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October 4, 2019

VIA ELECTRONIC MAIL

British Columbia Utilities Commission
6th Floor, 900 Howe Street
Vancouver, B.C.
V6Z 2N3

Attention: Patrick Wruck, Commission Secretary and Manager, Regulatory Support

Dear Sirs/Mesdames:

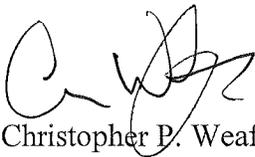
**Re: British Columbia Utilities Commission Indigenous Utilities Regulation Inquiry
Project No. 1598998**

We are counsel to the Commercial Energy Consumers Association of British Columbia (the "CEC"). Attached please find the CEC's Final Submissions with respect to the above-noted matter.

If you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

OWEN BIRD LAW CORPORATION



Christopher P. Weafer

CPW/jlb
cc: CEC
cc: Registered Interveners

**COMMERCIAL ENERGY CONSUMERS
ASSOCIATION OF BRITISH COLUMBIA**

FINAL SUBMISSIONS

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

October 4, 2019

Commercial Energy Consumers Association of British Columbia

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

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**COMMERCIAL ENERGY CONSUMERS ASSOCIATION
OF BRITISH COLUMBIA**

FINAL SUBMISSIONS

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

I. CEC PARTICIPATION IN INDIGENOUS UTILITIES INQUIRY

1. The Commercial Energy Consumers Association of BC (the “**CEC**”) represents the interests of ratepayers consuming energy under commercial tariffs in applications before the BC Utilities Commission (“**BCUC**” or “**Commission**”).
2. By Order in Council (“**OIC**”) No. 108 the BCUC was requested to advise the Lieutenant Governor in Council (“**LGIC**”) respecting the regulation of Indigenous utilities (the “**Indigenous Utilities Inquiry**”) in accordance with the terms of reference.
3. Section 3 of OIC No. 108, outlines the terms of reference for the Indigenous Utilities Inquiry as follows:
 - a) The BCUC must advise on the appropriate nature and scope, if any, of the regulation of Indigenous utilities;
 - b) without limiting paragraph (a), the BCUC must provide response to the following questions:
 - i) What are the defining characteristics of Indigenous utilities, having regard to:
 - (A) the nature of the ownership and operation of Indigenous utilities;
 - (B) the types of services provided by Indigenous utilities;
 - (C) the persons to whom services are provided by Indigenous utilities; and
 - (D) the geographic areas served by Indigenous utilities.
 - ii) Should Indigenous utilities be regulated under the UCA or under another mechanism, or be unregulated?
 - iii) If it is appropriate to regulate Indigenous utilities under the UCA, is there any matter under the Act in respect of which Indigenous utilities should be regulated differently from other public utilities, and, if so, how should that matter be regulated?

- iv) If it is not appropriate to regulate Indigenous utilities under the UCA but is appropriate to regulate Indigenous utilities in some manner, how should Indigenous utilities be regulated?
- v) If an Indigenous utility is not regulated under the Act, would the utility become subject to the Act on ceasing to be an Indigenous utility, and, if not, what transitional and other mechanisms are required to ensure that the utility is subject to the Act on ceasing to be an Indigenous utility?

II. CEC SUBMISSIONS

4. The CEC supports the Indigenous Utilities Inquiry and the desire to seek input into the regulatory process for Indigenous utilities.
5. The CEC further supports the desire of Indigenous peoples to develop energy solutions that will best meet their needs, particularly in remote areas.
6. The CEC's primary purpose is to protect the interests of commercial ratepayers, regardless of their status as Indigenous or not Indigenous, location in BC either on Indigenous land or otherwise, or from whom they receive supply.
7. Accordingly, the CEC has not taken strong positions on the value and nature of an Indigenous utility vis-a-vis non- Indigenous utilities.
8. In general, the CEC is guided by the provisions of the *Utilities Commission Act* ("UCA") which state that a public utility must provide a service to the public that is in all respects adequate, safe, efficient, just and reasonable,¹ and that a public utility must provide service without undue discrimination or delay to all persons who apply for service, are reasonably entitled to it and agree to pay the rates established under the UCA.²
9. The CEC submits that these principles are valid and necessary to protect the interests of any and all energy consumers in BC.
10. The CEC further submits that these principles apply and should apply to any public utility, whether Indigenous or non-Indigenous.
11. The CEC provides the following submissions for the Commission's review and consideration.
12. The CEC submissions in this proceeding are organized according to the questions in the terms of reference, and based on the evidence before the Commission in the Indigenous Utilities Inquiry proceedings.

¹ *Utilities Commission Act*, section 38

² *Utilities Commission Act*, section 39

13. As the CEC believes that it is appropriate to regulate Indigenous utilities under the UCA, the CEC has respectfully abstained from responding to questions iv and v, as they are made redundant by the CEC's position on question iii.

Questions

A. WHAT ARE THE DEFINING CHARACTERISTICS OF INDIGENOUS UTILITIES, HAVING REGARD TO:

i) The nature of the ownership and operation of Indigenous utilities.

14. The CEC is supportive of the economic development of Indigenous peoples and recognizes that any of several ownership structures or operation models may be most appropriate for a given situation.
15. There are a number of Indigenous utilities that exist in Canada, operating through different ownership structures and regulatory models. They are owned or/and operated, in full or in part, by a First Nation. They provide either electricity or natural gas utility services to customers or members on a reserve, either on their own or through a third-party. Compensation for the services is through rates charged to customers. They may be regulated or unregulated.³
16. There are new opportunities to develop renewable-based microgrids which may provide Indigenous Peoples who are living in the remote and rural areas of Canada with ownership and operational interests in unique, non-conventional utilities which will help address reliance on diesel generators.⁴
17. The CEC's primary purpose is to protect the interests of commercial ratepayers, and it therefore submits that any utility, within the service territory, must provide a service that is safe, efficient, just and reasonable, and without undue discrimination.
18. The CEC does not take a strong position with regard to the ownership or operational structure of an Indigenous utility.

ii) The types of services provided by Indigenous utilities.

19. The CEC understands that a variety of energy services may be contemplated by Indigenous utilities, and that there may be diverse energy sources. Energy services described in these proceedings range from the development of renewable energy resources such as geothermal heat and power (Kitselas), and ocean exchange, propane gas grids and wholesale purchase and distribution of electricity (Beecher Bay). Run-of-river electricity generation projects are contemplated in many remote areas.

³ Exhibit A-13, Jurisdictional Review of the Regulation of Indigenous Utilities in Canada, page v

⁴ Exhibit A-13, Jurisdictional Review of the Regulation of Indigenous Utilities in Canada, page vi

20. The CEC submits that there should be no specific restrictions applied to Indigenous utilities that are not applied to other utilities.
21. The CEC recognizes that overlaps may arise with existing energy utilities providing service under a CPCN. This may result in a duplication of infrastructure, with the possibility of stranded assets. Should a new utility, Indigenous or otherwise, supply energy to customers already supplied by an existing utility in an appointed service territory, assets of the existing utility could be underutilized or rendered useless, which may result in increased costs to remaining ratepayers.
22. The CEC submits that regulatory mechanisms should be put in place to address service territory overlaps and the potential for stranded or underutilized assets. The CEC further submits that direction from legislative bodies may be required to address these jurisdictional issues.

iii) The persons to whom services are provided by Indigenous utilities.

23. The Commission stated in an information sheet filed in this proceeding that a regulator's role is to ensure that customers have access to a safe, reliable energy service at a fair price, while allowing the utility the opportunity to earn a fair return on its investment.⁵
24. Kitselas Geothermal Inc. (“**KGI**”) states that there is a minimum scale of energy projects that would be required for them to be economic in a competitive context. KGI describes how the energy demand of the members of a given Indigenous Nation would be far too small to meet the capacity needs of ‘scale’ facilities. KGI believes that if Indigenous utilities were restricted to selling only to their members, competitive forces would push them out of the market.⁶
25. The CEC submits that Indigenous utilities should not be limited to supplying energy only to their members. However, the CEC submits that energy projects should be developed only when they are able to provide safe, reliable energy service at a fair price to local consumers and to all energy consumers in BC.
26. The CEC submits that it is appropriate for the Commission to exercise caution when developing principles that might result in ratepayers being responsible for costs resulting from projects that might be provided more economically from other ventures.
27. From the CEC's perspective as a ratepayer interest group, the protection of energy consumers is a key consideration in this proceeding, and in matters relating to utility regulation in BC. This applies whether the consumers are individuals or businesses, Indigenous or non-Indigenous, on or off Indigenous lands.

⁵ Information Sheet: What is Energy Utility Regulation https://www.bcuc.com/Documents/Proceedings/2019/DOC_53998_BCUC-Infosheet-Regulation-2019-05-13-WEB.pdf

⁶ Exhibit C6-6, response to CEC IR 1.3

iv) The geographic areas served by Indigenous utilities.

28. Hempling, in the Utility Regulation Report filed in this proceeding, states that most utilities are legal monopolies. The legislative body has passed a law, or a regulatory commission has issued an order, that does three things:
- a) it draws the boundaries of a particular service territory;
 - b) it appoints a single company to provide some set of services to customers within that service territory; and
 - c) it prohibits any other company from competing with the appointed company within that service territory.
29. We call this government action "granting a certificate of public convenience and necessity" or "granting a franchise."⁷
30. The UCA requires that the utility, within the service territory, must provide a service to the public that is in all respects adequate, safe, efficient, just and reasonable,⁸ and must provide service without undue discrimination or delay.⁹
31. The obligation to serve also includes an obligation to plan to serve, because the utility is responsible for its service territory's entire needs—its people and its economy—now and in the future.¹⁰
32. The CEC notes that existing utilities in BC are legally bound to provide service to energy consumers in their appointed services territories. These appointed service territories cover a large proportion of BC, particularly populated areas.
33. The CEC submits that this legal obligation is not extinguished by the desire of another actor to establish an energy utility.
34. The CEC submits that legislation to amend the UCA would be required to resolve the challenge of the existing obligation to provide service in the event of the establishment of another energy utility, whether or not it is an Indigenous utility.
35. The CEC notes that the boundaries of Indigenous lands may be difficult to define, whereas the boundaries of service territories designated under a CPCN are precisely defined. The protection of the interests of energy consumers may be subject to the interpretation of these geographic boundaries. The CEC submits that resolving boundary issues is complex and requires the balancing of disparate interests, and that direction from government may be required, perhaps on a case-by-case basis.

⁷ Exhibit A-8 Hempling Utility Regulation Report, page 5

⁸ *Utilities Commission Act*, section 38

⁹ *Utilities Commission Act*, section 39

¹⁰ Exhibit A-8 Hempling Utility Regulation Report, page 9

B. SHOULD INDIGENOUS UTILITIES BE REGULATED UNDER THE UCA OR UNDER ANOTHER MECHANISM, OR BE UNREGULATED?

36. Hempling notes that competition in a market causes each seller to operate as efficiently as technology and human ability allow. Without competitive pressure, a monopoly will become inefficient—charging excessive prices and providing low-quality service – and will discriminate, because discriminating is profitable. To address these two concerns—inefficiency and discrimination—most public utility statutes have two requirements:
- a) the utility’s rates must be "just and reasonable"; and
 - b) the utility must not grant any customer an "undue preference or advantage."¹¹
37. In a 2012 Commission report, the Commission set out a guideline that regulation is required when one of two conditions exist:
- a) “Natural monopoly characteristics are present and there is a need to regulate to protect the public interest; and/or
 - b) Legislation (such as the UCA or the *Clean Energy Act*), requires an activity to be regulated.”¹²¹³
38. BC Hydro states that public utilities generally provide an essential service which, by its nature, is a monopoly or has monopolistic characteristics. A monopoly is defined as the exclusive possession or control of the supply of or trade in a commodity or service. It is the lack of competitive forces acting on a public utility which creates the potential for a public interest concern.¹⁴
39. In the Electric Vehicle Inquiry, the CEC stated that natural monopolies arise when extremely high infrastructure costs or other significant barriers to entry exist relative to the size of the market such as technical superiority, patents, access to suppliers, government regulation or others. Sometimes the first-in supplier can saturate the market and become a natural monopoly. Natural monopolies provide the largest supplier with an overwhelming market advantage over potential competitors.¹⁵
40. The CEC further stated that natural monopolies can use an industry’s limited resources to greatest efficiency and have the ability to offer the lowest unit price to consumers.

¹¹ Exhibit A-8 Hempling Utility Regulation Report, page 5

¹² Exhibit C2-2, BCH Written Evidence, page 6

¹³ Commission Report in the matter of FortisBC Energy Inc. Inquiry into the Offering of Products and Services in Alternative Energy Solutions and Other New Initiatives, December 27, 2012, Page 7.

¹⁴ Exhibit C2-2, BCH Written Evidence, page 5

¹⁵ Regulation of Electrical Vehicle Charging Service, Exhibit C24-2, CEC Written Evidence, page 8 https://www.bcuc.com/Documents/Proceedings/2018/DOC_51110_C24-2_CEC_Written-Evidence.pdf

However, the lack of competition reduces motivation towards economic efficiency, and can result in higher prices.¹⁶

41. The CEC submits that regulation by the BCUC under the UCA provides some protections for energy consumers in BC which might not otherwise occur in the absence of competition.
42. Energy consumers experiencing protection benefits under the UCA include retail consumers, commercial and industrial customers. Also included are Indigenous peoples, whether on treaty or reserve lands, on or off traditional territories.
43. The CEC submits that energy regulation under the UCA can be an effective means of protecting the public interest.
44. BC Hydro states:

‘If BC Hydro customers were eligible to leave BC Hydro for a new provider of electric resources, this would result in costs for BC Hydro’s remaining ratepayers. These costs arise because, under the UCA, BC Hydro has an obligation to provide service. As a result, BC Hydro has planned and built its system to ensure adequate and reliable supply to current and future customers. Ensuring adequate and reliable supply requires making large scale, long-term investments in electric utility assets, the cost of which is recovered over time from current and future ratepayers. If customers leave BC Hydro for a new utility provider, they will no longer be contributing to the recovery of those costs. As a result, the assets may be underutilized relative to plan and the recovery of cost associated with the assets will be spread over a smaller group of customers. This increases costs for remaining customers’.¹⁷
45. BC Hydro points out that regardless of the cause of stranded assets, once they arise, the associated cost is borne either by the utility shareholder or by the utility’s remaining customers.¹⁸
46. The CEC notes that the obligation to provide service under a CPCN includes the need to plan for future requirements and to make infrastructure investments accordingly. Thus, infrastructure impacts are not limited to the immediate area of the stranded assets. Upstream infrastructure investments may have been made in anticipation of future demand and these assets could become oversized or redundant, increasing costs for remaining customers.
47. Should a new utility, Indigenous or otherwise, supply energy to customers already supplied by an existing utility under a CPCN, assets of the existing utility such as power lines could be underutilized or rendered useless.
48. The CEC submits that the cost of stranded assets would not be efficient, just and reasonable for energy consumers in BC. The CEC further submits that the risk of

¹⁶ Regulation of Electrical Vehicle Charging Service, Exhibit C24-2, CEC Written Evidence, page 9

¹⁷ Exhibit C2-3, response to BCUC IR 1.2.1

¹⁸ Exhibit C2-3, response to CEC IR 1.2.3

stranded assets is an issue that must be addressed when considering the regulation of Indigenous utilities that may operate in an existing service territory.

49. The CEC submits that regulation for all utilities under the UCA is an appropriate way to manage stranded asset risk and resolve issues as they may arise.
50. The Nisga'a Nation states that 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.¹⁹
51. The Nisga'a Nation states that 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.²⁰
52. The First Nations Leadership Council takes the firm position that First Nations in BC have jurisdiction over energy generation, transmission, and distribution in their territories. This sovereign authority and jurisdiction is undermined by BCUC regulation of Indigenous utilities.²¹
53. The CEC notes that, according to section 21(1) of the UCA, regulation of a public utility applies only to a public utility that is subject to the legislative authority of the province.²²
54. The CEC notes that BC Hydro provides electrical service to multiple Indigenous communities²³ and is provided under the BC Hydro tariff and is consistent with BC Hydro's obligation to serve. The CEC would submit an inequity or unfairness potentially arises if BC Hydro is deemed to have a legislated obligation to serve a First Nation but no reciprocal regulatory obligations exists to be impacted by UCA principles.
55. The CEC submits that jurisdictional issues relating to title and rights, treaty and reserve lands, traditional territories and Indigenous lands are very important and could be highly influential in establishing a valid regulatory regime.
56. The CEC recommends that the BCUC should seek direction and clarification from the provincial and federal governments on these jurisdictional issues.

¹⁹ Exhibit C21-4, response to BCUC 1.3

²⁰ Exhibit C21-4, response to BCUC 1.4

²¹ Exhibit C16-2, FNLC Written Evidence, page 5

²² *Utilities Commission Act*, section 21(1)

²³ Exhibit C2-3, response to CEC IR 1.1.1

C. IF IT IS APPROPRIATE TO REGULATE INDIGENOUS UTILITIES UNDER THE UCA, IS THERE ANY MATTER UNDER THE ACT IN RESPECT OF WHICH INDIGENOUS UTILITIES SHOULD BE REGULATED DIFFERENTLY FROM OTHER PUBLIC UTILITIES, AND, IF SO, HOW SHOULD THAT MATTER BE REGULATED?

57. The definition of a public utility in the UCA states that a public utility does not include a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries.²⁴
58. In its written evidence, Beecher Bay First Nation described its application for exemption from regulation under the UCA. “In order to proactively obtain certainty as to the operation of SB Utilities, Beecher Bay and its partners explored ways to ensure that SB Utilities would be exempt from the application of Part 3 of the UCA. This included detailed discussions with the Ministry of Energy and Mines. The Minister and ministry staff encouraged and supported SB Utilities application for an exemption under s.88 of the UCA or, alternatively, a declaration that for the purposes of the UCA, SB Utilities is a municipality. The Commission ultimately denied the application.”²⁵
59. During the Kelowna Community Input Session, the Commission chairperson stated that “in that case the decision didn’t turn on what percentage of ownership the utility was. It turned on whether a First Nation band was a municipality, or not, and under the *Interpretation Act* the finding was that it is not, by definition not a municipality. That’s not a comment on whether it should be regulated the same way a municipality is or isn’t, but the exception in the UCA is specifically for a municipality or a regional district. And there is no way that the definition of Band could have been shoehorned into that.”²⁶
60. Municipalities, as exempted by the UCA, were not determined to be exempt by the BCUC. A municipality is excluded from regulation by operation of legislation and does not need to make an application to the BCUC for such an exemption. The BCUC does regulate utilities operated by a municipality if, and to the extent that, they serve areas outside of the municipal boundaries.²⁷
61. The CEC submits that Indigenous lands and communities do not meet the definition of a municipality under the *Local Government Act*.
62. The CEC notes that the BCUC is an approval authority that operates under existing legislation. The BCUC’s authority does not extend to the creation of an exemption to the legislated regulations.

²⁴ *Utilities Commission Act*, section 1(1) Definitions

²⁵ Exhibit C9-2 Beecher Bay First Nation – Written Evidence, paragraph 12

²⁶ Transcript V2-CIS-Kelowna, page 60

²⁷ Exhibit C4-4, response to CEC 4.1

63. The CEC submits that if an exemption from regulation for Indigenous utilities, similar to the municipal exemption, was deemed to be desirable, it would require a legislated change to the UCA by the Government of BC.
64. The Open Access Transmission Tariff (“OATT”) provides power sellers and wholesale customers, such as electric utilities and power marketers, with access to BC Hydro’s transmission system to move power within British Columbia or to other transmission systems to access customers and markets for their business needs. Access to BC Hydro’s transmission system through the OATT is provided on a non-discriminatory basis with OATT rates being determined on a cost of service basis and approved by the Commission.²⁸
65. The CEC submits that access to the electricity transmission system, and potentially to export markets, exists under the existing regulatory system.

III. CONCLUSION

66. The CEC submits that the provisions of the UCA, which state that a public utility must provide a service to the public that is in all respects adequate, safe, efficient, just and reasonable,²⁹ and without undue discrimination or delay to all persons who apply for service, are valid and necessary to protect the interests of any and all energy consumers in BC.
67. The CEC further submits that these principles apply and should apply to any public utility, whether Indigenous or non-Indigenous.
68. The CEC submits that the protection of energy consumers is of paramount importance in the regulation of utilities. This includes retail, commercial, and industrial consumers, as well as Indigenous energy consumers whether or not they are on Indigenous lands.
69. The CEC submits that it is appropriate to regulate public utilities, including Indigenous utilities, and that the UCA, through the BCUC, is the current means of conducting this regulation and should be supported and adhered to accordingly.
70. As noted above, the CEC submits that Indigenous communities do not meet the definition of a municipality and under the *Local Government Act* and so cannot be exempted from regulation under the UCA by that means.
71. The CEC notes that the obligation of utilities to provide service under a CPCN may result in jurisdictional challenges with regard to geographic overlaps.
72. The CEC submits that the Commission may want to request clarification from government so as to define the role of the regulator in several jurisdictional areas:

²⁸ Exhibit C2-2, BCH Written Evidence, page 13

²⁹ *Utilities Commission Act*, section 38

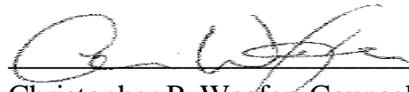
- Geographic;
- Rights and title, treaty and reserve lands;
- Overlapping service territories; and
- Stranded assets.

73. The CEC notes that if changes to the existing regulatory structure are deemed to be desirable, such changes would need to occur through legislated amendments to the UCA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David Craig

David Craig, Consultant for the Commercial Energy
Consumers Association of British Columbia



Christopher P. Weafer, Counsel for the Commercial
Energy Consumers Association of British Columbia