REQUESTOR NAME: **British Columbia Utilities Commission**
INFORMATION REQUEST **1.1, 2.1, 2.2, 2.3, 3.1, 4.1 and 5.1**
DATED: **August 2, 2019**
TO: **Collective First Nations**
RE: **British Columbia Utilities Commission – Indigenous Utilities Regulation Inquiry**
RESPONSE ISSUED: **September 10, 2019**

Reference: Exhibit C13-2, p. 3
Barriers to entry

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

> First Nations in general and the Collective First Nations in particular have never had an equal opportunity in British Columbia to participate in the: '(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 …'
>
> …With respect to the generation, transmission and distribution of electrical energy by BC Hydro [British Columbia Hydro and Power Authority] in the majority of the Province, the matter of BCUC [British Columbia Utilities Commission] regulation is complex. In some cases this regulation has been and is an on again off again proposition including the exemption from regulation of certain types of activities depending on the desires of its owner, the Province of B.C. This same owner provides BC Hydro with access to debt and equity financing on very favorable terms. It also appoints the quasi-judicial regulator – the BCUC. In total this represents a formidable barrier to entry for an Indigenous Utility in the electrical sector.

Please discuss the extent to which the Collective First Nations consider that the barriers to entry for Indigenous utilities are different from those experienced by prospective non-Indigenous, non-incumbent utilities.

Response:

Since the time of first contact with Europeans, First Nations were deprived of many of the rights they previously had within their own cultures and the rights Europeans accorded to themselves in British Columbia. The BCUC Indigenous Utilities Regulation Inquiry is not the appropriate forum to recant them in detail.

The Collective First Nations see economic opportunities as one of the means of bettering the lives of their members. One such opportunity is owning or controlling public utilities as this term is defined in the Utilities Commission Act (B.C.). This Act is a formidable barrier to any entity including First Nations, non-Indigenous and non-incumbent utilities to provide public utility services. The difference between First Nations providing these services and the non-Indigenous and non-incumbent utilities is the later entities were never deprived of their rights including the

land and resources in their traditional territories.

The very assets that Collective First Nations could have used as leverage to create economic opportunities for their members were not available to them. Through rights and title proceedings brought before the Courts and treaty or other negotiations, First Nations including Collective First Nations are slowly reclaiming some of their rights but this is not an exercise prospective non-Indigenous and non-incumbent utilities have to go through.

Reference: Exhibit C13-2, pp. 7, 11, 12; Exhibit C20-2, p. 12; Exhibit C16-2, p. 6
Defining characteristics of Indigenous utilities

On page 7 of Exhibit C13-2, the Collective First Nations state: "Indigenous nations should have majority ownership or control of Indigenous utilities. The benefits from these utilities should accrue as much as possible to Indigenous nations and not others."

The Coastal First Nations and the First Nations Leadership Council submit in their written evidence that a majority-ownership test should not be the only measure for identifying an Indigenous utility, as some First Nations may face constraints securing a majority equity position upfront.

Please discuss whether the Collective First Nations would consider Indigenous Nations[1] with a minority share in the utility, but with demonstrable benefits accruing to the Nation, to be an Indigenous utility.

Response:

It is a possibility but not the preference of the Collective First Nations., Indigenous Utilities should have majority ownership or control of Indigenous Utilities to be considered as such. If this standard cannot be achieved then the "Indigenous Utility" in question would be free to apply to for an exemption from regulation under the Utilities Commission Act or if the problem as outlined by the Coastal First Nations is a persistent and re-occurring the matter could be revisited by consultation between Indigenous Nations and senior Governments.

On page 11 of Exhibit C13-2, in response to the question "Does the Indigenous utility provide service on other lands?" the Collective First Nations state: "Subject to reviewing the submissions of other interveners and interested parties, no."

Please confirm, or explain otherwise, if the position of the Collective First Nations is that an Indigenous-owned utility operating outside of its: Reserve; Indigenous Nation/Band-owned lands; Treaty lands; and traditional territory, would be subject to regulation by the BCUC.

Response:

Confirmed except that if collectively First Nations created a public utility that was majority owned or controlled by the same First Nations that operated within the Reserve(s) Indigenous

[1] As defined in section 1 of Order in Council No. 108, http://www.bclaws.ca/civix/document/id/oic/oic_cur/0108_2019.

Nation/Band-owned land(s), Treaty land(s) and traditional territory of the same First Nations, it would not be subject to regulation by the BCUC.

On page 12 of Exhibit C13-2, in response to the question "Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?" the Collective First Nations state in part:

> The Collective First Nation's preference is that they pass their own laws regarding Indigenous Utilities within their traditional territories. The courts have recognized that there are indigenous laws and space must be made within existing law.

Please discuss if the Collective First Nations have a view on how laws regarding Indigenous utilities would be applied where there are potential overlaps in traditional territories between Indigenous Nations.

Response:

It would be a matter that the Indigenous Nations should settle as between themselves and barring settlement, it would be determined by the Courts.

Reference: Exhibit C13-2, pp. 9–10, 11
Utility infrastructure

On pages 9 to 10 of Exhibit C13-2, the Collective First Nations state:

> It is highly unlikely that the Indigenous Utility would compete with or displace other services that are currently provided by third parties and in particular public utilities. Because of the cost of building and maintaining utility infrastructure, it is generally not economic to duplicate this infrastructure. It is expected that Indigenous Utilities would serve new developments and not existing ones.

On page 11 of Exhibit C13-2, the Collective First Nations state: "There may be other instances where the existing public utility infrastructure is at capacity and it would be advantageous for the Indigenous Utility to develop parallel infrastructure."[2]

In the Collective First Nations' view, please clarify whether such "parallel infrastructure" developed by an Indigenous utility might compete with or displace existing utility services.

Response:

As noted by the Collective First Nations, it is generally not economic to duplicate existing infrastructure. However there may be instances where this existing infrastructure is at or near its ability to serve new load. For example an electrical transmission line that has no additional ability to serve new load. In this circumstance, it may be more economic for the Indigenous Utility to develop parallel infrastructure but to serve load that the incumbent utilities infrastructure cannot. In this sense it would be in competition with the incumbent utility primarily because the

[2] Emphasis added.

incumbent utility wasn't prepared to make the necessary investment.

Reference: Exhibit C13-2, p. 12
Common law

The Collective First Nations state in Exhibit C13-2:

> Indigenous Utilities should not be regulated under the UCA [*Utilities Commission Act*]. At a minimum, Indigenous Utilities should have the same status under the UCA as municipalities and regional districts without being designated as such. Although there as some similarities to municipalities and regional districts that have been highlighted in this Submissions, the Collective First Nations right to pass laws in their traditional territories is different than the law-making authority of municipal and regional governments. Advancing the proposition that they should be exempt from regulation under the UCA by using the example of municipalities and regional districts is not the equivalent of saying First Nations are municipalities or regional district or that the law-making authority is the same.
>
> Indigenous utilities should be regulated by their Indigenous owners subject to the common law.

Please explain how common law would apply to protect ratepayers who may be non-Indigenous but either living on traditional territory lands or being served by an Indigenous utility beyond that Nation's traditional territory.

Response:

It is important to note that the non-Indigenous ratepayer first must be a customer of the Indigenous Utility. In all likelihood they will be a customer of an incumbent utility which substantially narrows the scope of the concern raised in the question. The following passage from Chastain vs British Columbia Hydro and Power Authority as set out on pages 13 and 14 of Exhibit C13-2 provides the required explanation:

> ***"23** The obligation of a public utility or other body having a practical monopoly on the supply of a particular commodity or service of fundamental importance to the public has long been clear. It is to supply its product to all who seek it for a reasonable price and without unreasonable discrimination between those who are similarly situated or who fall into one class of consumers. The great utility systems supplying power, telephone and transportation services now so familiar may be of relatively recent origin, but special obligations to supply service have been imposed from the very earliest days of the common law upon bodies in like case, such as carriers, innkeepers, wharfingers and ferry operators.*
>
> *This has been true in England and in the common law jurisdictions throughout the world. In Munn v. Illinois, 94 U.S.113 in the Supreme Court of the United States, the historical roots of this principle were examined and they have been applied in the United States. In Canada the law has followed the same path. In St. Lawrence Rendering Company Ltd. v. The City of Cornwall [1951] O.R. 669 at p. 683, Spence, J. then of the Ontario High Court,*

said:

> *That a public utility was at common law compelled to treat all consumers alike, to charge one no more than the others and to supply the utility as a matter of duty and not as a result of a contract, seems clear: The Attorney-General of Canada v. The City of Toronto (1893), 23 S.C.R. 514; Scottish Ontario and Manitoba Land Co. v. City of Toronto (1899), 26 O.A.R. 345; The City of Hamilton v. The Hamilton Distiller Company; The Same v. The Hamilton Brewing Association (1907), 38 S.C.R. 239; 51 Corpus Juris, para 16."*

Please discuss whether the Collective First Nations have a view on whether the common law would be applicable to the regulation of an Indigenous utility serving customers on Treaty territory or self-governing traditional territory, where an Indigenous Nation has negotiated a Treaty or self-government agreement.

Response:

This matter would be best addressed in the final submissions as a legal matter. Some of the members of the Collective First Nations have entered into the The Maa-nulth Final Agreement between the Government of Canada, the Government of British Columbia and the Maa-nulth First Nations. The five Maa-nulth First Nations are Ucluelet First Nation, Huu-ay-aht First Nations, Toquaht Nation, Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, and Uchucklesaht Tribe, all located on the west coast of Vancouver Island. The Maa-nulth First Nations represent about 2,000 people. The details of the agreement can be found at https://www.aadnc-aandc.gc.ca/eng/1100100022623/1100100022643.

Reference: Exhibit C4-2, pp. 8–9; Exhibit C13-2, pp. 18–21
Applicability of the UCA

In Exhibit C13-2, the Collective First Nations provide a response to the question “Is there another legal basis, taking precedence over the UCA, for Indigenous utilities to be unregulated or regulated by another body?”

Prepared by its legal counsel, the FortisBC Group of Companies (FortisBC) provides an analysis on pages 8 to 9 in Exhibit C4-2 of constitutional considerations with respect to the applicability of the UCA and the jurisdiction of the BCUC on Reserve lands. FortisBC submits that the UCA is a law of general application and applies to Reserve lands.

Please provide the view of the Collective First Nations on the legal analysis provided by FortisBC, regarding the applicability of the UCA on Reserve lands.

Response:

The legal analysis provided by Fortis is incomplete and not correct because in the material provided by Fortis, it neglects to account for the overarching doctrines of interjurisdictional immunity and federal paramountcy. It only deals with Land Codes by a cross reference to the

Spirt Bay Utilities Proceeding which in itself never addressed federal paramountcy and interjurisdictional immunity. The Fortis analysis also makes no mention of: Reference re: Public Utilities Act (Nfld.), [2017] N.J. No. 194, 2017 NLCA as noted on pages 20 and 21 and of Exhibit C13-2. Another material shortcoming.