

## First Nations Leadership Council response to BCUC's inquiry to FNMPC

- 1.1 Please find below the First Nation Leadership Council (FNLC)'s response to the following question posed to the FNMPC: *Please clarify if FNMPC has a position on what interim regulatory framework may be appropriate for Indigenous utilities while issues pertaining to land jurisdiction are being resolved. Alternatively, please explain if FNMPC considers that the regulation under the Utilities Commission Act should apply until land jurisdiction issues are resolved. Please provide the rationale for FNMPC's response.*
- 1.2 The FNLC's submission proposed a number of options for interim regulatory frameworks. We believe that bold and innovative regulatory action cannot wait, and that barriers to the financial and legal viability of Indigenous utilities must be removed immediately – to catalyze economic development as well as renewable resource economies with the goal of empowering self-governance and climate change action. The FNLC maintains that the language of "land jurisdiction issues" does not reflect current Canadian jurisprudence regarding the reality of Aboriginal Title, which recognizes existing, inherent jurisdiction and rights of self-governance. It also does not reflect the UN Declaration on the Rights of Indigenous Peoples, which sets out the minimum standards and rights of Indigenous peoples regarding resource and economic development in our territories, as well as the standard of free, prior and informed consent. The BCUC and the Province have the opportunity to implement these legal and international standards by recognizing Indigenous jurisdiction, today, to operate electrical utilities in our territories.
- 1.2 The FNLC urges that Indigenous utilities should be immediately exempted from the *Utilities Commission Act* (UCA).
- 2.2 The definition of "Indigenous utility" should be, as in Order-in-Council No. 108, a public utility that is owned and operated, in full or in part, by an Indigenous Nation.
- 3.2 However, the definition of "Indigenous nation" must be expanded from the narrow definition in the Order-in-Council to accord with the Supreme Court's decision in *Tsilhqot'in*. This includes any Indigenous governing structure or entity within whose territorial Title area it owns or operates a utility. Such entities bear section 35 rights which include economic rights, and are not limited to bands within the meaning of the *Indian Act*.
- 4.2 Indigenous utilities should be exempted from the UCA on the same basis as municipalities, in that the Indigenous owner or operator is a public body with governmental powers, albeit powers which are inherent rather than delegated from the Canadian constitution.
- 5.2 Precedent exists for understanding First Nations as public bodies. The Canada Revenue Agency now recognizes a First Nations as being a "public body performing a function of government in Canada" within the meaning of the *Income Tax Act*. The First Nations Tax Commission supports First Nations to exercise their jurisdiction over real property taxation.

- 6.2 The important difference from these initiatives is that Indigenous utilities must be empowered to operate across territory within their Title area, rather than only on-reserve. This is inherent in the nature of operating a utility as well as reflects the true jurisdiction of First Nations. Limiting the scope of Indigenous utilities to reserve lands would necessarily limit their economic viability, discouraging the development of renewable resource economies.
- 7.2 The FNLC proposes, as an interim strategy, that Indigenous utilities exempted from the UCA and wishing to set rates for direct distribution to consumers within their territory off-reserve submit a rationale with a plan to protect ratepayers and provide an effective dispute resolution forum. This rationale and plan would not be an onerous “rate application”, but could instead address questions of importance to First Nations, such as the criteria the FNLC proposed in response to the CEC’s information request.
- 8.2 It is advised that the BCUC not be empowered to decline the plan, but could issue recommendations to the Indigenous utility. BCUC would also remain available as a dispute resolution forum, or an appeals forum if the Indigenous utility has a functioning dispute resolution forum available. An outstanding question requiring further reflection and consultation is whether the BCUC would be in a position to issue binding recommendations in response to the rationale, or whether it would remain in an advisory capacity only, making suggestions and provide support and advice if requested by the Indigenous utility.
- 9.2 FNLC suggests that the BCUC immediately convene a special committee for overseeing this process, composed of individuals with the necessary expertise and position of respect with First Nations. Priority should be given to Indigenous committee members. The first task of the committee should be to research and consult on the above questions as to the minimum standards that an Indigenous utility plan must meet, and whether the committee can issue binding recommendations on certain issues or simply remain in an advisory role.
- 10.2 Going forward, the BCUC and the province, working in partnership with the FNLC and Indigenous utilities, should dedicate research funding for the development of an Indigenous Utilities Commission (IUC) that can provide dedicated support for Indigenous utilities and governments wishing to own or operate utilities in their territories. The IUC may require enabling legislation, a partnership agreement, resolutions by the FNLC, or a combination.
- 10.2 The IUC could follow the model of the First Nations Tax Commission, with the important difference that its founding instruments would not restrict Indigenous utilities to operating on-reserve, nor would it require oversight by the *Indian Act*. The stated purpose of the First Nations Tax Commission is to “ensure that the real property taxation systems of First Nations reconcile the interests of taxpayers with the responsibilities of chiefs and councils to govern the affairs of First Nations.” This is consistent with need to balance the rights of First Nations governments (in all their forms, not restricted to bands) with the interests of energy consumers and rate payers. The IUC could have a role of providing economic, governance,

dispute resolution, and regulatory advice and support to Indigenous utilities and governments as they exercise their inherent jurisdiction. It would be necessarily independent from the Crown.

11.2 The Province and the FNLC through the Commitment Document have already identified the need for an Indigenous Commission that will assist First Nations with governance, revitalization of legal orders, nation-building, shared territory dispute resolution, and other matters. While the IUC needs to be distinct in that it requires particular subject matter expertise and dedicated research, the process of creating the Indigenous Commission could be followed for the creation of the IUC.