation's written evidence. The Nisga'a Nation is only seeking an exemption for Nisga'a Utilities, which may include, among other things, utilities, owned or operated, in whole or in part, by the Nisga'a Nation (see paragraph 8 of the Nisga'a Nation's written evidence).

The fundamental element that would define a Nisga'a Utility would be that the Nisga'a Nation is providing the service, either directly or through contractors, within Nisga'a Lands. The Nisga'a Nation, as a self-governing nation, should have the flexibility in determining the structure of the Nisga'a Utility, whether it is owned outright by the Nisga'a Nation or owned through another corporate structure, wholly or with other Indigenous or non-Indigenous partners.

2.2 What happens if the Nisga'a Nation decides to sell the utility?

**Response:**

If the Nisga'a Nation decides to sell a Nisga'a Utility, and it loses the fundamental element that defines a Nisga'a Utility as set out in paragraph 50 of the Nisga'a Nation's written evidence, it will no longer be a Nisga'a Utility. Another form of regulation may apply to the utility in that situation.

**C. OWNERSHIP & OPERATION**

**3.0 Reference: Nisga'a Utility Ownership & Operation  
Exhibit C21-3, Section 50, p 12  
UCA**

The definition states:

"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

**Request:**

3.1 Does the Nisga'a Nation agree that only if the Nisga'a Nation owns the Nisga'a Utility outright, then it is not included in its proposed definition of a public utility?

**Response:**

The Nisga'a Nation disagrees with the above-noted statement, and refers Mr. Flintoff to paragraphs 8, 10, 50 and 51 of the Nisga'a Nation's written evidence and its response in IR 2.1 above.

A Nisga'a Utility may be owned or operated by the Nisga'a Nation directly or indirectly. Various forms of corporate entities may be used as long as it is ultimately controlled by the Nisga'a Nation.

3.2 Does the Nisga'a Nation agree that corporations (wholly owned, partly owned, owned with other Indigenous or Non-Indigenous partners) are still, by the proposed definition, public utilities subject to regulation but eligible

for exemptions from regulation of certain parts of the UCA? Please explain.

**Response:**

The Nisga'a Nation will comment only on corporations owned, in whole or in part, by the Nisga'a Nation. The Nisga'a Nation further refers Mr. Flintoff to paragraphs 8, 10, 50 and 51 of the Nisga'a Nation's written evidence.

In addition, as a self-governing nation, and distinguishable from municipalities and regional districts, the Nisga'a Nation should not be confined in structuring a Nisga'a Utility in the same way as municipalities must structure utilities to be exempt from regulation under the UCA.

- 3.3 Please explain the difference between a Nisga'a Nation directly owned, a Nisga'a government corporation, a Nisga'a exempt corporation, and a "person" as defined above in the definition of a public utility in the UCA.

**Response:**

There is no difference between a corporation that is controlled by the Nisga'a Nation and a corporation that is controlled by a municipality. Both corporations are governed by provincial or federal legislation depending upon the jurisdiction of incorporation.<sup>2</sup>

Nisga'a exempt corporations and Nisga'a government corporations are not relevant for the purpose of the Inquiry, and are only relevant for the purposes of the Fiscal Relations Chapter of the Nisga'a Treaty.

**D. NISGA'A FINAL AGREEMENT**

**4.0 Reference: Nisga'a Final Agreement  
Application of British Columbia Laws**

**Request:**

- 4.1 Please confirm that under Legal Proceedings, Notice of issues arising, section 20(1) shall not be decided until the party raising the issue has properly served notice on the Attorney General of Canada, the Attorney General of British Columbia and the Nisga'a Lisims Government.

**Response:**

This question is outside the scope of the Inquiry.

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<sup>2</sup> Nisga'a Treaty, Chapter 1 – Definitions; Nisga'a Treaty, Chapter 11 – Nisga'a Government, {00054414;1}

4.1.1 To your knowledge, has notice been served on any of the above parties?

**Response:**

The Nisga'a Nation refers Mr. Flintoff to its response to IR 4.1 above.

**Reference:**

Chapter 2 - PROVINCIAL LAW

29. Canada will recommend to Parliament that federal settlement legislation include a provision that, to the extent that a law of British Columbia does not apply of its own force to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, or Nisga'a citizens, that law of British Columbia will, subject to the federal settlement legislation and any other Act of Parliament, apply in accordance with this Agreement to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, or Nisga'a citizens, as the case may be.

4.2 Please confirm BC Laws only apply subject to federal approval.

**Response:**

This question is outside the scope of the Inquiry.

4.3 If the unlicensed water flow is 300,000 cubic decameters of water per year, what is the BC Indigenous Utilities Regulation Inquiry 4 IR No. 1 licensed water flow?

**Response:**

This question is outside the scope of the Inquiry.

4.3.1 Does the Nisga'a Nation have plans to develop hydro-electric resources on their lands?

**Response:**

This question is outside the scope of the Inquiry.

4.3.1.1 What is the amount of energy from hydro-electric generations that is currently being planned?

**Response:**

This question is outside the scope of the Inquiry.

4.3.1.2 If the amount of energy generated, exceeds the needs of the Nisga'a Nation, how will it dispose of its surplus energy?

**Response:**

This question is outside the scope of the Inquiry.

**5.0 Reference: Nisga'a Final Agreement  
Nisga'a Hydro Power Reservation**

Nisga'a Hydro Power Reservation

140. In addition to the Nisga'a water reservation established under paragraph 122, British Columbia will establish a water reservation in favour of the Nisga'a Nation, for 20 years after the effective date, of all of the unrecorded waters of all streams, other than the Nass River, that are wholly or partially within Nisga'a Lands (the "Nisga'a Hydro Power Reservation"), to enable the Nisga'a Nation to investigate the suitability of those streams for hydro power purposes, including related storage purposes.

141. If the Nisga'a Nation applies for a water reservation for hydro power purposes on a stream subject to the Nisga'a Hydro Power Reservation, British Columbia will, after considering the results of any investigations referred to in paragraph 140, establish a water reservation for hydro power purposes and any related storage purposes on the unrecorded waters of that stream if it considers that stream to be suitable for hydro power purposes.

142. If British Columbia establishes a water reservation for a stream under paragraph 141, the Nisga'a Hydro Power Reservation will terminate in respect of that stream.

143. If, after British Columbia establishes a water reservation under paragraph 141, the Nisga'a Nation applies for a water licence for hydro power purposes and any related storage purposes for a volume of flow from the stream subject to that water reservation, British Columbia will grant the water licence if the proposed hydro power project conforms to federal and provincial regulatory requirements.

144. If British Columbia issues a water licence under paragraph 143 for a stream, the water reservation established under paragraph 141 will terminate in respect of that stream.

**Request:**

5.1 In what year does Nisga'a Hydro Power Reservation expire?

**Response:**

This question is outside the scope of the Inquiry.

5.2 Does BC continue to have authority over water reservation for hydro power?

**Response:**

This question is outside the scope of the Inquiry.

5.3 If the Nisga'a Nation is not regulated under the UCA and is treated differently than other utilities in BC, how does it propose to sell its surplus energy?

**Response:**

If the Nisga'a Nation is not regulated under the UCA, the Nisga'a Nation could still sell its surplus energy to other utilities in the normal commercial course.

5.4 Does the Nisga'a Nation find any benefits in being regulated as like any other utility in BC?

**Response:**

The purpose of the Nisga'a Nation's written evidence in this Inquiry is to provide information on the Nisga'a Nation's jurisdiction on Nisga'a Lands and its broad lawmaking authority to regulate, among other things, a Nisga'a Utility for the generation, storage, distribution and sale of energy on Nisga'a Lands.

The Nisga'a Nation further notes that although there may be benefits in being regulated by the BCUC, as like other utilities in British Columbia, the Nisga'a Nation, as a self-governing nation, should have the flexibility to determine whether to be regulated by the BCUC. As part of the exercise of its governance right, the Nisga'a Nation may adopt by reference legislative regimes like the UCA as part of the Nisga'a Nation regulatory regime, and contract with a regulatory body such as the BCUC to regulate a Nisga'a Utility.

- 5.5 As uniform regulation is necessary to provide a stable environment throughout BC for the continuing development of the energy industry, is the Nisga'a Nation willing to assist the BCUC in achieving this goal or does it prefer some other arrangement? If so, please explain why.

**Response:**

This question is outside the scope of the Inquiry. The Nisga'a Nation rejects any suggestion that implementing the provisions of the Nisga'a Treaty, now or in the future, may undermine the stability of the regulatory environment for public utilities in the province or the valid regulatory objectives of the BCUC. The Nisga'a Nation could also harmonize its regulation with the BCUC and other regulatory entities.

**E. NISGA'A UTILITY CUSTOMERS**

**6.0 Reference: Nisga'a Utility's Customers  
Exhibit C21-3, Section 17, p. 4**

The specific exclusion is necessary to respect allow the Nisga'a Nation's jurisdiction and allow the Nisga'a Nation to regulate the services provided by a Nisga'a Utility. The Nisga'a Nation has comprehensive jurisdiction to enact and administer that regulation. That governance structure also protects the public interest and offers Nisga'a Utility customers recourse to protect their interests related to utility service.

**Request:**

- 6.1 What is the potential size of Nisga'a Nation's customer base?

**Response:**

Answering IRs 6.1 – 6.4 would require the Nisga'a Nation to speculate since it has not studied the potential size of the Nisga'a Nation's customer base. The Nisga'a Nation submits it would be inappropriate to speculate, and declines to do so.

- 6.2 What is the potential load of the Nisga'a Nation's customer base?

**Response:**

The Nisga'a Nation refers Mr. Flintoff to its response in IR 6.1 above.

- 6.3 What is the potential annual energy that the Nisga'a Utility can generate in 5 years?

**Response:**

The Nisga'a Nation refers Mr. Flintoff to its response in IR 6.1 above.

- 6.4 If the energy generated exceeds the energy consumed by Nisga'a Nation, how does the Nisga'a Nation proposed to sell it and who will regulate the sale of the energy outside of Nisga'a Nation's lands?

**Response:**

The Nisga'a Nation refers Mr. Flintoff to its response in IR 6.1 above.